

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
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APPLICANTS' FILING NOTICE

FILED HEREWITH:

- 1. HEADS OF ARGUMENT.**
- 2. CHRONOLOGY TABLE.**

3. RULE 10 AND 10A CERTIFICATE.

Dated and signed at Bloemfontein on 17 June 2020.

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APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. Since the applicants have not yet been formally admitted in the appeal as amicus curiae, in these heads of argument the parties are referred to as cited in the appeal and the four applicants herein are referred to as applicants.
2. In this appeal the appellants seek an order declaring the conduct (failure to obtain certain authorisations in terms of the applicable environmental statutory laws and to comply with certain national and provincial legislation relating to land planning and use and relocation of graves) of the First Respondent (“Tendele”) to be unconstitutional.
3. Following a declaration of unconstitutionality of the conduct, the appellants seek an interim interdict in terms of which the mining operations of Tendele are to be completely stopped until Tendele secures the authorisations and/or complies with the relevant legislation relating to land planning and use and relocation of graves.
4. The applicants do not believe that Tendele’s conduct is unlawful as alleged by the appellants. Mainly the applicants are concerned with the net effect and implication of the relief that the appellants seek. The

applicants understand that the implication would be far disastrous to the community, employees and Tendele in that it would not be financially viable for Tendele to resume operations at a later stage irrespective of whether the halting of the mining operation of Tendele is for a short or long period of time.

5. The first applicant (“MTC”), third applicant (“AMCU”) and fourth applicant (“NUM”) respectively represent the entire community and 95% of the employees employed by Tendele. The second applicant (“MCMF”) serves as liaison communication structure between Tendele and the community.
6. The applicants will limit their submissions insofar as the net effect and implication of the relief sought by the appellants are concerned. The applicants submit that it is not in the best interests of the community that if a declaration of unconstitutionality is made, the mine should be closed, which is the net effect of the order being sought by the appellants.

SOCIO-ECONOMIC IMPACT AND IMPLICATION OF THE RELIEF SOUGHT BY THE APPELLANTS

7. The community in which Tendele operates the mine is a deep rural area with a population of about 220 000¹. The unemployment rate is very high

¹ Applicants Submissions in the court a quo, page 14, para 26; page 15, para 31

and Tendele directly and indirectly employs more than 1 500 people as at 2019 of which 80% are from the community and indirectly about another 200 people who contract with Tendele for certain services and who in turn employ other community members.²

8. The community members and the employees of Tendele are currently 20% shareholders of Tendele pursuant to the BEE transaction concluded in 2015. Of the 20% shareholding, the community owns 80% and the 20% is owned by the employees of Tendele.³

9. Tendele is the largest employer in the community and if the mine is closed, the unemployment rate will increase substantially. In 2016 the employment rate in the community was standing at 39%. If Tendele's mining operations were to be stopped, the unemployment rate will increase significantly, if one considers the unemployment rate as at 2016.

10. Tendele has improved the community infrastructure significantly and currently maintains various projects within the community⁴ which would be negatively affected and the economic gains in this regard reversed, if Tendele's mining operations were to be halted, even for a short period of time.

² Applicants Submissions in the court a quo, page 14, para 28; page 19, paras 48-49

³ Applicants Submissions in the court a quo, page 23, paras 56-58

11. Tendele is the largest producer and supplier of high-quality anthracite in South Africa and supplies about 80% of the anthracite required by the ferrochrome industry in South Africa. If the Tendele's operations are stopped, the ferrochrome industry in South Africa cannot source the required volume of anthracite anywhere, except to import same which would be more expensive for the South African ferrochrome industry.⁵
 12. It is estimated that the ferrochrome industry in South Africa employs about 20 000 people who stand to lose their employment if the mine is closed or stopped for a period of time. In addition, Tendele exports anthracite worldwide which helps to generate foreign revenue, which is generally beneficial for the country's economy.⁶
 13. The appellants represent less than 2% of the members of the community who are against the mining operations of Tendele. The majority of the community members want the mining operations to continue. The court should weigh these competing interests of the community members taking into account the socio-economic contributions that Tendele makes in the community in light of the alleged failure of Tendele to comply with the relevant legislation.
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⁴ Applicants Submissions in the court a quo, page 21, para 55; page 23, para 59

