REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11488/17P

In the matter between:

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

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-NATALI HERITAGE COUNCIL	Ninth Respondent

ORDER

The application is dismissed with costs, such costs are to be paid by the applicants jointly and severally and are to include the costs of two (2) Counsel.

JUDGMENT

Seegobin J

Introduction

[1] This is an application for an interdict. The matter was fully argued before me on 24 August 2018. In the course of preparing this judgment, judgment in the matter of *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another*[1] was handed down by the Constitutional court on 25 October 2018. That case dealt primarily with two competing rights in the context of evictions: the first was the right of the applicants to occupy and enjoy the farm which they and their predecessors-in-title had occupied for nearly a century; and the second was the right of the respondents (the respective mining companies) to mine on the farm occupied by the applicants. The case thus concerned a dispute between occupiers of land on the one hand and entities that were granted mining rights to mine platinum group metals under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) on the self-same land on the other.

[2] In light of the findings made in *Maledu* counsel in the present matter were duly afforded an opportunity to make further written submissions, if they so wished, on whether such findings have a material bearing on the issues that call for determination in the present matter. Taking up this offer counsel for the applicants

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[1] [2018] ZACC 41.

Mr *Dickson* SC (assisted by Ms *Mazibuko*) delivered further written submissions on 30 October 2018 and by agreement counsel for the respondents, Mr *Lazarus* SC (assisted by Mr *Ferreira*) did likewise on 2 November 2018. I am indebted to counsel in this regard. I will deal with these further submissions and the findings in *Maledu* later in this judgment.

Present matter

[3] This case concerns the Somkhele Mine (Somkhele) which carries on mining operations adjacent to the Hluhluwe-Imfolozi Park in northern KwaZulu-Natal. Somkhele is one of the largest resources of open-pit mineable anthracite in the country and is the principal supplier of anthracite to the ferrochrome industry in the Republic. The ferrochrome industry on its own provides employment for about 20 000 people in this country.

The parties

[4] This application is brought by 3 applicants: the first is Global Environmental Trust, a registered trust which has the general object of pursuing and supporting environmental causes and has the power to bring legal proceedings to advance its objects; the second is the Mfolozi Community Environmental Justice Organisation whose main object is to protect the rights of the members of the association who are members of the communities affected by open-cast mining in the area where they reside. The second applicant boasts a membership of 530 residents. The third is Sabelo Dumisani Dladla, an adult male student who resides in an area known as Nkolokotho which is near the site of the mining being conducted by the first respondent at Somkhele. Mr Dladla is the main deponent to the applicants' founding papers.

[5] The application is brought in terms of s 24 of the Constitution of 1996[2] and also in terms of one or more of the provisions of s 38 of the Constitution,[3] either in the public interest or as an affected party.

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[2] Constitution of the Republic of South Africa 1996, s 24 of which reads as follows:
Environment – Everyone has the right-
(a) to an environment that is not harmful to their health or well-being; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

[6] Nine respondents have been cited: the first and perhaps the most important being Tendele Coal Mining (Pty) Ltd which will be referred to simply as 'Tendele'. It is Tendele that conducts mining operations in the area of Somkhele. Tendele opposes the granting of any relief against it as set out further on in the judgment. (see para 12 *infra*)

[7] The eight other respondents (in the order in which they have been cited) are the Minister of Minerals and Energy (second respondent), the MEC: Department of Economic Development, Tourism and Environmental Affairs (third respondent), the Minister of Environmental Affairs (fourth respondent), the Mtubatuba Municipality (fifth respondent), the Hlabisa Municipality (sixth respondent), the Ingonyama Trust (seventh respondent), Ezemvelo KZN Wildlife (eighth respondent) and lastly Amafa aKwaZulu-Natali Heritage Council (ninth respondent). Apart from the second respondent indicating that he will abide the decision of this court, none of the other respondents have shown any interest in the matter.

