

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO A QUO: 11488/17P

SCA CASE NO: 1105/2019

MPUKUNYONI TRADITIONAL COUNCIL (MTC)
MPUKUNYONI COMMUNITY MINING FORUM (MCMF)
ASSOCIATION OF MINE WORKERS AND CONSTRUCTIONS UNION (AMCU)
NATIONAL UNION OF MINE WORKERS (NUM)

Amicus Curiae

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) 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 |

AMICUS CURIAE'S FILING NOTICE

FILED HEREWITH:

1. PRACTICE NOTE.
2. LIST OF AUTHORITIES.

DATED AT BLOEMFONTEIN ON THIS 17TH DAY OF AUGUST 2020.



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AND TO:

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AMICUS CURIAE'S PRACTICE NOTE

1. NAME AND NUMBER ON THE MATTER

Global Environmental Trust and Two Others v Tendele Coal Mining (Pty) Ltd and Eight Others.

SCA Case No: 1105/2019

KZP Case No: 11488/17P

2. NATURE OF THE APPEAL

2.1. The appeal is against the whole judgment and order by His Lordship Mr Justice Seegobin in the KwaZulu-Natal Provincial Division, Pietermaritzburg on 20 November 2018 under Case No: 11488/17P.

2.2. The appeal concerns interpretation and application of various environmental statutory regime enacted to give effect to the section 24 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“Constitution”) as well as the applicability of and compliance with KwaZulu Natal. Planning and Development Act 6 of 2008, Spatial Planning and Land Use Management Act 16 of 2014, Mtubatuba Spatial Planning and Land Use Management By-Law, January 2017 and KwaZulu Natal Heritage Act 4 of 2008.

3. CONSTITUTIONAL ISSUES

The appellants seek an order in terms of section 172(1)(a) and (b) of the Constitution declaring the First Respondent’s conduct to be

unconstitutional.

4. **JURISDICTION**

Leave to appeal was applied for and granted to the appellants on 17 September 2019 by the court a quo. The appellants and as required filed the notice of appeal and appeal record.

5. **ISSUES ON APPEAL**

5.1. Having regard to the present particular factual circumstances and the socio-economic rights of the entire community members where the First Respondent operates, the court and in terms of section 172(1)(b) is not obliged to grant the order sought by the appellants to stop the mining operations of the First Respondent, even if the conduct of the First Respondent (“Tendele”) is declared unconstitutional in terms of section 172(1)(a) of the Constitution.

5.2. The court, and in terms of section 172 (1)(b) is required to weigh the particular factual circumstances following a declaration of unconstitutionality and give an order that is just and equitable which may include structural interdict and/or other alternative remedies including suspension of the interdict to ensure that socio-economic rights and interests of the parties concerned are protected.

6. **ESTIMATED DURATION OF THE ARGUMENT**

The proceedings are not expected to exceed 1 (one) day.

7. **PORTIONS OF RECORD IN LANGUAGE OTHER ENGLISH**

None.

8. **NECESSARY PARTS OF THE RECORD FOR THE PURPOSES OF THE AMICUS CURIAE'S ARGUMENT**

- 8.1. It is noted that except for pages 309 to 335 in Volume 2 of the Record which is the request for admission as amici and consents thereto, the Applicants' written submissions before the court a quo have been omitted from the appeal Record.

- 8.2. The written submissions made by the amicus curiae before the court a quo are filed herewith in a separate bundle.

9. **SUMMARY OF THE ARGUMENT**

- 9.1. The need for the court to consider socio-economic impact of the Tendele's mining operations in the community.

- 9.2. The court should weigh and balance the effect and impact on the community of the prohibitory interdict being sought by the appellants which equates to closing Tendele's mine, whether for a short or long

period of time.

- 9.3. The impact of the stoppage of the mine operations of the First Respondent should be weighed against the socio-economic rights and interests of the affected community members in light of the availability of less evasive alternative remedies which the court is entitled to consider and grant in terms of section 172(1)(b) of the Constitution, in the event of the court finding that the conduct of Tendele is unconstitutional;
- 9.4. The amicus curiae seek to persuade the court to consider alternative remedies, short of closing Tendele's mine, including structural interdict or suspension of the interdict to ensure that Tendele complies within a particular period of time to the extent that all what is required is for Tendele to apply for the various authorisations as contended for by the appellants;
- 9.5. The financial impact of closing the mine for few months or so to allow Tendele to apply for and be granted the necessary authorisations far outweighs the benefits that will accrue to the community if Tendele is allowed to continue to operate under strict conditions that it applies for and secure the authorisations with a specified period of time;
- 9.6. It has been proven in the mining industry that closing a mine, even if it is

for a short duration of time, has serious negative impact and costly to resume the operations at a later stage, hence it would make more sense and justifiable so for the court to consider alternative remedies including structural interdict or suspension of the interdict, short of closing the mine.

10. **CORE BUNDLE**

None

Dennis Sibuyi

Amicus Curiae
MTC, MCMF, AMCU & NUM

14 August 2020

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LIST OF AUTHORITIES

CASES

1. Hoffmann v South African Airways 2001 (1) SA 1 (CC)
2. City of Cape Town v Ruddolph and Others 2004 (5) SA 39 (C)
3. Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC)
4. BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation 2019 (6) SA 443 (ECG)
5. Robertson and Another v City of Cape Town and Another Truman-Baker v City of Cape Town 2004 (5) Sa 412 (C)
6. Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others 2005 (5) SA 315 (CC)

STATUTES

Constitution of the Republic of South Africa, Act 108 of 1996

LITERATURE

Christopher Mbazira: Litigation Socio-Economic Rights in South Africa: A choice between corrective and distributive justice. Published in 2009 by Pretoria

University Law Press

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AMICUS CURIAE'S FILING NOTICE

FILED HEREWITH:

1. AMICUS CURIAE'S HEADS OF ARGUMENT
2. CHRONOLOGY TABLE
3. RULE 10 AND 10A CERTIFICATE

DATED AT BLOEMFONTEIN ON THIS 17TH DAY OF AUGUST 2020.



