IN THE HIGH COURT OF SOUTH AFRICA

KWA ZULU NATAL DIVISION PIETERMARITZBURG

CASE NO: 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Applicant
UMFOLOZI COMMUNITY ENVIRONMENTAL TRUSTEES ORGANISATION	Second Applicant
SABELO DUMISANI DLADLA	Third Applicant
and	
TENDELE COAL MINING (PTY) LIMITED	First Respondent
MINISTER OF MINERALS & ENERGY	Second Respondent
MEC DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM & ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONAYMA TRUST	Seventh Respondent
EZEMVELO KZN WILD LIFE	Eighth Respondent
AMAFA AKWAZULU NATAL NATALI HERITAGE COUNCIL	Ninth Respondent

HEADS OF ARGUMENT:

APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. The applicant brings this application pursuant to the provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013. That section, it will be recalled, provides that leave to appeal may be granted where the Judge is of the opinion that *"the appeal would have a reasonably prospect of success"* or *"there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

2. We submit that there is a reasonable prospect of success. There are also compelling reasons why the appeal should be heard.

3. In respect of the first element of section 17(1), the first respondent has correctly identified the test as being the existence of a reasonable prospect that any appeal would succeed – this requiring a measure of "certainty". But we do not have to show that the appeal will succeed, a reasonable prospect suffices.

4. Yet even an application for leave to appeal with limited prospects of success may be granted if there are compelling reasons for doing so[1]. One of the compelling reasons may be the existence of conflicting judgments on the issue. But there may be others, including the public importance of the case or the novelty of the issue to be decided. We submit that the application qualifies for the granting of leave under section 17(1)(a)(i) and (ii) of the Act.

NEMA Applies

5. The first question is whether or not as a matter of statutory construction, mining activities could be undertaken without an environmental authorization issued in terms of section 24 of the National Environmental Management Act 107 of 1998 (NEMA).

6. The first respondent argues that for as long as an environmental management plan issued under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) is obtained, mining activities may commence. This is because the MPRDA *"exclusively"* governs environmental authorization for mining related activities.

7. The contention of the first respondent has been accepted by this court. In paragraph 50 of the Judgment, it is held

> *"Prior to 8 November 2014 the environmental impacts of mining were regulated exclusively through the MPRDA (2002) and through a requirement under that Act to obtain an Environmental Management*

[1] Minister of Justice and Constitutional Development and others v Southern African Litigation Centre 2016 (3) SA 317 (SCA) at para [23]

Plan (EMP) prior to commencing mining and to ensure that mining takes place in accordance with such an approved EMP."

8. The same conclusion is reiterated in paragraph 54 of the Judgment, where the following appears

"In light of the above, it is evident that the position prior to 8 December 2014 was that the Minister of Minerals and Energy's decision to approve an applicants mining EMP and to grant the mining license effectively constituted the environmental authorization to conduct the mining activity."

9. We submit that there is a reasonable prospect that the Court of Appeal would reach a different conclusion.

9.1 NEMA gives effect to a constitutional right, namely section 24 of the Constitution. Section 39(2) of the Constitution imposes an obligation when interpreting any legislation that this court must promote the spirit, purport and objects of the Bill of Rights.

9.2 The obligation includes the duty to generously construe legislation *"in order to afford claimants the fullest possible protection of their constitutional guarantees."*[2]

9.3 The same applies to NEMA. It must be construed purposively to afford the applicants its fullest possible protection. It cannot be

[2] *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another* 2019 (2) SA 1 (CC) at para 45.

displaced by the MPRDA. The two must be construed in a co-extensive fashion.

9.4 There is no clear textual justification for the interpretation which allows the MPRDA to trump NEMA.

9.5 Section 24(2) of NEMA provides that the Environmental Minister may identify "activities which may not commence without environmental authorisation from the competent authority." Section 24D provides that any such activities must be listed in the Gazette.

9.6 Prior to amendment, section 24F of NEMA provided that "[n]otwithstanding the provisions of any other Act, no person may commence an activity listed in terms of section 24 (2) (a) or (b) unless the competent authority has granted an environmental authorisation for the activity."

9.7 The starting point is therefore that no listed activities may occur without an environmental authorisation.

9.8 This interpretation is further bolstered by section 24(8)(a) of NEMA, which was inserted by s 2 of the National Environmental Management Amendment Act 62 of 2008 (i.e. after the enactment of the MPRDA) and commenced on 1 May 2009. This section expressly provides that authorisations or permits obtained under any other law (such as the MPRDA) for an activity listed in terms of NEMA do not absolve the applicant from obtaining authorisation under NEMA:

"Authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L."

9.9 Sections 24K and 24L of NEMA, which were also introduced by Act 62 of 2008, also expressly contemplate that other legislation may also require an environmental authorisation.

