IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1105/2019
KZP CASE NO: 11488/17P

In the matter between:

GLOBAL ENVIRONMENTAL TRUST	First Appellant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Appellant
SABELO DUMISANI DLADLA	Third Appellant

and

TENDELE COAL MINING (PTY) LIMITED	First Respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent
MTUBATUBA MUNICIPALITY	Fifth Respondent
HLABISA MUNICIPALITY	Sixth Respondent
INGONYAMA TRUST	Seventh Respondent
EZEMVELO KZN WILDLIFE	Eighth Respondent
AMAFA aKWAZULU-NATAL HERITAGE COUNCIL	Ninth Respondent
CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae

FILING NOTICE

THE FIRST RESPONDENT HEREWITH FILES THE FOLLOWING –

1. the first respondent's certificate in terms of rule 10A(b);
2. the first respondent's practice note; and
3. the first respondent's heads of argument.

Dated at Sandton on this the 8th day of **JUNE 2020**.

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TO:
THE REGISTRAR
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BLOEMFONTEIN

AND TO:
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MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Appellant (2nd Applicant in the court a quo)
SABELO DUMISANI DLADLA	Third Appellant (3rd Applicant in the court a quo)

and

TENDELE COAL MINING (PTY) LTD	First Respondent (1st Respondent in the court a quo)
MINISTER OF MINERALS AND ENERGY	Second Respondent (2nd Respondent in the court a quo)
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent (3rd Respondent in the court a quo)
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent (4th Respondent in the court a quo)
MTUBATUBA MUNICIPALITY	Fifth Respondent (5th Respondent in the court a quo)
HLABISA MUNICIPALITY	Sixth Respondent (6th Respondent in the court a quo)
INGONYAMA TRUST	Seventh Respondent (7th Respondent in the court a quo)
EZEMVELO KZN WILDLIFE	Eighth Respondent (8th Respondent in the court a quo)
AMAFA EKWAZULU-NATAL HERITAGE COUNCIL	Ninth Respondent (9th Respondent in the court a quo)
CENTRE FOR ENVIRONMENTAL RIGHTS	Amicus Curiae

TENDELE'S CERTIFICATE IN TERMS OF RULE 10A(b)

We certify that Tendele has complied with the provisions of Rule 10 and Rule 10A(a) of the Rules of the Supreme Court of Appeal.

Peter Lazarus SC

Nick Ferreira

8 June 2020

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and

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MINISTER OF MINERALS AND ENERGY	Second Respondent (2nd Respondent in the court a quo)
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT TOURISM AND ENVIRONMENTAL AFFAIRS	Third Respondent (3rd Respondent in the court a quo)
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent (4th Respondent in the court a quo)
MTUBATUBA MUNICIPALITY	Fifth Respondent (5th Respondent in the court a quo)
HLABISA MUNICIPALITY	Sixth Respondent (6th Respondent in the court a quo)
INGONYAMA TRUST	Seventh Respondent (7th Respondent in the court a quo)
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TENDELE'S PRACTICE NOTE

1 NAME AND NUMBER OF THE MATTER

As above.

2 NATURE OF THE APPEAL

This is an appeal against the whole judgment and order granted by Seegobin J in the KwaZulu-Natal Provincial Division, Pietermaritzburg on 20 November 2018. Seegobin J refused to grant the appellants an interdict that would have closed the Somkhele Coal Mine on the basis of their contention that Tendele is mining without the necessary statutory authorisations and approvals.

3 JURISDICTION

Seegobin J granted the appellants leave to appeal on 17 September 2019.[1]

4 CONSTITUTIONAL ISSUES

The litigation is constitutional in nature and the appellants base their cause of action on section 24 of the Bill of Rights and legislation enacted to give effect to that right.

[1] Vol 4 pp 702 - 708

5 **ISSUES ON APPEAL**

5.1 Whether the appellants' pleadings made out any proper case for the relief that they sought.

5.2 If it is found that the appellants made out a case for their relief, whether Tendele requires the following approvals for its mining operations at Somkhele:

5.2.1 Environmental Authorisation in terms of the National Environmental Management Act 107 of 1998;

5.2.2 Municipal town planning approval for its land use;

5.2.3 A Waste Management Licence in terms of the National Environmental Management: Waste Act 59 of 2008; and

5.2.4 Written approval in terms of the KwaZulu-Natal Heritage Act 4 of 2008 to relocate graves.

6 **ESTIMATED DURATION**

1 day.

7 **PORTIONS OF THE RECORD IN LANGUAGE OTHER THAN ENGLISH**

None.

8 **NECESSARY PARTS OF THE RECORD**

Tendele agrees with the appellants that Volumes 1 and 4 are the essential components of the record.

9 SUMMARY OF THE ARGUMENT

Tendele's case is that:

9.1 The appellants' pleadings before the High Court were fatally defective. The founding affidavit failed to make the necessary allegations to establish even a *prima facie* case of a breach of NEMA, the Waste Act or the Land Use legislation.

9.2 Tendele's operations are undertaken pursuant to valid Mining Rights and Environmental Management Programmes ("**EMPs**") granted and approved by the Department of Mineral Resources (as it then was) in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"). Prior to the commencement of the "One Environmental System" on 8 December 2014, the environmental impacts of mining were regulated solely through the relevant mining laws and the requirement contained therein for holders of mining rights to obtain an EMP prior to commencing mining and to mine in accordance with such an approved EMP. Furthermore, the legislative amendments which gave effect to the One Environmental System contain transitional arrangements which provide for the continuation of mining operations lawfully conducted prior to the amendments and mining operations undertaken pursuant to applications for mining rights submitted prior to the amendments.

9.3 Tendele's mining operations on Reserve No. 3 (Somkhele) No. 15822, pre-date the introduction of mining as a land use requiring municipal approval. The provincial and national land use planning legislation that introduced mining as a land use that required municipal approval

provides for the continuation of lawful, historical mining operations such as those undertaken by Tendele. In any event, Tendele has obtained municipal approval for its mining operations.

9.4 The transitional provisions of the Waste Act provide for the continuation of waste management activities provided they were being lawfully undertaken prior to the amendment of the list of waste management activities that have, or are likely to have, a detrimental effect on the environment, on 29 November 2013. As a result, even assuming that Tendele is conducting activities which would require a waste management licence, the fact that they were being conducted in terms of EMPs approved by the Department of Mineral Resources in terms of the prevailing legislation means that they may continue by virtue of the transitional provisions.

