

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO A QUO: 11488/17P

SCA CASE NO: 1105/2019

In the matter between:

MPUKUNYONI TRADITIONAL COUNCIL	First Applicant
MPUKUNYONI COMMUNITY MINING FORUM	Second Applicant
ASSOCIATION OF MINE WORKERS AND CONSTRUCTIONS UNION	Third Applicant
NATIONAL UNION OF MINE WORKERS	Fourth Applicant
and	
GLOBAL ENVIRONMENTAL TRUST	First Respondent
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Respondent
SABELO DUMISANI DLADLA	Third Respondent
TENDELE COAL MINING (PTY) LTD	Fourth Respondent
MINISTER OF MINERALS AND ENERGY	Fifth Respondent
MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS	Sixth Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Seventh Respondent
MTUBATUBA MUNICIPALITY	Eighth Respondent
HLABISA MUNICIPALITY	Ninth Respondent
INGONYAMA TRUST	Tenth Respondent
EZEMVELO KZN WILDLIFE	Eleventh Respondent
AMAFA akWAZULU-NATLI HERITAGE	Twelfth Respondent

In re:

GLOBAL ENVIRONMENTAL TRUST	First Appellant
MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	Second Appellant
SABELO DUMISANI DLADLA	Third Appellant
and	
TENDELE COAL MINING (PTY) LTD	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-NATLI HERITAGE	Ninth Respondent

NOTICE OF MOTION: APPLICATION TO BE ADMITTED AS AMICUS CURIAE IN TERMS OF RULE 16(4) OF RULES OF THE COURT

TAKE NOTICE THAT the applicants hereby apply to the Judge President of this

Court for an order in the following terms:

1. The applicants are admitted as amicus curiae in the appeal under the aforementioned case number.

2. To the extent necessary, the applicants' late application is condoned.


TAKE FURTHER NOTICE THAT the accompanying affidavit of Dennis Jaffa Sibuyi is annexed in support of this application.

DATED AT SANDTON ON THIS THE 15th DAY OF JUNE 2020


DMS ATTORNEYS

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TO:
THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN


11:36 17/06/2020

AND TO:
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Ref: J.L. Richie / Bianca Strydom

THE FIRST RESPONDENT

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AMICUS CURIAE'S ATTORNEYS
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17/08/2020

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In re:

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and	
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SUPPORTING AFFIDAVIT OF THE APPLICANTS


I, the undersigned,

DENNIS JAFTA SIBUYI

do hereby make oath and say that:

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1. I am an adult male practising attorney under the name and style, DMS Attorneys situated at Ground Floor, Block A, Unit 3, Upper Grayston Office Park, 150 Linden Road, Sandton, Johannesburg.
2. The facts set out herein are within my own personal knowledge, unless stated otherwise to the contrary, and to the best of my knowledge and belief both true and correct.
3. I am duly authorised to depose to this affidavit on behalf of the applicants. I depose to this affidavit to request the Judge President to admit the applicants as amicus curiae in the appeal.
4. I set out herein below the background facts leading to this application:
 - 4.1. In the court a quo the applicants applied for and were admitted as amici of the court a quo after the appellants and the fourth respondent ("Tendele") gave written consent for the applicants to be admitted. During the hearing of the matter in the court a quo, the court confirmed the admission of the applicants as amici of the court a quo and the submissions of the applicants are briefly referred to in the judgment of the court a quo.
 - 4.2. The appellants applied for leave to appeal the judgment of the court a quo. However, the notice of application for leave to

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appeal was not served on the applicants and as such, the applicants were not aware that an application for leave to appeal has been lodged and subsequently granted.

4.3. In the ordinary cause, the appellants filed a notice of appeal and appeal record in this court. The applicants were not aware that the appeal and appeal record were filed.

4.4. I only learned of the pending appeal in this court on 17 April 2020 while dealing with a review application brought in the High Court, Pretoria by the second and third appellants to review and set aside the mining license of Tendele. The applicants have intervened and are also respondents in the review application pending in the High Court, Pretoria.

4.5. On 17 April 2020 I addressed an e-mail to the appellants' attorneys to enquire about the pending appeal before this court and informed appellants' attorneys that the applicants were not served with the application for leave to appeal and as such, they were not aware of the pending appeal.

4.6. The appellants' attorneys emailed me the appeal record through an e-mail link. As indicated above, I also act for the applicants in the review application pending in the High Court, Pretoria. At the time, I was required to prepare an answering affidavit to the

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founding and supplementary affidavits of the applicant in the review application which run to more than a six hundred pages including annexures.

4.7. It was for the aforementioned commitment that I was only able to serve a formal request in terms of Rule 16 of the Rules of this Court requesting consent from the appellants and Tendele to admit the applicants as amicus curiae in the appeal.

4.8. In anticipation that the appellants and Tendele would give consent for the applicants to be admitted as amicus curiae in the appeal, I prepared heads of argument to ensure that same are ready for filing on the due date for the filing of the respondents' heads of argument in the appeal being 8 June 2020.

4.9. Tendele gave its written consent for the applicants to be admitted as amicus curiae in the appeal on 8 June 2020. In the afternoon of 8 June 2020, the appellants' attorneys indicated that they do not consent to the applicants being admitted as amicus curiae in the appeal and recorded they will abide by the decision of this court.