Amici curiae

[8] In the course of these proceedings four other parties applied jointly for consent to be admitted as *amici curiae* in terms of rule 16A(2) of the Uniform Rules. Neither the applicants nor Tendele raised any real objections to the application and the *amici* were duly admitted. They comprise the following: The Mpukunyoni Traditional Council and Mpukunyoni Traditional Authority (MTC), the 30 Izinduna of the 30 Isigdodi in the Mpukunyoni Area (Mpukunyoni Izinduna), Mpukunyoni Community Mining Forum (MCMF), the Association of Mineworkers and

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(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[3] Section 38 reads as follows:

Enforcement of rights – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

Construction Union (AMCU) and the National Union of Mine Workers. At the opposed hearing on 24 August 2018 the *amici* were represented by *Mr D Sibiyi*.

[9] The positions occupied by the respective *amici* in relation to the applicants on the one side and Tendele on the other are as follows: the MTC has a substantial interest in the mining activities of Tendele since Tendele is one of the biggest employers of community members of the Mpukunyoni area. The Mpukunyoni Izinduna are by extension the arm of the MTC and stand in an immediate contact position with the Mpukunyoni community members who are employees and/or potential employees of Tendele. The MCMF operates as a liaison between the Tendele management and the Mpukunyoni community at large regarding the operations of Tendele. AMCU and the National Union of Mine Workers represent the employees of Tendele, whose interests would be adversely affected if the mine was closed.

[10] In the main the case made out by the *amici* was that the closure of the mine would have a deleterious effect not only on the people who work there but also on the community at large. They contended that even if the mine were to shut down for a short period the negative consequences of the damage and loss of infrastructure may be difficult to reverse. The Mpukunyoni community in particular would stand to lose the current good state and condition of the infrastructure provided by Tendele which would be dilapidated and costly to rehabilitate should the mine close.

[11] The position adopted by the *amici* is in many ways very similar to that of Tendele as far as the interests of its employees and the broader interests of the community are concerned. They highlighted the beneficial effects that mining has had in the area as it is one of the main sources of income for many households within the Mpukunyoni community. The majority of households in the area are entirely dependent on the continued existence of the mining operations for their livelihood.

Relief sought

[12] The applicants seek an interdict to shut the mine down completely. They argue that the mine is operating illegally and in contravention of various pieces of

legislation. The full extent of the relief claimed in the amended notice of motion is the following:

"1. THAT First Respondent be and is hereby interdicted and restrained from carrying on any mining operations at the following sites: -

1.1 Area 1 on Reserve No. 3 (Somkhele) No 15822 measuring 660.5321 hectares as described in the Mining Right dated 22nd June 2007;
and/or

1.2 Areas 2 and 3 on Reserve No. 3 (Somkhele) No. 15822 measuring 779.8719 hectares as described in the Mining Right date 30th March 2011;
and/or

1.3 Areas of KwaQubuka and Luhlanga areas on Reserve No. 3 No. 15822 measuring 706.0166 hectares as described in the Amendment of a Mining Right dated 8th March 2013;
and/or

1.4 One part of the Remainder of Reserve No. 3 No. 15822 in extent 21233.0525 hectares described in the Mining Right dated 26th October 2016;

Until further order of this Honourable Court.

2. THAT First Respondent pay the costs of this application together jointly and severally, with any other Respondent who opposes this application.

3. THAT Applicants be granted further and/or alternative relief."
(my emphasis)

Nature of the relief claimed

[13] There was some disagreement on the papers between the applicants and Tendele as to whether the interdict they seek is final or interim. It seems that the relief originally sought in the notice of motion was for a final interdict that would have restrained Tendele from conducting any mining operations at Somkhele. In the replying affidavit the applicants denied that the relief they seek is final. They foreshadowed an amendment to the notice of motion that will clarify the position. They averred that they "do not seek a final interdict to prevent Tendele from mining

at Somkhele but an interdict to prevent the mining from taking place illegally or contrary to the requirements of the law."

[14] In paragraph 2 of their heads of argument and in oral submissions counsel for the applicants again characterised the relief as being interim in nature. They submitted that "the interdict being sought by applicants is semi-temporary in that it is sought until further order of this Honourable Court" (this is in line with the wording now appearing in the amended notice of motion). In paragraph 5.2 of their heads of argument they say that they seek

> "an interdict to prevent Tendele from conducting itself illegally pending compliance and a return to the High Court. In other words an interdict until Tendele satisfies the court that it is compliant. This is temporary in nature and effect. These are referred to as 'structural interdicts'."