9.5 While Tendele accepts that it has previously removed or altered traditional graves without being in possession of the necessary authorisations, it did so following lengthy consultations with the families concerned, and has never relocated graves without a signed agreement and consent from the relevant family. There is no risk that it will in future conduct any such removal or alteration without the necessary approvals. Since April 2017 Tendele has been working in close collaboration with Amafa (the ninth respondent) and a comprehensive procedure has been established for all future relocations of the graves.

10 **CORE BUNDLE**

None.

11 **COMPLIANCE WITH RULE 8(8) AND 9**

Tendele has complied with Rule 8(8) and Rule 9.

Peter Lazarus SC

Nick Ferreira

Counsel for Tendele

8 June 2020

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TENDELE'S HEADS OF ARGUMENT

INTRODUCTION AND OVERVIEW

1. The appellants seek an order interdicting the first respondent ("**Tendele**") from conducting its mining operations at the Somkhele mine. They contend that Tendele is mining without the necessary statutory authorisations and approvals.

2. The interdict would have the effect of closing a mine which is the primary employer in the impoverished Mpukunyoni Area, a major contributor to social and economic development, and the principal supplier of anthracite to ferrochrome producers in South Africa.

3. The appellants say that Tendele's current mining operations are unlawful because Tendele –

    3.1. has no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 ("**NEMA"**);

    3.2. has no land use authority, approval or permission from any municipality having jurisdiction;

    3.3. has no waste management licence issued by the Minister of Environmental Affairs (the fourth respondent) in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 ("**Waste Act**"); and

3.4. has no written approval in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 ("**KZN Heritage Act**") to damage, alter, exhume or remove any traditional graves from their original position.

4. These allegations are unsustainable:

4.1. As the appellants accepted in the application for leave to appeal,[1] their pleadings were fundamentally defective. Their affidavits do not contain necessary allegations to establish even a *prima facie* case that Tendele breached NEMA, the Waste Act or the land use legislation.

4.2. Tendele's operations are undertaken pursuant to valid Mining Rights and Environmental Management Programmes ("**EMPs**") granted and approved by the Department of Mineral Resources (as it then was) in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"). Prior to the commencement of the "One Environmental System" on 8 December 2014, the environmental impacts of mining were regulated solely through the relevant mining laws and the requirement contained therein for holders of mining rights to obtain an EMP prior to commencing mining and to mine in accordance with such an approved EMP. Furthermore, the legislative amendments which gave effect to the One Environmental System contain transitional arrangements which provide for the continuation of mining operations lawfully conducted prior

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1 Judgment in the application for leave to appeal, Vol 4, p 705, para 7.

to the amendments and mining operations undertaken pursuant to applications for mining rights submitted prior to the amendments.

4.3. Tendele's mining operations on Reserve No. 3 (Somkhele) No. 15822, pre-date the introduction of mining as a land use requiring municipal approval. The provincial and national land use planning legislation that introduced mining as a land use that required municipal approval provides for the continuation of lawful, historical mining operations such as those undertaken by Tendele. In any event, Tendele has obtained municipal approval for its mining operations.

4.4. The transitional provisions of the Waste Act provide for the continuation of waste management activities provided they were being lawfully undertaken prior to the amendment of the list of waste management activities that have, or are likely to have, a detrimental effect on the environment, on 29 November 2013. As a result, even assuming that Tendele is conducting activities which would require a waste management a licence, the fact that they were being conducted in terms of EMPs approved by the Department of Mineral Resources in terms of the prevailing legislation means that they may continue by virtue of the transitional provisions.

4.5. While Tendele accepts that it has previously removed or altered traditional graves without being in possession of the necessary authorisations, it did so following lengthy consultations with the families concerned, and has never relocated graves without a signed agreement and consent from the relevant family. There is no risk that it will in future conduct any such

removal or alteration without the necessary approvals. Since April 2017 Tendele has been working in close collaboration with Amafa (the ninth respondent) and a comprehensive procedure has been established for all future relocations of the graves.

FACTUAL BACKGROUND

5. Mining operations commenced in the Somkhele area in the mid 1880's.[2] Tendele began its mining operations in 2006 pursuant to the grant of an "old order" mining licence and subsequently a mining right and the approval of an EMP granted and approved in terms of the MPRDA.[3]

6. The Somkhele Mine comprises a single mining area on Reserve No. 3 (Somkhele) No. 15822. However, the mining operations are divided between five areas and separate mining rights and separate EMP's apply to different areas.

6.1. The mining right in respect of Area 1 was granted to Tendele on 21 May 2007.[4] The EMP applicable to the Area 1 mining right was approved on 22 June 2007.[5]

6.2. The Areas 2 and 3 converted mining right was granted to Tendele on 1 February 2011.[6] On 8 March 2013, this right was amended, to include the KwaQubuka and Luhlanga areas. The EMP attaching to the Areas 2 and

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2 AA Vol 1 p 168 para 23.
3 AA Vol 1 p 178 para 54.
4 AA Vol 1 p 179 para 57.1; annexure TCM5 pp 250-262.
5 AA Vol 1 p 182 para 60.1.
6 AA Vol 1 p 179 para 58; annexure TCM6 pp 263-274; annexure TCM7 pp 275-279.

3 converted mining right was approved by the Regional Manager on 30 March 2011. Amendments to this EMP, to cater for the inclusion of the KwaQubuka and Luhlanga areas were approved on 29 May 2012.

6.3. The Areas 4 and 5 mining right was granted on 31 May 2016.[7] The EMP applicable to this right was approved on 26 October 2016.

7. Tendele is only actively mining in area 1 and the extended area of area 2, namely the KwaQubuka and Luhlanga areas. The mine's coal wash plants are located in area 2.[8] Mining operations are not being undertaken in area 3.[9] Mining operations ceased in area 2 in January 2012 due to depletion of the anthracite reserves.[10] Mining operations have not started in areas 4 and 5.[11] The second and third applicants have launched review proceedings to, *inter alia*, set aside the areas 4 and 5 mining right.

8. The appellants seek to interdict all mining operations at Tendele, until Tendele has obtained the authorisations referred to in paragraph 3 above, which it says are required.[12] We submit, for the reasons that follow, that the High Court correctly refused to grant that relief.

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7 AA Vol 1 p 181 para 59; annexure TCM8 pp 280-294.
8 AA Vol 1 p 183 para 61.
9 AA Vol 1 p 184 para 64.
10 AA Vol 1 p 184 para 65.
11 AA Vol 1 p 184 para 66.
12 Appellants HOA, para 86.