4.10. To avoid prolixity, I do not annex hereto the e-mail correspondences supporting what I state above between our office and the offices of the appellants' and Tendele's attorneys

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as well as the request in terms of Rule 16. The exchange of the e-mail correspondences and service of Rule 16 request is matter of common cause between the parties.

5. Rule 16(5) of the Rules of this Court requires that an application for admission as amicus curiae should be brought within 1 (one) month from the date of the filing of the record. As indicated above, the record was not initially served on the applicants until when an e-mail link was forwarded to me on 20 May 2020 and the applicants were not aware when the record was filed in this Court.

6. As a matter of procedure, I requested a written consent in terms of Rule 16(2) from the appellants and Tendele. As indicated above, I only received the response from the appellants in the afternoon of 8 June 2020 refusing to give consent.

7. I submit that the applicants have acted swiftly upon receipt of the notification refusing to give consent from the appellants' attorneys in bringing this application.

8. To the extent that this court considers this application to be late, the applicants humbly request this court to grant condonation since the reasons for the delay have been explained above.

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9. In terms of Rule 16(6), an application of this nature should briefly describe the interest of the amicus curiae in the proceedings, identify the position to be adopted by the amicus curiae, and set out the submissions that the amicus curiae intend to advance in the proceedings.

10. The applicants are interested parties in that:

10.1. The first applicant is established in terms of section 3 of Traditional Leadership and Governance Framework Act 41 of 2003. The first applicant is constituted by 30 Izinduna of the 30 Izigodi (communities) where Tendele's mine is situated which represent about 220 000 community members who have vested interests in the mining operations of Tendele's mine. In essence, the first applicant represents the entire community of Mpukunyoni area through the 30 Izinduna standing as the leaders in the respective 30 communities situated around Tendele's mine.

10.2. The second applicant is a structure or an organisation established in the community where the mine is situated at the recommendation of DMR, KZN which structure operates as a liaison between the management of mine and the community regarding the operation of the mine.

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10.3. The second applicant is an inclusive structure representing all members and organisations within the community (including, but not limited to, the royal family through Inkosi, traditional council, tribal authority, Izinduna from the affected mining areas operated by Tendele Mine, local municipality, trade unions (NUM and AMCU), ordinary members of the community who wish to participate in their individual capacity or through group representatives, full time shop stewards, local entrepreneurs, local church groups, local academic institutions, local NGOs and NPOs) on the one hand and mine's management on the other hand.

10.4. The third and fourth applicants are trade unions which represent about 95% percent of the unionised workers employed by mine. There is a third union, Solidarity which represents about 5% percent of the unionised workers employed by mine.

11. It is submitted that the applicants, as the representatives of entire of the community and about 95% of the employees of the mine, have substantial interests in this matter as well as the outcome thereof.

12. With regard to the position to be adopted by the applicants, the applicants wish to appraise the court of the disastrous effect of the order/s sought by the appellants. In this regard, the applicants seek to submit argument to the extent that this court finds in favour of the

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applicant and the court has to decide on the appropriate remedy in terms of section 172(1)(b) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").

13. The applicants as the representatives of the entire community where mine is situated and operated as well as the representatives of about 95% of the employees of the mine are concerned with the disastrous effect of the order being sought by the appellants. As part of the record of appeal¹, the applicants have made substantive submissions of the economic impact of closing the mine and the financial contribution of the mine to the community and employees of the mine.

14. Having regard to the fact that the interdict being sought by the applicants has the net effect of completely closing the mine, the applicants and in terms of section 172(1)(b) will seek to persuade the court to consider alternative remedies including structural remedies or suspension of the interdict.

15. With regard to the submissions that the applicants intended to make, I have already indicated that the applicants have prepared heads of argument in this matter. The heads of argument are fairly short and set out the necessary submissions which the applicants intend to advance before this court.

¹ Part of the submissions made by the applicants in the court a quo have been excluded from the appeal record. The applicants have put together this part of the record which is about 67 pages and same is filed herewith in a separate bundle.

16. In the circumstances, the Honourable Court is requested to have regard to the heads of argument which are filed herewith in a separate bundle in order for the court to have an understanding of the extent of the submissions that the applicants intend to make in the appeal.
17. It is submitted that it would be in the interest of justice for the applicants to be admitted as amicus curiae. The applicants represent the entire community members and about 95% of the employees of the mine.
18. Further, the applicants have already prepared heads of argument and practice note which are filed together with this application in a separate bundle in anticipation that this Court will admit the applicants as amicus curiae.
19. It should be noted that the applicants have been part of this matter as amici of the court *a quo* since the inception of the matter.
20. The appellants' attorneys gave no cogent reason for their refusal to give consent and only stated that they would abide by this Court's decision. Tendele had already given its consent for the applicants to be admitted as amici of this Court. There is no reason why the

applicants or their submissions should be excluded in the appeal,
when the applicants have been part of the matter since its inception.

WHEREFORE the applicants humbly request the court to grant the orders
set out in the notice of motion.


DENNIS JAFRA SIBUYI

I CERTIFY that this Affidavit was signed and sworn to before me at Sandton
on this the 15th day of **JUNE 2020**, by the deponent who acknowledged
that he knew and understood the contents of this Affidavit, had no objection
to taking this oath, considered this oath to be binding on his conscience
and who uttered the following words: "I swear that the contents of this
Affidavit are true, so help me God".



COMMISSIONER OF OATHS

SIMON RORY PENNEFATHER
Ex Officio Commissioner of Oaths
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