[15] At the outset I make the following preliminary observations concerning the manner in which the relief has been framed. Having regard to counsels' submissions as set out above, it seems to me that the applicants are not entirely sure as to precisely what relief they seek. I say this for the following reasons:

15.1 By definition an interim interdict is

> "a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."[4]

15.2 The legal requirements for an interim interdict are well-established.[5] The following statement of the requirements by Corbett J (as he then was)[6] is representative of what has become the almost standard formulation of the requirements:[7]

> "Briefly [stated] these requisites are that the applicant for such temporary relief must show –

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[4] *National Gambling Board v Premier, KwaZulu-Natal and others* 2002 (2) SA 715 (CC) para 49, quoting LTC Harms in Joubert (ed) *The Law of South Africa* 1st re-issue vol 11 para 314.
[5] *Setlogelo v Setlogelo* 1914 AD 221.
[6] In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municiaplity v L F Boshoff Investments (Pty) LTd* 1969 (2) SA 256 (C) at 267A-F.
[7] Prest *The Law and Practice of Interdicts* at 50 – 51.

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the applicant has no other satisfactory remedy."

15.3 In *Maledu, supra*, the Constitutional Court, with reference to the applicable legal framework relevant to the issues in that matter found it necessary to investigate whether the MPRDA provided for an alternative avenue of relief that should have been first exhausted before the respondents were entitled to approach the court for relief in the form of an eviction and an interdict. In this regard the Constitutional Court said the following:

> "[8] …. In the main, this will entail investigating whether the MPRDA creates an alternative avenue for relief that must be exhausted before the respondents could approach a court for eviction and an interdict as they did. This is in line with the well-entrenched rule of our law that an application for an interdict cannot succeed if the requirements set out in *Setlogelo* are not met. The requirements include, among others, "the absence of any other satisfactory remedy" (footnotes omitted, my emphasis).

15.4 A structural interdict on the other hand is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order. It thus involves the continued participation of the court in the implementation of its orders. The circumstances in which a court will consider making such an order and the pre-requisites for such an order are aptly summarised by Lowe J in *Kenton-On-Sea Ratepayers v Ndlambe Municipality*[8] as follows:

[8] 2017 SA 86 (ECG) paras 97 – 101.

"[97] The Constitutional Court has shown itself willing to grant structural interdicts in appropriate circumstances. In *Hoërskool Ermelo and Another v Head, Department of Education, Mpumalanga, and Others* 2009 (3) SA 422 (SCA), the court stated that a remedy in the form of a structural interdict or supervisory order may be very useful. This is because, the court stated further, it advances constitutional justice by ensuring that the parties themselves become part of the solution.

[98] A structural interdict consists of five elements. First, the court declares the respects in which the violator's conduct falls short of its constitutional obligations; second, the court orders the violator to comply with its constitutional obligations; third, the court orders the violator to produce a report within a specified period of time setting out the steps it has taken; fourth, the applicant is afforded an opportunity to respond to the report; and finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court. (See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837; [2000] ZACC 8) paras 67 – 70; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033; [2002] ZACC 15) paras 101 – 114 and 124 – 133; *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) para 50; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32) para 97.)

[99] And in 10(1) *Lawsa* the following appears: A court —

> '(m)ay grant appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been breached. This relief is typically invoked when government policy is inconsistent with the Constitution. Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties. The purpose of a structural interdict is to compel an organ of state to perform its constitutional duties and to report from time to time on its progress in so doing. This order involves requiring an organ of state to revise an existing policy and to submit the revised policy to the court to enable the court to satisfy itself that the policy is consistent with the Constitution.'

[100] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851; [1997] ZACC 6) para 100, Kriegler J stated:

> 'There is no reason, at the outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its future infringement, it may be appropriate relief . . . .'

[101] The Constitutional Court (para 19, Ackermann J) held that:

> 'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'"

15.5 Structural interdicts are ordinarily only appropriate in cases where it is necessary to secure compliance with a court order. The Constitutional Court[9] has held that (footnotes omitted):

> "The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council* this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."