ENVIRONMENTAL AUTHORISATIONS

9. The appellants contend that Tendele is mining unlawfully because no environmental authorisation as contemplated by NEMA has been issued to Tendele in respect of its mining operations. According to the appellants, such environmental authorisation was required both prior to 8 December 2014 (when the One Environmental System was introduced) and after 8 December 2014.

10. We submit that:

10.1. First, the question of whether Tendele was required to obtain an environmental authorisation as required by section 24F(1)(a) of NEMA does not arise on these pleadings, because the appellants failed to allege that Tendele is conducting any listed activities at Somkhele.[13]

10.2. Second, even if this were not so, Tendele did not and does not require environmental authorisation in terms of NEMA for its current mining and mining related activities in area 1 and the extended area of area 2, as these activities commenced prior to the introduction of the One Environmental System. At that time the environmental impacts of mining were regulated exclusively through the MPRDA and in particular through the requirement under that Act to obtain an EMP prior to commencing

13 Vol 1 FA pp 20-31 paras 36-63.

mining and to ensure that mining takes place in accordance with an approved EMP.[14]

10.3. Tendele also does not require environmental authorisation for its proposed mining and mining related activities in areas 4 and 5. This is because the EMP related to that mining right was submitted prior to the introduction of the One Environmental System on 8 December 2014 and, by virtue of the transitional provisions in the legislation giving effect to the new system, that EMP and the mining operations undertaken pursuant to it, are governed by the law as it was prior to 8 December 2014.

THE PLEADINGS: FAILURE TO IDENTIFY LISTED ACTIVITIES

11. The appellants' founding affidavit lacks the necessary allegations to sustain this ground of unlawfulness.

12. Section 24F(1)(a) of NEMA prohibits the commencement of "*listed activities*" in the absence of environmental authorisation. Listed activities are those identified in terms of section 24(2)(a) and (d).

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14 AA p 191 para 75. See section 38(1)(c)(i) of the MPRDA (prior to its repeal by Act 49 of 2008) which provided as follows: "*The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit – must manage all environmental impacts – in accordance with his or her environmental management plan or approved environmental management programme, where appropriate; …*".

13. Acting in terms of this section (and its predecessor, section 21 of the Environment Conservation Act 73 of 1989 ("**ECA**")), the Minister of Environmental Affairs identified the activities listed in Annex R1 to the appellant's replying affidavit.[15]

14. Since the first list of activities was published on 5 September 1997[16] (in terms of the ECA) until the most recent list published on 4 December 2014[17] (in terms of NEMA), the list of activities has been replaced and amended on several occasions, with new activities being added, the definition of certain activities being amended and with some activities being removed from the various lists.

15. Accordingly, any allegation that Tendele has breached section 24F(1)(a) of NEMA must, at a bare minimum, identify (a) the listed activity alleged to have commenced without environmental authorisation; and (b) the date on which that activity commenced.[18]

16. In the founding affidavit, the appellants did not plead these essential facts. The sum total of the appellants' evidence in the founding affidavit relating to the activities Tendele is allegedly undertaking without environmental authorisation is the following:

> *"Normally speaking, mining is a listed activity which has an impact on the environment and as such an Environmental Authorisation ("EA") must be obtained in terms of the National Environmental Management Act 107 of 1998 (NEMA)."*[19]

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15 Annexure R1, Vol 2 p 387.
16 GNR 1182, published in GG 18261 on 5 September 1997 (as amended).
17 GNR 983, 984 and 985, published in GG 38282 on 4 December 2014 (as amended).
18 The prohibition in section 24(2)(a) is on the commencement of an activity and not, as the appellants' heads of argument say in paragraph 21.3, the occurrence.
19 FA Vol 1 p 20 para 36.

17. Tendele's answering affidavit was a perfectly legitimate response to this allegation. Tendele bore no onus or evidentiary duty to provide the missing allegations for the appellants.

18. Tendele's answering affidavit set out why, as a matter of law, it contended that there is no requirement for environmental authorisation for its current mining operations.[20] It also pointed out that, under the ECA, authorisation under any environmental legislation was not required for mining operations or activities directly related thereto. [21]

19. In their replying affidavit, the appellants accepted the mistake as follows:

> *"It is accepted that there are no listed activities related to "mining" as a special category. However, there are a host of listed activities which relate to mining.*
> *These are set out in a table which is annexure 'R1' hereto."*[22]

20. Annexure R1 contains a list of the activities requiring environmental authorisation under NEMA. The appellants make no effort, even in reply, to identify which of the activities it contends Tendele is undertaking, nor when Tendele is alleged to have commenced them.

21. In any event, by the time of the replying affidavit it is too late. These are the kinds of allegations which should have, and could have, been included in the founding affidavit in order to allow Tendele to answer to them.

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20 AA Vol 1 pp 185 – 191 paras 69 – 89.
21 AA Vol 1 p 219 para 141.2.2.
22 RA Vol 2 p 369 para 10.5.

22. In their heads of argument, the appellants try to avoid this problem by casting a duty or onus on Tendele to have supplied the missing allegations, either in its answering affidavit or the correspondence. They say that it was clear from the pre-litigation correspondence that the appellants lacked sufficient detail to enumerate which activities triggered specific listed activities; that it was common cause from the correspondence that Tendele was conducting listed activities; and that Tendele ought to have denied that it was engaged in any listed activities or explained what listed activities it was undertaking.[23]

23. There is no mention in the founding affidavit that it was the appellants' understanding that it was common cause that listed activities are taking place at Tendele's mines or what those listed activities are. Nor does the founding affidavit contain any indication of a lack of adequate knowledge on the part of the appellants as to which activities were occurring at Somkhele.

24. The appellants submit that Tendele ought to have supplied the allegations that were missing from the founding affidavit, because those facts were within Tendele's peculiar knowledge.[24]

25. In support of this proposition, they rely on *Wightman.*[25] But *Wightman* does not apply where an essential element of a cause of action has not been even been alleged in the founding affidavit. It applies only "*<u>when the facts averred</u> are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer*".[26] In those circumstances, a bare denial will not suffice to

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23 Appellants HOA paras 40 – 41.
24 Appellants HOA para 50 – 51.
25 Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA).
26 Wightman at para 13, emphasis added.

create a dispute of fact. Here, there was nothing to deny because the appellants were mistaken about the elements of their cause of action. In these circumstances, the respondent has no duty to supply the missing allegations.