⁵ Applicants Submissions in the court a quo, page 29, paras 62.9-62.11

SECTION 172(1)(b) OF THE CONSTITUTION VERSUS THE RELIEF SOUGHT

BY THE APPELLANTS

14. It submitted that having regard to the current continuing contributions of Tendele in the community members, the court should consider granting alternative remedies, including structural interdict or suspension of the interdict, short of closing the mine, as permitted by section 172(1)(b) of the Constitution of the Republic of South Africa, Act 108 of 1996 (“Constitution”).
15. The court’s discretion to ensure that the court grants remedies that are practical and which address the practical reality of the parties is entrenched in our case law. The courts, including this court, have fashioned alternative remedies to address the impact on the socio-economic rights of the parties concerned even in an instance where a declaration of unconstitutionality of a particular conduct has been made. The court is always guided by what is just and equitable in any given set of facts.
16. Notwithstanding that structural interdicts are mainly granted when an organ of the state is involved, it beyond dispute that section 172(1)(b) is
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⁶ Second to Fifth Amicus Curiae Applicants Submissions, page 29, para 62.10

applicable to and between private parties as is the case in the present matter. Section 172(1)(b) is concerned with a violator of a constitutional right, be it an organ of a state or private person, the section finds application.

17. On the issue of the applicability of structural interdicts against private persons, Christopher Mbazira in his book, *'Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice'*, confirmed that structural interdicts are not limited to public institutions, but equally applicable between private persons⁷ for as long as the issue at hand relates to a violation of a constitutional rights.

18. In *Hoffmann v South African Airways* and after declaration of unconstitutionality of the discriminatory conduct of South African Airways, the Constitutional Court ("CC") stated the following with regard to the appropriate relief:

"The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the

⁷ Christopher Mbazira: *Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice*, page 178, Published in 2009 by Pretoria University Law Press. "Contrary to the general perception, although there is no denying that their application in the realm of public law has been more controversial, structural interdicts are not exclusive only to public law but have been applied in private law as well. In the realm of private law, courts have, for a very long period of time, undertaken managerial roles, resulting either from judicial initiatives or from statutory powers. Courts have through receivers managed bankrupt or insolvent companies and supervised the administration of estates, trusts and wills."

objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.’⁸

19. The CC calls for a balancing act of the competing interests of the parties that would be affected by the relief following a declaration of unconstitutionality of a particular conduct under section 172(1)(b) of the Constitution

20. In the case of *City of Cape Town v Rudolph and Others* the court reasoned that the relief following a declaration of unconstitutionality of particular conduct or law should be chosen for its ability to protect the constitutional rights and mainly depend on the factual circumstances of the case. The court stated the following in this regard:

“The relief must be chosen for its ability to protect the constitutional right which is infringed, and fashioned to meet the nature of the infringement. What will be effective, depends on

⁸ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 45

the factual context of the case. If the relief is not effective, the right is not vindicated.”⁹

21. It cannot be said that the constitutional rights of the appellants in this matter would be best protected by closing the mine when benefits of keeping the mine operational far-outweigh the negative impact that would follow if the mine is closed. A structural interdict or suspension thereof would effectively achieve the desired outcome while protecting the interests of the majority of the community members by keeping the mine operational on the one hand and while compelling Tendele to obtain the necessary authorisations within a particular period of time, on the other hand.

22. In Allpay Consolidated Investment Holdings case, the CC called for multi-dimensional enquiry, consideration of factual disputes and competing interests of the parties concerned in fashioning a relief under section 172(1)(b) of the Constitution. In this regard, the CC stated the following:

“The enquiry must therefore be multi-dimensional. Factual disputes, at a practical level, added another aspect to be considered. In these circumstances, a just and equitable remedy will not always lie in a simple choice between ordering correction

⁹ *City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C)* at 87E – G.