15.6 In the *Treatment Action Campaign* matter, *supra*, the Constitutional Court, after conducting an examination of the jurisprudence in foreign jurisdictions on the question of remedies found "that courts in other countries also accept that it may be appropriate, depending on the circumstances of the

[9] *Minister of Health and others v Treatment Action Campaign and others (No. 2)* 2002 (5) SA 721 (CC) para 129.

particular case, to issue injunctive relief against the State …" (para 107). In paragraph 112 of the judgment the court went on to say the following:

> "[112] What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the State's obligations are not performed diligently and without delay."

15.7 Following from the above the SCA[10] has characterised the relief as "*an order where the court exercises some form of supervisory jurisdiction over the relevant organ of state.*"

15.8 From the authorities it thus appears that structural interdicts are virtually always sought and/or granted against organs of state.

[16] In light of the principles set out above it is left to be seen whether the applicants have made out a proper case for the relief sought or for some other relief that would be appropriate in the circumstances.

Applicants' complaints

[17] The applicants complain that Tendele's current mining operations are unlawful because Tendele (a) has no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998 (NEMA); (b) has no land use authority, approval or permission from any municipality having jurisdiction; (c) has no waste management licence issued by the Minister of Environmental Affairs in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 (Waste Act) and (d) has no written approval in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (the KZN Heritage Act) to damage, alter, exhume or remove any traditional graves from their original position.

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[10] *Modderfontein Squatters, Greater Benoni City Council v Modderklop Boerdery (Pty) Ltd (Agri SA and Legal Resources Center, Amici Curiae); President of the Republic of South Africa and others v Modderklop Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at para 39.

Issues that require determination

[18] The following broad issues arise:

18.1 Whether Tendele was required to obtain environmental authorisation as contemplated in section 24 of NEMA prior to commencing with operations and if so, whether statute permits the continuation of mining operations pending compliance with legislation.

18.2 Whether an Environmental Management Programme (EMP) obtained under the MPRDA prior to the legislative amendments in December 2014 which gave rise to the One Environmental System entitles Tendele to continue its pre-existing mining operations.

18.3 Whether the provisions of the KwaZulu-Natal Planning and Development Act 6 of 2008 (KwaZulu-Natal PDA)), the Special Planning and Land Use Management Act 16 of 2013 (SPLUMA) and the provisions of the Mtubatuba SPLUMA Bylaws of January 2017 are applicable to Tendele, and if so:

18.3.1 Whether Tendele submitted a land use application to the fifth and/or sixth respondent and whether it received the requisite authority to use and develop the property as contemplated in the KwaZulu-Natal PDA;

18.3.2 Whether Tendele has complied with the provisions of SPLUMA, particularly s 26 read with Schedule 2;

18.3.3 Whether Tendele has complied with the provisions of the SP LUMA Bylaws of the fifth respondent;

18.3.4 Whether the provisions of the KZN Heritage Act are applicable to Tendele and if so, whether Tendele has complied therewith, especially s 35 thereof.

18.3.5 Whether Tendele requires a waste management licence for any of its mining activities as required by the National Environment Management: Waste Act 59 of 2008 and more specifically sections 19 and 20 read with Schedule 3 thereof.

18.3.6 Whether the interdict sought is interim or final.

18.3.7 Whether, if the court finds that the applicants have established the requirements of either an interim or final interdict, it would be just and equitable for the court to suspend the operation of any interdict in order to allow Tendele the opportunity to apply for the necessary statutory approvals to continue its mining operations.

Legislative content

[19] The legislative instruments relevant to this application are:

- the National Environmental Management Act 107 of 1998,
- the Mineral and Petroleum Resources Development Act 28 of 2002,
- National Environmental Management Laws Amendment Act 25 of 2014,
- National Environment Management Act Regulations, GN R10328, *GG* 38282, 4 December 2014,
- KwaZulu-Natal Planning and Development Act 6 of 2008,
- Spatial Planning and Land Use Management Act 16 of 2013,
- Mtubatuba SPLUMA Bylaws of January 2017, *Provincial Gazette* 1797, 9 March 2017,
- National Environmental Management: Waste Act 59 of 2008, and
- The KwaZulu-Natal Heritage Act 4 of 2008.