26. It is trite that in motion proceedings the affidavits must contain the factual averments that are sufficient to support the cause of action sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit.[27]

27. It is for this reason that it is impermissible for an applicant in motion proceedings to make out a new case in reply.[28]

28. The issue of the proper interpretation of the MPRDA and NEMA accordingly does not arise on these papers. However, if this Court does reach the issue, we submit that the High Court correctly held that Tendele did not require an environmental authorisation as a matter of law.

ENVIRONMENTAL AUTHORISATION WAS NOT REQUIRED FOR TENDELE'S <u>CURRENT</u> MINING AND MINING RELATED ACTIVITES

29. As mentioned above, Tendele is currently only mining in Area 1 and the extended area of area 2, namely the KwaQubuka and Luhlanga areas. The mining rights and

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27 Quartermark Investments v Mkhwanazi 2014 (3) SA 96 (SCA) at para 13.
28 Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H - 636F, emphasis added.

EMP's in respect of these areas were granted and approved prior to the commencement of the One Environmental System on 8 December 2014.

30. There can be no real dispute that at that stage (i.e. prior to 8 December 2014), an environmental authorisation was not required for the undertaking of the activity of mining *per se*. This is so: -

30.1. Firstly, because section 5A (which provides that no person may, inter alia, mine without an environmental authorisation) had not yet been introduced into the MPRDA.[29] At that stage the relevant section of the MPRDA (section 5(4)(a)) provided that no person may, inter alia, mine without an approved EMP.[30]

30.2. Secondly, because it was only with the coming into operation of the 2014 EIA regulations on 8 December 2014, that the commencement of mining *per* se required an environmental authorisation in terms of NEMA.

31. The question that nevertheless arises is whether activities incidental to mining which were also identified as listed activities in the relevant EIA Regulation, required, in addition to a mining right and EMP in terms of the MPRDA, an environmental authorisation in terms of NEMA.

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29 Section 5A was introduced into the MPRDA on 8 December 2014 by virtue of section 5 of Act 49 of 2008.

30 Section 5(4) was deleted at the same time as section 5A was introduced, namely on 5 December 2014 in terms of Act 49 of 2008.

32. In our submission, prior to 8 December 2014, such environmental authorisation under NEMA was not required because the environmental impacts of mining and activities incidental to mining were regulated exclusively through the MPRDA.

33. This is evident, we submit, from a proper interpretation of the scope and effect of the MPRDA and NEMA and the interaction between the two statutes.

34. Before dealing with the two Acts individually, it must be emphasised that both NEMA and the MPRDA were enacted to give effect to section 24(b) of the Constitution.[31] This starting point is important in determining the inter-relationship between the two enactments.

35. In what follows it will be submitted that in enacting the MPRDA, the legislature sought to cover the field as far as the environmental impacts and management of mining related activities are concerned. In the process it made the implementation of the MPRDA subject to the pre-existing principles[32] of NEMA but left the interpretation thereof and decision making in the hands of the functionaries of the Department of Mineral Resources in accordance with the MPRDA and the regulations promulgated in terms thereof.

<u>The regulation of the environmental impacts of mining under the MPRDA (prior to the commencement of the One Environmental System)</u>

36. The principal means through which the MPRDA sought to regulate the environmental impacts of mining was through the requirement contained therein

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31 NEMA Preamble; MPRDA section 2(h).
32 As set out in section 2 of NEMA.

for holders of mining rights to obtain an EMP prior to commencing mining and to mine in accordance with such an approved EMP.[33]

37. The procedure for submission and approval of such EMP's and the minimum content thereof was set out in section 39 of the MPRDA together with the regulations promulgated thereunder.[34]

38. The regulations prescribed in detail what must be contained in the scoping reports and environmental impact assessment reports which were to be taken into consideration by the relevant authority in deciding whether or not to authorise the relevant mining operation. Importantly, and by virtue of section 38(1)(b) of the MPRDA, such reports and assessments had to comply with the minimum requirements set out in section 24(7) of NEMA.

39. The regulations further prescribed the content of EMP's which were required, by virtue of section 38(1)(b) of the MPRDA, to give effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA.

40. Section 41 of the MPRDA read together with regulations 53 and 54 provided in addition for financial provision to be made for the remediation of environmental damage caused by mining operations.

41. Section 37(1) of the MPRDA provided that the environmental management principles set out in section 2 of NEMA are applicable to all prospecting and mining

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33 Sections 5(4)(a) and 38(1)(c).

34 The MPRDA regulations were published in GNR 527 of 23 April 2004. See in particular regulations 48 – 52.

operations and are to serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

42. In addition, NEMA was expressly referred to in section 38(1) of the MPRDA which provided, inter alia, that the holder of a mining right must at all times give effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA and must consider, investigate, assess and communicate the impact of his mining operations on the environment as contemplated in section 24(7) of NEMA.[35]

43. Cognisant of the fact that other government departments administer laws relating to matters affecting the environment, section 40 of the MPRDA required the Minister of Mineral Resources, when considering an EMP, to consult with such other government departments.

44. It is clear, therefore, that the MPRDA prescribed a comprehensive system to manage and mitigate the environmental impacts of mining in fulfilment of its object to give effect to section 24(b) of the Constitution.[36]

Environmental authorisations required in terms of NEMA

45. NEMA came into operation on 29 January 1999.

46. In its original form NEMA was not intended to create an extensive regulatory system in the hands of the Minister of Environmental Affairs and Tourism ("**the**

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35 Section 24(7) of NEMA was repealed and replaced by section 24(4) by Act 8 of 2004.
36 MPRDA section 2(h).

Environment Minister") and the various provincial MEC's responsible for the environment. To a large extent, NEMA constituted framework legislation which recognised the power of other organs of state in terms of other legislation to give authorisation for activities *"… which may significantly affect the environment…".*[37] The manner in which these powers had to be exercised by such other organs of state in terms of other legislation was, however, regulated by NEMA.

47. The application of Chapter 5 of NEMA to mining operations entailed that prior to the commencement of such operations their impact on, *inter alia*, the environment had to be considered, investigated, assessed and reported to the Department of Minerals and Energy, being the organ of state charged by law with authorising mining operations. In deciding whether to authorise a particular mining operation, that department had to ensure compliance with the minimum requirements contained in section 24(7) of NEMA.

48. Section 24(2)(a) and (b) gave the Environment Minister the power to identify, amongst other things, activities or areas in which specified activities may not commence without prior authorisation from the Minister or such MEC.