*and maintaining the existing position. It may lie somewhere in between, with competing aspects assessed differently...*¹⁰

23. The above approach by the CC was followed in the case of *BW Bright Water Way Props* where the court was guided by the factual circumstances of the particular matter in fashioning a just and equitable relief.¹¹

24. In the *Robertson and Truman-Baker* case, the court was careful not to grant an order that would result in administrative confusion or create chaos in particular where the offending conduct can be corrected within a short space of time.¹² The Stopping the mine for 3 or 6 or 12 or even more months would in no way completely vindicate the appellants' constitutional right that has been allegedly violated by Tendele, if regard is had to the current socio-economic benefits flowing from the mining operations of Tendele.

25. It submitted that if indeed Tendele is required to obtain certain authorisations under the environmental legislation and/or comply with land planning and use legislation as well as the legislation on relocation of graves, these can be achieved within a reasonable space of time,

¹⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC)* at paras 30, 32, 33 and 39.

¹¹ *BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation 2019 (6) SA 443 (ECG)* at paras 52 and 82

¹² *Robertson and Another v City of Cape Town and Another Truman-Baker v City of Cape Town 2004 (5) SA 412 (C)* at para 153

while allowing the continued operation of the mine to ensure continued economic benefits to majority of the members of the community.

26. The courts' discretion to grant structural interdicts and maintain continued supervision was entrenched by the CC in Sibiya's case.¹³ This appeal came before the appeal court from the lower court namely, High Court, Pietermaritzburg and the appeal court can delegate such supervisory function on any structural remedy that the appeal court may grant to the lower court.

27. It is submitted that this appeal presents an appropriate scenario where the court should suspend the interdict or consider a structural interdict, since all the relevant parties including the relevant ministers in charge of the various applicable statutory regimes are before this court.

28. There is nothing in the conduct of Tendele that can be said that Tendle deliberately violated the constitutional rights of the community members. Tendele's position is simply that in terms of the applicable environmental laws, it believes that its EMPs are sufficient for the purposes of compliance with the legislation in question.

CONCLUSION

¹³ *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC) at 62

29. Section 172(1)(b) of the Constitution gives the court a wide discretion to fashion remedies that are progressive to ensure that the socio-economic rights and interests of the parties concerned are protected and enhanced, irrespective of the declaration of the constitutional invalidity of the offending conduct.
30. It is submitted that in an instance where the court finds that the conduct of Tendele is unconstitutional and declared same as such, the relief being sought by the appellant is inappropriate in the circumstances of this matter since the impact of halting the operations of the mine would be far more disastrous to the community.
31. It has been proven that closing a mine for substantial period of time may very well mean the end of the mine since the expense to re-commerce operations may be very prohibitive. There is no substantial benefit that would accrue to the appellants' members if the mine is closed for six months, for example, to allow the First Respondent to obtain the authorisations.
32. Therefore, it would be appropriate and in the best interests of all concerned for the court to grant an alternative remedy. Structural interdict may be appropriate in this matter which can be fashioned either by agreement between the parties which would allow the appellants to have an input during the interim period while Tendele is operating on the

one hand and making the necessary application to obtain the required authorisations on the other hand.

33. No case has been made out by the appellants that the impugned conduct of Tendele is so harmful and disastrous to the community to the extent that continuation of the mine for 6 months or so would be completely unacceptable or the court would be failing in its duty unless it orders a mandatory prohibitory interdict against Tendele until Tendele obtains the authorisations.

34. Therefore, it would be just and equitable for the court to engage in a balancing act of the competing socio-economic rights and interests of all parties concerned and fashion an alternative remedy that would best address the concern of the parties, short of closing the mine.

Dennis Sibuyi

Applicants

8 June 2020

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APPLICANTS' CHRONOLOGY

The Applicants only refers to the submissions they made before the court a quo which have been excluded in the appeal record and filed together with the Applicants' application to be admitted as amici of the court.

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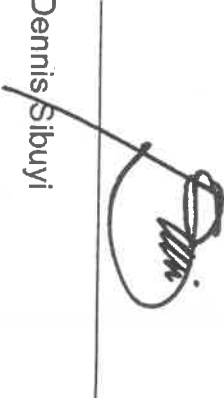
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APPLICANTS' COMPLIANCE CERTIFICATE

We hereby certify that Rules 10 and 10A of the Rules of this Court have been complied with.


Dennis Sibuyi
Applicants

8 June 2020