9.10 Section 24K(1) allows the National Environment Minister or a MEC responsible for administering environmental affairs to consult with any organ of state responsible for administering "legislation relating to any aspect of an activity that also requires environmental authorisation under [NEMA]" in order to coordinate the respective requirements of such legislation and to avoid duplication.

9.11 Under s 24K(3) the competent authority may, when considering an application for environmental authorisation under NEMA that "also requires authorisation in terms of other legislation take account of ... any process authorised under that legislation as adequate for meeting the requirements of Chapter 5 of [NEMA]."

9.12 Section 24L(1) provides that if the carrying out of a listed activity contemplated in s 24 of NEMA "is also regulated in terms of another law", the respective authorities may exercise their powers jointly by, amongst other things, issuing an integrated environmental

authorisation. Furthermore, a competent authority empowered to issue an environmental authorisation under NEMA may regard an authorisation in terms of any other legislation that meets the requirements of NEMA to be an environmental authorisation in terms of NEMA (s 24L(4)).

9.13 On the plain text of the NEMA, no listed activities may commence without an environmental authorisation. This clearly includes mining.

9.14 It must be noted that the NEMA refers to an "environmental authorisation". This is not the same thing as an "environmental management plan" referred to in the MPRA.

9.15 A judgment concerning the same principle City of Cape Town v Maccsand (Pty) Ltd & Others 2010 (6) SA 63 (WCC) seems to have come so a different conclusion. The court held that

> *"Notwithstanding the processes and authorizations under other laws including the MPRDA, that an environmental authorization under NEMA must be obtained unless the competent authority, empowered to issue the NEMA authorization, decides to regard the authorization under another law as a NEMA authorization because it meets all the requirements stipulated in section 24(4).*" In the definition *"specific environmental management Acts*" under NEMA the MPRDA is not included.

9.16 The judgment of Rogers J in Mineral Sands Resources (Pty) Ltd v Magistrate, Vredendal Kroutz NO: The Judge found that a company intending to embark on mining would typically have to perform activities such as establishing infrastructure for the bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation and *"would thus have needed environmental authorization for those activities in terms of section 24 of NEMA."*[3]

9.17 The first respondent contends that the finding at paragraph 8 of the Minerals Sands judgment is obiter. This may be so. But it is not our submission that Rogers J was correct and that the learned judge in the present matter was wrong. We simply rely on the judgment to illustrate that the prospects of success on appeal are not unreasonable.

9.18 For this purpose, it should not matter that the focus of Rogers J's judgment was on a different question and that his comments with regard to the interplay between mining and environment were obiter. The main point is that his finding is at odds with the finding of this court.

10. We submit that as a matter of legal principle the first respondent was required to obtain an environmental authorization under section 24 of NEMA. The failure to do so was fatal.

Grinding halt?

[3] [2017] 2 AllSA (WCC) at para 8.

11. There is no basis to the claim in paragraph 37 of the first respondent's heads of argument that a requirement to obtain a NEMA authorization prior to commencement of mining activities would bring the whole mining industry *"to a grinding halt"*.

12. No evidence exists, except of course in relation to the present matter, that other mining companies also failed to obtain section 24 of NEMA authorizations prior to commencement of mining activities. And at any rate the calamity referred to by the first respondent is a matter of the exercise of just and equitable discretion by a court seized with a particular dispute. It cannot be decided upfront and in a vacuum.

Transitional provisions

13. The transitional provisions do not take the matter further. They cannot be used to interpret legislation retrospectively.

14. In any event section 12(4) of NEMA is plain in its text. It states that an environmental management plan or program approved under the MPRDA immediately before the Act comes into operation *"must be regarded as having been approved in terms of the NEMA"*.

15. This cannot be construed to collapse the MPRDA and NEMA provisions into one, on a retrospective basis. It simply means that an environmental management program approved under the MPRDA must be accepted as an environmental management program under NEMA. An environmental management program is not the same thing as an environmental authorization.

16. The correct reading is that an environmental management program is a prerequisite prior to the granting of an environmental authorization. Therefore, the transitional provisions do not have the consequence of completely dispensing with environmental authorization which should have been granted under NEMA.

Issue properly pleaded

17. The issue in dispute was "[w]hether Tendele was required to obtain environmental authorisation as contemplated in section 24 of NEMA prior to commencing with operations."[4]

18. Tendele's defence was that "it does not require environmental authorisations in terms of s 24 of NEMA because its operations are undertaken pursuant to valid mining rights and EMPs granted and approved by the Department of Mineral Resources (DMR) prior to the legislative amendments in December 2014 which gave rise to the One Environmental System."[5]

19. On 14 June 2017, the applicants' attorney wrote to the DMR and DEA seeking information.

20. She made the following submission:

> *"5. Under NEMA, the holder of a mining right, further to the compilation and approval of an EMP or EMPR, had to apply for an environmental authorisation if the holder was conducting or involved in any of the activities listed in the Environmental Impact Assessment Regulations Listing Notices.*

[4] Judgment para 18.1.