49. If an activity identified by the Minister fell within the jurisdiction of another Minister, however, the decision to require environmental assessment and permitting for that activity could only be taken with the agreement of that other Minister. This would

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37 Section 24(1) of NEMA (as it was originally promulgated).

consequently have required the agreement of the Environment Minister and the other Minister concerned.[38]

50. Where an activity was identified in terms of section 24(2), however, section 24(5) made it clear that an authorisation received from the Environment Minister (or his or her provincial counterpart) did not remove the need to obtain authorisation for that activity from any other organ of state charged by law with authorising the activity.

51. At the time the MPRDA came into operation no activities had been identified in terms of section 24(2) of NEMA. The only activities which required an environmental impact assessment ("**EIA**") under environmental laws specifically, were those activities that had been identified in terms of section 21 of the ECA and the regulations promulgated in terms thereof on 5 September 1997.[39] Mining, *per se*, was not identified in these regulations.

52. Section 24(3) of NEMA, however, authorized any Minister responsible for an organ of state that was charged by law with authorizing an activity which may significantly affect the environment to prescribe regulations in terms of such a Minister's own legislation, laying down the procedures to be followed and the reports to be prepared for the investigation of the potential impact of that activity on the environment. In terms of section 24(3)(c) of NEMA, such regulations had to comply with the procedures set out in section 24(7) of NEMA.

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38 This arose by virtue of the use of the phrase '*in consultation with*' in the proviso to section 24(2). See McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642(C) at 649B – 649E.

39 Promulgated in GNR 1182, 1183 and 1184 in GG 18261 of 5 September 1997.

53. What is immediately apparent from this analysis is that the provisions of the MPRDA discussed above gave express effect to these provisions of NEMA and reflected the legislature's interpretation of precisely how these sections of NEMA were to be implemented in the mining context.

54. On 21 April 2006, the Environment Minister promulgated regulations ("**the 2006 EIA regulations**") in terms of section 24 of NEMA which identified activities that may not commence without environmental authorisation. The 2006 EIA regulations, were repealed with effect from 2 August 2010 and replaced by new EIA regulations ("**the 2010 EIA regulations**") containing amended criteria for the obtaining of environmental authorization in terms of section 24 of NEMA and listing new activities in respect of which such authorization was required.[40]

55. Although both the 2006 and 2010 EIA regulations identified mining and mining related activities, as activities which could not commence without an environmental authorisation, the provisions referring to these particular activities never came into effect.

56. The first time that environmental authorisation in terms of NEMA was expressly required for the commencement of mining and mining related activities was when the 2014 EIA regulations came into effect on 8 December 2014. These regulations provide that any activity including the operation of that which requires a mining right as contemplated in section 22 of the MPRDA, "including associated infrastructure,

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40 Promulgated under sections 24(5), 24M and 44 of NEMA in GNR 543, 454, 545 and 546 in GG 33306 of 18 June 2010.

structures and earthworks directly related extraction of mineral resource"[41] may not commence without an environmental authorisation.

The regulation of activities "incidental" to mining

57. The rights created through the grant of a mining right in terms of the MPRDA include not only the right to undertake the actual mining operations but also the right to carry out any other activity '*incidental to*' such mining operations which does not contravene the provisions of the Act.[42]

58. The question that arises is whether the undertaking of such "incidental" activities fell to be regulated not only by MPRDA but also by NEMA directly through the requirement to obtain environmental authorisation.

59. This question must be answered with reference to purpose and context of both the MPRDA and NEMA as set out above.[43]

60. If an environmental authorisation was required for such "incidental" activities which were also listed in the 2006 and 2010 EIA regulations, holders of mining rights would potentially face competing and contradictory but mandatory directions from the designated authority under the MPRDA and the competent authority in terms of NEMA in respect of the same activity.

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41 Other mining and mining related activities were identified in Listing Notice 1 (items 20 and 21) and Listing Notice 2 (items 17 – 22).

42 Section 5(3)(e) of the MPRDA. Various other provisions in the MPRDA confer rights on holders of mining rights, including specifically section 25 and more generally sections 6, 11, 96 and 102.

43 *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) [28].

61. Since this clearly cannot have been intended, it is necessary to interpret the MPRDA as conferring exclusive jurisdiction upon the Minister of Mineral Resources (or his or her functionaries) to regulate mining operations, including the environmental consequences thereof.

62. This raises the question of whether or not such an interpretation is justified by the language employed in the MPRDA.

63. There are two powerful considerations which dictate that a person should not be subject to conflicting laws or to conflicting directives from authorities deriving their powers from such laws. The first is the constitutional principle of the rule of law, articulated in sections 1 and 2 of the Constitution and the second is the presumption against absurdity.

64. Laws which subject persons to conflicting requirements or expose them in respect of the same conduct to potentially conflicting directives or administrative orders infringe the rule of law because they are vague and because those subject to them cannot order their affairs consistent with the legal regime to which they are subject. Where possible, laws must be interpreted so as to avoid that result: "*Well-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together*".[44]

65. The presumption against absurdity is an articulation of the legitimate expectation that legislation will be reasonable.[45] Whatever the difficulties may be in deciding

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44 Ruta v Minister of Home Affairs 2019 (2) SA 329 (CC) at para 42.
45 Lourens du Plessis: Re-Interpretation of Statutes 162.

whether or not a particular interpretation is absurd, an interpretation which permits of conflicting requirements is clearly absurd.

66. The argument advanced on this issue in these heads of argument is that in the MPRDA the legislature made a deliberate choice: instead of rendering those subject to its provisions also subject to the pre-existing provisions of NEMA, it chose to subject them to the principles of NEMA, as interpreted and applied by the functionaries of the Department of Mineral Resources. Realising that that approach might give rise to anomalies, in that the functionaries charged with applying the provisions of NEMA might interpret those principles or their application differently, it provided for a form of consultation.[46]

67. This would have been unnecessary if the MPRDA provided for the direct application of NEMA. Why, one may ask, would the legislature have made such careful provision for the indirect application of NEMA if NEMA was directly applicable? If on a proper interpretation of the MPRDA, the legislature did not intend NEMA to apply directly, then effect must be given to that intention unless a contrary intention can be discerned from the relevant provisions of NEMA.

68. It is our submission that section 24 of NEMA (prior to 8 December 2014) did not, either directly or by necessary implication, contradict the interpretation set out above of the MPRDA.

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46 Section 40.

69. As a result, the power conferred upon the Environment Minister to list activities for which environmental authorisation must be obtained must be read as excluding activities governed by the MPRDA.