Summary of applicants' case

[20] The applicants contend that:

20.1 the environmental authorisations were a requirement necessitating compliance and that the subsequent amendments to NEMA and the MPRDA do not alter the pre-existing obligations for Tendele to obtain an environmental authorisation.

20.2 the provisions of the KwaZulu-Natal PDA and SPLUMA and the fifth respondent's municipal bylaws are applicable to Tendele and more importantly prior to embarking on the mining activity Tendele was required to obtain the requisite land use authorisation from the fifth alternatively sixth respondent and has not done so.

20.3 the removal and/or altering of traditional graves could only have been embarked upon in terms of section 35 of the KwaZulu-Natal Heritage Act, however Tendele has not done so.

20.4 Tendele has failed to comply with the provisions of the Waste Act which are applicable to the activities conducted by Tendele at the Somkhele mine.

Summary of Tendele's case

[21] Tendele's case is that:

21.1 it does not require environmental authorisations in terms of s 24 of NEMA because its operations are undertaken pursuant to valid mining rights and EMP's granted and approved by the Department of Mineral Resources (DMR) prior to the legislative amendments in December 2014 which gave rise to the One Environmental System.

21.2 its mining operations pre-date the introduction of mining as a land use requiring municipal approval and the introduction of the relevant legislation provides for the continuation of lawful, historical mining operations such as those undertaken by it and that, in any event, it has obtained municipal approval for its mining operations.

21.3 while it accepts that it has previously removed or altered traditional graves without being in possession of the necessary authorisation, there is no risk that it will in future conduct any such removal or alteration without approval and accordingly there is no basis for any interdict.

21.4 it does not require a waste management licence in terms of the Waste Act because the transitional provisions of the Waste Act provide for the continuation of waste management activities provided they were being lawfully undertaken prior to the commencement of the provisions in the Waste Act applying to residue stockpiles and residue deposits.

21.5 if the court finds that the applicants have established the requirements for either an interim or a final interdict, the court should suspend the operation of any interdict it may be inclined to grant in order to give Tendele the opportunity to apply for the necessary statutory approvals without ceasing its mining operations, as it is the primary employer in the Somkhele area and the only livelihood of thousands of people.

Mining rights and approved EMP's held by Tendele

[22] No dispute arises on the papers concerning the mining rights being held by Tendele at Somkhele. In its answering affidavit deposed to by its CEO Mr Du Preez, Tendele points out that although the Somkhele mine comprises a single mining area, the mining operations are divided between five areas and separate mining rights apply to the different areas. All five areas fall within Reserve 3 in the magisterial district of Mtubatuba in KwaZulu-Natal. The mineral in respect of which all mining rights are held is coal.

[23] The mining right applicable to each area is as follows:

23.1 Area 1 mining right

On 21 May 2007, Tendele was granted a mining right in terms of section 23 of the MPRDA, bearing the Department of Mineral Resources' ("**DMR**") reference number KZN30/5/1/2/2/135MR ("**Area 1 mining right**")[11]

23.2 Area 2 and 3 converted mining right

On 1 February 2011, Tendele was granted a mining right in terms of Item 7 of Schedule 2 to the MPRDA bearing DMR reference number: KZN30/5/1/2/2/216MR ("**Areas 2 and 3 converted mining right**")[12]

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[11] Annexure TCM5 to the answering affidavit at 250.

23.3 Prior to the grant of the Areas 2 and 3 converted mining right, Tendele held a mining licence issued on 9 April 2003 in terms of section 9 of the (now repealed) Minerals Act 50 of 1991 ("Minerals Act") in respect of the two areas (bearing reference number KZN ML 354/2003). In accordance with the provisions of Item 7 of Schedule 2 of the MPRDA, Tendele applied for the conversion of its mining licence to a mining right following the commencement of the MPRDA on 1 May 2004.