[5] Judgment para 21.1.

6. Tendele Coal Mining should have made application in terms of one or more of the following:

a. Environmental Impact Assessment (EIA) Regulations published under GN R 1183 of September 1997 of the previous Environment Conservation Act of 1989;

b. EIA Regulations under GN R385 of 21 April 2006 under the National Environmental Management Act, 1998;

c. EIA Regulations under GN R543 of 18 June 2010; or

d. EIA Regulations under GN R982 GN R983, GN R984 and GN R985 of 4 December 2014."[6]

21. She requested "a copy of all environmental authorisations issued to Tendele Coal (Pty) Ltd, along with all supporting documentation such as Environmental Management Programmes, at your earliest convenience."[7]

22. It is clear from the correspondence that the applicants did not have sufficient detail on Tendele's operations to enumerate which of Tendele's activities triggered specific listed activities set out in the relevant notices.

23. It was plainly open to Tendele to deny that it was engaged in any listed activities. It did no such thing.

24. Instead, Tendele denied that its activities were unlawful on the sole basis that the "Environmental Conservation Act 73 of 1989 (ECA) and National Environmental Management Act 107 of 1998 were not at the time deemed to be applicable to mining operations."[8]

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[6] Annexure "I" p 139.

[7] Ibid.

[8] Annexure "J" pp 142 – 143.

25. The applicants accordingly approached this Court to compel Tendele to comply with the NEMA and obtain an environmental authorisation. The applicants understandably presented as 'common cause from the correspondence' that no environmental authorisation had been issued to Tendele, and that the sole reason that no authorisation had been sought was because Tendele believed that such authorisations were not required as EMPs had been issued under the MPRDA.[9]

26. The applicants had no basis to anticipate a dispute arising over whether Tendele's mining operations triggered any listing notice because Tendele's sole defence prior to the application was that the NEMA was not 'deemed to be applicable to mining operations.'

27. Plainly, if Tendele had denied that its operations triggered any listing notice, the applicants would have addressed this denial in the founding papers. They cannot be faulted for failing to anticipate a dispute Tendele did not raise when it had opportunity to do so.

28. Even now, Tendele does not raise a genuine dispute. Instead, it complains that the applicant has not proven that they have engaged in such activities. Yet, the information is squarely within their knowledge.

29. This is particularly notable as the deponent, Tendele's CEO, is intimately familiar with Tendele's operations. He is legally advised in this matter. If Tendele is not engaged in any listed activities, he could have said so. He did not.

[9] FA p 29 para 55.

30. This failure is striking. Tendele's own papers record that "Somkhele has one of the largest resources of open-pit mineable anthracite reserves in South Africa" and that Tendele is "the principal supplier of anthracite to ferrochrome producers in South Africa."[10]

31. Given the scale of the operation, it is submitted that another judge may reasonably follow the dictum of Rogers J and infer that *"a company intending to embark on mining would typically have had to perform activities which were listed activities."*[11]

32. This inference is completely justified here. If the facts are within the peculiar knowledge of the averring party, but not adequately canvassed on paper, a court will give such version no credence. In *Wightman v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6 it was held:

> *"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)*

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[10] AA p 170 para 25.

[11] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others* [2017] 2 All SA 599 (WCC) at para 8.

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ... If that does not happen it should come as no surprise that the court takes a robust view of the matter."

33. Manifestly, the extent of the mining activities undertaken was within the peculiar knowledge of the first respondent. They should have set out in full the activities but failed to do so.

Town planning legislation

34. This Court found that Tendele is not mining in contravention of the KwaZulu Natal Planning and Development Act ("the KZN Planning Act") or the Spatial Planning and Land Use Management Act ("SPLUMA").

35. The KZN Planning Act commenced on 01 May 2010. It applies only to *"those operations which involved a material change to the existing use of any building or land without subdivision"*.[12] This Court found that because Tendele's operations commenced before 2010 there is no 'development' in need of approval.

[12] Judgment para 83.

36. SPLUMA commenced on 01 July 2015. SPLUMA provides for the lawful continuation of existing land uses that would otherwise be prohibited. This Court held that because Tendele's operations 'pre-dated the commencement of SPLUMA and were lawful at the time that SPLUMA commenced',[13] no SPLUMA approval is necessary as the operations were an existing land use.

37. In making these findings regarding the SPLUMA and the KZN Planning Act, this Court accepted that mining contrary to the relevant town planning instrument would be prohibited.