70. It goes without saying that the fact that the Environment Minister identified certain activities in the EIA regulations which are subject to regulation under the MPRDA is neither here nor there. Such an administrative act would simply reflect the Minister's opinion as to the extent of his or her powers. One cannot interpret a provision of an Act conferring a power upon a functionary by looking at what powers the functionary has sought to exercise. That would be to allow the executive to usurp the powers of the legislature.

71. Even if we are wrong in our interpretation of section 24 of NEMA, it is nevertheless clear from the EIA regulations themselves, that they did not intend to regulate activities incidental to mining before the particular provisions in the regulations which regulated such activities came into operation.

72. What was sought to be listed in the 2006 and 2010 EIA regulations was mining and related activities within a mining area. This is clear from the reference in the 2006 EIA regulations to "*mining as provided for in the* [MPRDA]", "*mining related activity or operation within a … mining area as defined in section 1 of the* [MPRDA]" and the reference in the 2010 EIA regulations to "*any activity which requires a mining right or renewal thereof as contemplated in … the* [MPRDA]". Since the terms are defined in the MPRDA so as to include activities incidental to mining, the express reliance in the EIA regulations on the terms "*as contemplated in the* [MPRDA]" demonstrates that the regulations intended to include activities incidental to mining.

73. Other activities identified separately in the 2006 and 2010 EIA regulations, must thus be interpreted to comprise activities other than those which are incidental to mining operations – as such activities were deliberately included in the definition of the mining activities identified in the regulations.

74. This interpretation must be correct because to interpret the regulations as requiring environmental authorisation for the undertaking of a separately identified activity (such as the development of a road) in addition to requiring environmental authorisation for the undertaking of a "mining related activity" (which may happen to be the same road), would clearly amount to duplication.

75. Moreover, the interdict which the appellants seek is plainly too broad in relation to the right that it seeks to protect. Even if the appellants' complaints were correct (which is denied), the alleged unauthorised undertaking of listed activities in terms of NEMA could not possibly entitle the appellants to an interdict shutting down the entire mining operation. At best, they would only be entitled to relief in respect of a specified listed activity (assuming that such an activity had been identified in their pleadings, which, as already stated above, the appellants have failed to do).

ENVIRONMENTAL AUTHORISATION IS NOT REQUIRED FOR TENDELE'S <u>PROPOSED</u> MINING AND MINING RELATED ACTIVITES

76. Tendele submitted its application for the Areas 4 and 5 mining right on 13 June 2013 and submitted its EMP for approval on 9 May 2014. Both dates preceded the commencement of the One Environmental System on 8 December 2014.

77. As one would expect, the introduction of the One Environmental System on 8 December 2014 contained certain transitional arrangements.

78. In terms of section 12(7) of the NEMA Amendment Act[47] –

> *"An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the Mineral and Petroleum Resources Development Act, 2002 that is pending on the date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, must be dispensed of in terms of that Act as if that Act had not been amended."*[48]

79. A similar transitional provision was also included in the 2014 Environmental Impact Assessment Regulations, which came into effect on 4 December 2014. In terms of Regulation 54(1) of these regulations –

> *"An application*[49] *submitted in terms of the previous MPRDA regulations and which is pending when these Regulations take effect must despite the repeal of those regulations be dispensed with in terms of those previous MPRDA regulations as if those previous MPRDA regulations were not repealed."*

80. The effect of these transitional provisions on Tendele, is that both its application for a mining right and its application for the approval of its EMP fell to be adjudicated on the basis of the law as it was prior to the implementation of the One Environmental System on 8 December 2014.

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47 Act 62 of 2008. Section 12(7) was introduced into the NEMA Amendment Act by the National Environmental Management Laws Amendment Act 25 of 2015 with effect from 2 June 2014.

48 The date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, is commonly accepted as being 8 December 2014, being the date 18 months after the date of commencement of the MPRDA Amendment Act, 2008.

49 "Application" for the purpose of this regulation was defined in Regulation 54(1) to include, amongst others, an application for a right or for the approval of an EMP.

81. As mentioned above, prior to 8 December 2014, environmental authorisation in terms of NEMA was not required for mining and mining related activities.

LAND USE APPROVALS

82. The appellants contend that Tendele is undertaking mining operations in contravention of the Kwa-Zulu Natal Planning and Development Act, 6 of 2008 ("the KZN Planning Act") and the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"). They now accept that this does not apply to any of Tendele's operations that occurred prior to the commencement of these statutes and limit their attack to mining which will occur in future in terms of the Areas 4 and 5 mining right.[50]

83. The appellants say that the use of the land covered by the Areas 4 and 5 mining right "*to commence mining would be to convert that land to a new purpose by 'making use of its resources'*".[51]

84. This submission is unsustainable. First, it was not pleaded by the appellants. As a result, the necessary factual allegations are not to be found in the appellants' affidavits and Tendele has never had an opportunity to respond to those allegations. Second, the appellants' submission treats the mining that will occur in Areas 4 and 5 in the future as though it is wholly divorced from and unrelated to the mining that has occurred at Somkhele to date.

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50 Appellants' HOA, paras 56 – 58.
51 Appellants' HOA para 59.

85. As explained above, the Somkhele Mine (including the area forming the subject of the Areas 4 and 5 Mining right) comprise a single mining area on Reserve No. 3 (Somkhele) No. 15822.

86. Tendele's mining operations commenced on Reserve No. 3 in 2006 before both the KZN Planning Act and SPLUMA commenced on 1 May 2010 and 1 July 2015 respectively. The continuation of such activities on Reserve No. 3 thus does not require municipal consent in terms of either Act.

87. In any event, both the Hlabisa Local Municipality and the Mtubatuba Municipality have confirmed that no planning approval or land use approval is required for the continuation of mining operations by Tendele.[52]

No breach of the KZN Planning Act

88. At the time that Tendele commenced its mining operations in 2007, land use in KwaZulu-Natal was regulated by the KwaZulu-Natal Town Planning Ordinance, 27 of 1949 ("KZN Town Planning Ordinance").[53]

89. Section 11(2)(a) of the KZN Town Planning Ordinance provided that:

> *"[N]o person shall without the prior authorisation of the responsible Member of the Executive Council, develop within the meaning of the section any land whether inside or outside the municipal area..."*[54]

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52 FA Vol 1 pp 32-33 paras 67 and 68.
53 AA Vol 1 p 193 para 96.
54 AA Vol 1 p 193 para 97.