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AMICUS CURIAE'S (MTC, MCMF, AMCU AND NUM) HEADS OF ARGUMENT

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INTRODUCTION

1. In these heads of argument, the parties are referred to as cited in the appeal and the four amici of the court are referred to as amicus curiae.
2. Where reference is made to any one or more of the four amici, an acronym is used, namely, 'MTC' for Mpukunyoni Traditional Council, 'MCMF' for Mpukunyoni Community Mining Forum, 'AMCU' for Association of Mine Workers and Constructions Union and 'NUM' for National Union of Mine Workers.
3. 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 ("T endele") to be unconstitutional.

4. Following a declaration of unconstitutionality of Tendele's conduct, the appellants seek an interim interdict in terms of which the mining operations of Tendele are to be completely halted until Tendele secures the authorisations and/or complies with the relevant legislation relating to land planning and use and relocation of graves.
5. The amicus curiae do not believe that Tendele's conduct is unlawful as alleged by the appellants. Mainly the amicus curiae are concerned with the net effect and implication of the relief sought by the appellants. The amicus curiae understand that the implication would be far disastrous to the community, employees of Tendele and Tendele itself in that it would not be financially viable for Tendele to resume operations at a later stage irrespective of whether the mining operations of Tendele are halted for a short or long period of time.
6. MTC, AMCU and NUM respectively represent the entire community and 95% of the employees of Tendele. MCMF serves as liaison communication structure between Tendele and the community insofar as the mining operations of Tendele vis-à-vis the community are concerned.
7. The amicus curiae will limit their submissions insofar as the net effect and implication of the relief sought by the appellants are concerned. The amicus curiae 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**

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

9. 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

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

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

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

increase significantly, if one considers the unemployment rate as at 2016.

11. 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.

12. 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

13. 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

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

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

generally beneficial for the country's economy.⁶

14. 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 (who are members of the amicus curiae herein) 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.

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

15. It submitted that having regard to the current continuing contributions of Tendele in the community, the court should consider granting alternative remedy, 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").
16. The court's discretion to ensure that the court grants remedies that are practical and which address the practical reality of the affected parties is entrenched in our case law. The courts, including this court, have

⁶ Second to Fifth Amicus Curiae Applicants Submissions, page 29, para 62.10

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.

17. Notwithstanding that structural interdicts are mainly granted when an organ of the state is involved, it beyond dispute that section 172(1)(b) is 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.

18. On the issue of the applicability of structural interdicts against private persons, the author, Christopher Mbazira, 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 right.

19. In Hoffmann's case and after declaration of unconstitutional of 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."

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 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

20. 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

21. In the *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:

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

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

22. It cannot be said that the constitutional rights of the appellants in this matter would be best protected by closing the mine when the benefits of keeping the mine operational far-outweigh the negative impact that would follow if the mine is closed. A structural interdict or suspension of the interdict 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.

23. In Allpay Consolidated Investment Holdings, 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

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

*will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between, with competing aspects assessed differently...*¹⁰

24. 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

25. In *Robertson and Truman-Baker*, 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 Closing the mining operations of *Tendele* 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*.

26. 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

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

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

28. 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 departments and ministers in charge of the various applicable statutory regimes are before this court.

29. There is nothing in the conduct of Tendele that can be said that Tendele 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

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

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

compliance with the legislation in question.

CONCLUSION

30. Section 172(1)(b) of the Constitution gives the court 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.

31. 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 mining operations of Tendele would be far more disastrous to the community.

32. It has been proven that closing a mine which has been in operation for more than 10 years 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 simply to allow Tendele to obtain the authorisations.

33. Therefore, it would be appropriate and in the best interests of all parties 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.

34. 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 operations for 6 months or so (while allowing Tendele to secure the authorisations) would be completely unacceptable or the court would be failing in its duty unless it orders a prohibitory interdict against Tendele (effectively closing the mine) until Tendele obtains the authorisations.

35. 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 all the affected parties, short of closing the mine.

Dennis Sibuyi

Amicus Curiae
(MTC, MCMF, AMCU & NUM)

14 August 2020

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO A QUO: 11488/17P

SCA CASE NO: 1105/2019

MPUKUNYONI TRADITIONAL COUNCIL (MTC)
MPUKUNYONI COMMUNITY MINING FORUM (MCMF)
ASSOCIATION OF MINE WORKERS AND CONSTRUCTIONS UNION (AMCU)
NATIONAL UNION OF MINE WORKERS (NUM)

Amicus Curiae

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) 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 |

AMICUS CURIAE'S CHRONOLOGY

The amicus curiae only refer to the submissions they made before the court a quo which have been excluded in the appeal record and filed together with the amicus curiae's heads of argument.

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AMICUS CURIAE'S COMPLIANCE CERTIFICATE

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

complied with.

A handwritten signature in black ink, appearing to read 'Dennis Sibuyi', written over a horizontal line.

Dennis Sibuyi

Applicants

14 August 2020