38. Despite this, this Court held that because Tendele's mining commenced before the commencement of the KZN Planning Act and SPLUMA, the grandfather clauses in both instruments shielded otherwise unlawful conduct from illegality.

39. This may be so for the mining rights that became operative prior to 2010 in relation to the KZN Planning Act or 2015 for SPLUMA as the shielding of existing conduct from new laws is an understandable safeguard against retrospectivity.

40. But this does not apply to new mining conducted under mining rights granted after the commencement of the KZN Planning Act and SPLUMA.

41. Take, for instance, the mining right granted in 2016. It grants mining rights over 21233 hectares – more than 200 square kilometres. This is an area nearly ten times larger than the other mining rights combined.

[13] Judgment para 88.

42. The question presented here is whether the mining of these additional 200 square kilometres is a 'material change', and therefore covered by laws that commenced five years before the mining was authorised, or an 'existing land use' and thus shielded from illegality by the grandfather clauses of the KZN Planning Act and/or the SPLUMA.

43. As defined in the judgment of this Court, development is *"the process of converting [land] to a new purpose by constructing buildings or making use of its resources."*[14]

44. Plainly, a different court may find that the decoupling of customary land covered by mining is a process of converting land to a new purpose by making use of its resources, and therefore a development, and therefore covered by the KZN Planning Act, and therefore unlawful unless and until town planning approval is granted.

Waste management licence

45. In relation to the waste management license argument, the learned judge cited regulation 7(1) of the 2013 listing notice which empowers the Minister by Notice in the Gazette to call upon a person who is conducting a waste management activity to apply for a waste management license.

46. The learned judge held that a person who was conducting a listed waste management activity lawfully as at 29 November 2013 *"is entitled to continue conducting such activity without a waste management license until such time*

[14] Judgment para 84.

as they are called upon by the Minister by notice in the Gazette to apply for such license.".

47. In conclusion, the learned judge noted that *"the Minister of Environmental Affairs has not yet called upon Tendele to apply for a waste management license"*. Bearing in mind that the Minister was a party, the learned judge noted that if Tendele had been found to be acting unlawfully, they would have been called upon by the Minister to regularize their unlawful activity.

48. There is a fundamental difficulty with the approach adopted by the learned judge. If the law requires a waste management license, it is upon the court to pronounce upon such necessity. The failure of the Minister to enforce the law is irrelevant to the judicial power of courts to declare that there has been a breach of the law. To adopt the approach which the learned judge appears to have adopted is to abdicate the judicial function to Government functionaries.

49. The determination as to whether the particular conduct is lawful or not is not to be made by ministers, although they are granted particular powers. The determination as to the lawfulness of particular activities is to be made by courts. After all, the judicial function is in terms of section 165 of the Constitution vested in the courts.

Graves

50. The learned judge dealt with the issue at paragraph 91. In that paragraph it was noted that the first respondent had accepted in the answering affidavit that

it had altered and removed traditional graves without being in possession of authorizations from the Heritage Council.

51. Nevertheless, it was contended that the relocation of the graves had taken place in consultation with the effected families and communities. However, the learned judge held that the first respondent engaged with the ninth respondent on the issue of relocation of the graves.

52. It was on the strength of this engagement between the first respondent and the ninth respondent that the learned judge came to the conclusion that the ninth respondent would have said something *"if it was not satisfied with the manner in which traditional graves were being relocated in terms of the KNZ Heritage Act."*

53. In the light of this, the learned judge declined to take into consideration the previous unlawful conduct in the relocation of graves without the necessary authorization. We submit that there is a reasonable prospect that the Supreme Court of Appeal would come to a different conclusion on the law.

53.1 Whether or not the relocation of graves is lawful cannot be decided by reference to the view taken by the Heritage Council. It is to be decided by reference to the Act. The conclusion at paragraph 92 of the judgment may be held differently by the court of appeal.

53.2 The true question that was before the court was whether the relocations had taken place in accordance with the Act. The consultation with the families or communities, or for that matter the Heritage Council, were

not directly germane to the issue of the legality of the relocations. They may have been relevant to any remedy that a court may consider, but not the legality of the relocation.

54. There is accordingly a reasonable prospect that another court may arrive at a different conclusion and particularly a conclusion different to that reached by the learned judge.

CONCLUSION

55. In the circumstances, it is submitted that there are reasonable prospects that the Supreme Court of Appeal would come to a different conclusion. In the alternative, this is a matter of sufficient public importance, which raises novel issues worthy of attention of the Supreme Court of Appeal.

56. Leave to appeal ought to be granted to the Supreme Court of Appeal.

Tembeka Ngcukaitobi

Mawande Mazibuko

Counsel for applicants

11 September 2019