90. In the matter of *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and another*[55] the Durban High Court considered the ambit of this provision and concluded that since the Ordinance did not regulate mining operations (at least prior to the amendment of the Ordinance on 10 October 2008, which catered for mining specifically), the commencement of such activities prior to 10 October 2008 did not require municipal consent for the purposes of the Ordinance.

91. Since Tendele's operations commenced before 10 October 2008, municipal consent was not required in terms of the Ordinance.

92. The KwaZulu-Natal Planning and Development Act 6 of 2008 ("the KZN Planning Act") came into operation on 1 May 2010. Section 38(1) provides as follows:

> *"The development of land situated outside the area of a scheme may only occur to the extent that it has been approved by a municipality in whose area the land is situated."*

93. Section 38(3) defines *"development"* to mean –

> *"the carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision".*

94. It is evident from this definition of "development" that the KZN Planning Act did not intend to regulate existing, lawful mining (or building, construction or engineering

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55 Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another 2013 (4) BCLR 467 (KZD).

operations) but only those operations which involve a material change to the existing use of any building or land without subdivision.

95. Furthermore, when the words "develop" and "development" are used in Chapter 4 of the KZN Planning Act (sections 38 – 49, which deal with the development of land situated outside the area of a scheme), it is evident that they are intended to refer to proposed developments and are not intended to cover existing developments. This is clear from the references in the Chapter to persons who may "*initiate the development of land*"[56], the procedure that must be followed for the development of land and in particular what the "*proposal for the development of land*" may include[57], the duties of the municipality in considering a "*proposal*" for the development of land[58], the matters the municipality must take into account when considering the merits of a "*proposal to develop land*"[59], the discretion afforded to the municipality in deciding on the "*proposed development of land*"[60] and when and in what circumstances the right granted by the municipality for the development of land, will lapse[61].

96. Since Tendele was already conducting its mining operations on Reserve No. 3 at the time that the KZN Planning Act came into operation on 1 May 2010 (and even when the Act was assented to on 5 December 2008[62]), it is evident that its operations do not fall within the definition of development contained in section 38(3) and accordingly, do not require municipal consent to continue.

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56 Section 39(1).
57 Section 40(1) and (2).
58 Section 41.
59 Section 42.
60 Section 43(1).
61 Section 49(1).
62 FA Vol 1 p 33 para 71.

No breach of SPLUMA

97. The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) came into effect on 1 July 2015.

98. Section 26 of SPLUMA, provides in subsection 2 that land may be used only for the purposes permitted by a land use scheme, by a town planning scheme (until such scheme is replace by a land use scheme) “*or in terms of subsection (3)*”.

99. Section 26(3) provides for the continuation, after the commencement of SPLUMA, of certain land uses in certain circumstances. It provides as follows:

> *“Where no town planning or land-use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act.”*

100. Schedule 2 includes in the list of land-use purposes "*mining purposes*” which are defined in the Schedule to mean "*purposes normally or otherwise reasonably associated with the use of land for mining*".

101. It is evident that the purpose of section 26(3) is to maintain the existing land use regime applicable to land to which no town planning scheme or land use scheme applies for the period after SPLUMA commences and until a land use scheme is approved in terms of SPLUMA.

102. It achieves this by allowing the use of land for certain purposes to continue where the land was lawfully being used for that purpose immediately before the commencement of SPLUMA on 1 July 2015.

103. Tendele's mining operations at Somkhele pre-dated the commencement of SPLUMA and was lawful at the time that SPLUMA commenced. No town planning or land use scheme applies to the land where Tendele is conducting its mining operations. Accordingly, the continuation of mining operations is not in breach of the provisions of SPLUMA.

Areas 4 and 5 are on the same footing

104. The appellants now say that this defence does not avail Tendele in respect of the Areas 4 and 5 mining right, since that right post-dates the enactment of the relevant legislation, and the mining in terms of that right has not yet commenced.

105. This was never pleaded and Tendele has accordingly not answered to it. If it had been pleaded, Tendele would have been able to put up detailed evidence to demonstrate that the mining to take place in terms of the Areas 4 and 5 right are not a new use or development but merely an extension of the existing land use on Reserve No. 3

106. In any event, it is clear from the evidence that the mining that is to occur in terms of the Areas 4 and 5 mining right is not a new development. It constitutes the expansion of the existing Somkhele mining area onto another part of Reserve No. 3.

WASTE MANAGEMENT LICENCES

107. The appellants contend that Tendele's operations are unlawful as Tendele does not have a waste management licence for its activities as required by the Waste Act.[63]

108. In the founding papers, the appellants failed to identify any aspect of Tendele's operations that would require a waste management licence. This ground of alleged unlawfulness is accordingly unsustainable on the pleadings.

109. However, even if the appellants' pleadings were not defective, it is clear that Tendele does not require a waste management licence to continue its operations at Somkhele.

110. In terms of the Waste Act:

110.1. No person may commence, undertake or conduct a waste management activity except in accordance with a waste management licence or the requirements or standards determined in terms of section 19(3).[64]

110.2. A "*waste management activity*" is defined as any activity listed in schedule 1 or published by notice in the Gazette under section 19.[65]

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63 FA Vol 1 p 39 para 91.
64 Section 20 of the Waste Act.
65 Section 1 of the Waste Act.

110.3. Section 19 of the Waste Act empowers the Minister by notice in the Gazette to publish a list of waste management activities.

110.4. On 29 November 2013 ("2013 listing notice"), the Minister published the list of waste management activities that have or are likely to have a detrimental effect on the environment.[66]

110.5. The 2013 listing notice contains transitional provisions whose purpose is to regularise the affairs of persons who were in the process of conducting waste management activities at the time of publication of the listing notice.

110.6. Regulation 7(1) of the 2013 listing notice says that:

> *"A person who lawfully conducts a waste management activity listed in this schedule on the date of the coming into effect of this notice may continue with the waste management activity until such time that the Minister by notice in a Gazette calls upon such a person to apply for a waste management licence."*

111. Tendele's mining operations and any waste management activities that it was conducting were being lawfully conducted in terms of its mining rights and approved EMPs at the time of the coming into effect of the 2013 listing notice. Tendele was therefore entitled by regulation 7(1) to continue conducting such activity without a waste management licence until the Minister calls upon it to apply for a waste management licence by notice in the Gazette. The Minister of

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66 Government Gazette 29 November 2013 No. .37083.

Environmental Affairs has not called upon Tendele to apply for a waste management licence as provided for in regulation 7(1) of the 2013 listing notice.[67]

112. Accordingly, Tendele does not require a waste management licence in order to continue its operations at the Somkhele Mine.

113. The interdict which the appellants seek is plainly too broad in relation to the right that it seeks to protect. Even if the appellants' complaints were correct (which is denied), the alleged unauthorised undertaking of waste management activities in terms of the Waste Act could not possibly entitle the appellants to an interdict shutting down the entire mining operation. At best, they would only be entitled to relief in respect of a specified listed activity (assuming that such an activity had been identified in their pleadings, which, as already stated above, the appellants have failed to do).

THE TRADITIONAL GRAVES

114. Tendele accepts that it has previously removed or altered traditional graves without being in possession of the necessary authorisations from Amafa.[68]

115. However, despite the fact that Tendele has previously removed or altered graves without having the necessary authorisations, there is no risk whatsoever that it will

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67 AA Vol 1 p 199 para 118.
68 AA Vol 1 p 200 para 122.

do so again in future. This is clear from the answering affidavit[69] (which allegations were not meaningfully contested in reply).[70]

116. It is accordingly clear on the uncontested facts in the answering affidavit that although Tendele had previously relocated and exhumed graves after having obtained approval in the form of signed agreements from relatives, it did so without the necessary authorisation. It is seeking to rectify its past failures in this regard and going forward has tendered unequivocally and undertaken that it will ensure that future relocations comply with the spirit of the law.

117. It is trite that the remedy of an interdict is designed to prevent present or future infringements of rights.[71] In the absence of any allegation of facts justifying a reasonable apprehension that the harm is likely to be repeated, the interdict is not an appropriate remedy.[72]

118. In this matter there are no facts that would justify any reasonable apprehension that Tendele will again relocate or exhume graves without the appropriate statutory approval.

119. Moreover, the interdict which the appellants seek is plainly too broad in relation to the right that it seeks to protect in relation to the relocation of graves. Even if the appellants' complaints were correct (which is denied), the alleged unauthorised removal of traditional graves could not possibly entitle the appellants to an interdict

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69 AA Vol 1, pp 200 – 206, paras 122 – 125.
70 RA Vol 2 pp 374-376; para 13.
71 National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at para 20.
72 Openshaw para 22.

shutting down the entire mining operation. At best they would only be entitled to relief sufficient to protect the particular graves they allege are being unlawfully damaged or altered.[73]

REMEDY

120. If, notwithstanding our submissions above, this Court finds that the appellants have established the requirements for either an interim or a final interdict, we submit that this is a case in which it would be just and equitable for the Court to suspend the effect of any interdict in order to give Tendele the opportunity to apply for the necessary statutory approvals to continue its mining operations.

121. This Court plainly has the power to grant such an order, because this is constitutional litigation.[74]

121.1. Section 172(1)(b) of the Constitution provides that, when deciding a constitutional matter, a court "*may make any order that is just and equitable*".

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73 AA Vol 1 p 200 para 121.

74 The appellants expressly seek a declaration of invalidity in terms of 172(1)(a) of the Constitution. (Appellants' HOA, para 76).

121.2. The Constitutional Court has held that this power entitles a court to make an order that is just and equitable within the context of the dispute between the parties.[75] This remedial power is "*ample and flexible*".[76]

121.3. In the exercise of this wide remedial power, the Constitutional Court has highlighted the need for courts to be pragmatic in crafting a just and equitable remedies.[77]

121.4. We submit that the "*ample and flexible*" remedial power, which is designed to allow the court to resolve the actual underlying dispute between the parties, plainly extends to suspending the operation of an interdict to afford Tendele time to bring itself into compliance with any applicable statutory obligations.

121.5. Such an order would be just and equitable in the circumstances and would balance the need for legality and certainty with the pragmatic reasons not to close the Somkhele mine while it regularises its position.

122. Even if this were not constitutional litigation, this Court would be entitled to suspend the operation of an interdict.[78]

123. We submit that in this matter, there are even more compelling reasons why the operation of any interdict ought to be suspended. Tendele is the primary employer

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75 Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) at para 96.
76 Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) at para 97.
77 Electoral Commission v Mhlope & Others 2016 (5) SA 1 (CC) at para 132.
78 Laskey And Another v Showzone CC and Others 2007 (2) SA 48 (C) at paras 40 and 45.

in the Somkhele area. Thousands of people depend on Somkhele for their livelihood. The effect of an interdict would be to close the Somkhele Mine, with catastrophic consequences.

123.1. The Somkhele Mine is the primary driver of economic activity in Mtubatuba.[79] It employs over 1000 people with 83% of its employees being resident in the Mpukunyoni area surrounding Somkhele.[80]

123.2. The Somkhele Mine is one of the largest resources of open-pit minable anthracite in South Africa and is the principal supplier of anthracite to ferrochrome producers in South Africa.[81] If the supply of anthracite from Somkhele were to cease, it is likely that local ferrochrome producers would be required to import its reductants in order to continue production which would significantly increase the cost of the production of ferrochrome - a crucial component in the production of stainless steel.[82]

123.3. The Mtubatuba Municipality's Integrated Development Plan recognises that:

123.3.1. Mining is one of the major employment sectors in the municipality, and the majority of people working in the Somkhele Mine are locals.[83]

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79 AA Vol 1 p 172 para 32.
80 AA Vol 1 p 162 para 9.
81 AA Vol 1 p 162 para 8.
82 AA Vol 1 p 171 para 26.
83 AA Vol 1 p 170 para 30.

123.3.2. In 2001 the unemployment rate in Mtubatuba Municipality was 59.7%. By 2011, there was a significant improvement to 39%, which was attributed to the coal mining operation at Somkhele.[84]

123.4. Tendele has made significant investments in the development of the area in which it is mining including training in farming activities, adult basic education and training, the provision of student teachers, the provision of apprenticeships, and bursaries. [85] Between December 2006 and December 2016, Tendele spent R719m on local community employee salaries; R54m on community projects in accordance with approved social and labour plans attaching to the Tendele Mining Rights; and R300m on procuring services from community based Black Economic Empowerment companies.[86]

124. A closure of the mine would result in the loss of all of these benefits to the Mpukunyoni community and would be the death knell of the Mtubatuba economy. We submit that this would not be just and equitable.

PRAYER

125. We submit that the appeal should be dismissed. Alternatively, if the Court finds that the requisites for an interim or final interdict are established, it should suspend

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84 AA Vol 1 p 170 para 31.
85 AA Vol 1 p 171 para 33.
86 AA Vol 1 pp 171-172 para 35.

the effect of any interdict to enable Tendele to comply without halting its existing mining operations.

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8 June 2020

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