23.4 On 8 March 2013 Areas 2 and 3's converted mining right was amended through an application in terms of section 102 of the MPRDA to include the KwaQubuka and Luhlanga areas (also known as Areas 8 and 9) into the ambit of Areas 2 and 3 converted mining right.[13]

23.5 On 31 May 2016, Tendele was granted a mining right in terms of section 23 of the MPRDA bearing DMR reference number: KZN3/5/1/2/2/10041MR ("**Areas 4 and 5 mining right**").[14]

23.6 Prior to the grant of Areas 4 and 5 mining right, Tendele was the holder of a converted prospecting right bearing DMR reference number: KZN3/5/1/2/2/86PR, having been granted such right on 4 April 2006. Prior thereto and on 18 September 2003, Tendele was granted a prospecting permit in accordance with the provisions of the Minerals Act in respect of Area 4 which, at the time, included the KwaQubuka and Luhlanga areas. Tendele commenced drilling activities in and on the KwaQubuka and Luhlanga areas in July 2777 in accordance with an old order prospecting right (as defined in Item 1 of Schedule 2 of the MPRDA, prior to the registration of the converted prospecting right in the Mining and Petroleum Titles Registration Office on 29 August 2007. In addition to the prospecting permit, Tendele took cession from AfriOre of a notarially executed mineral lease and prospecting contract with the Ingonyama Trust (the seventh respondent) on 14 May 2001.

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[12] Annexure TCM6 to the answering affidavit at 263.
[13] Annexure TCM7 to the answering affidavit at 275.
[14] Annexure TCM8 to the answering affidavit at 280.

23.7 An environmental management programme ("EMP"), as contemplated in the now repealed section 39 of the MPRDA, was approved by the DMR in respect of each of Tendele's mining rights as follows:

23.7.1 The EMP applicable to the Area 1 mining right was approved by the Regional Manager of the DMR: KwaZulu-Natal Province ("Regional Manager") on 22 June 2007.

23.7.2 The EMP attaching to the Areas 2 and 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 (Areas 8 and 9) were approved on 29 May 2012 in terms of section 102 of the MPRDA as mentioned above.

23.7.3 The EMP attaching to the Areas 4 and 5 mining right was approved by the Regional Manager on 31 May 2016.

Relevant background

Tendele's current mining operations

[24] Mr du Preez points out that at present Tendele is only actively mining in Area 1 and the extended area of Area 2, namely the KwaQubuka and Luhlanga areas. (As mentioned previously these areas are also known as Areas 8 and 9). The mine's coal wash plants, which are also presently in operation, are located in Area 2.

[25] Tendele commenced with its mining operations in Area 1 in July 2007 in accordance with the Area 1 mining right and the approved EMP in relation to that Area.

[26] Mining operations (in the form of drilling activities) also commenced in 2007 in Areas 8 and 9 in accordance with an old order prospecting right (as mentioned above). Mining operations commenced in Area 2 in 2006 in accordance with an old order mining right prior to the registration of the Areas 2 and 3 converted mining right. Mining operations continued in these areas after the commencement of the

MPRDA in accordance with the Areas 2 and 3 converted mining right and the associated EMP.

[27] Mining operations are not being undertaken in and on Area 3. Mining operations ceased in Area 2 in January 2012 due to the depletion of the anthracite reserves. To date, mining operations have not commenced on Areas 4 and 5, notwithstanding the grant of the Areas 4 and 5 mining right and the approval of the associated EMP.

History of mining in the Somkhele area

[28] The following history of mining in the Somkhele area as contained in Tendele's answering affidavit is not disputed:

28.1 Since the discovery of significant quantities of anthracite in the Somkhele area in the 1880's, the Somkhele mining area became the subject of numerous prospecting and mining projects. In 1895 and in anticipation of coal mining in the Somkhele area, the construction of a railway line commenced from Durban to the Somkhele area. The first commercial extraction of anthracite from the Somkhele area occurred between 1903 and 1909 in what is now Area 4 of Reserve 3 when the now defunct Zululand Collieries produced a total of 49 209 tons of anthracite.

28.2 Between 1936 and 1939, Umfolozi Co-Op Sugar Planters Ltd tested the suitability of the anthracite from Somkhele for use at their sugar mills near Mtubatuba. Some 300 tons of anthracite were subsequently mined by Sugar Planters for use in the mechanically stoked boilers. In 1965, JCI Mining (Pty) Ltd ("**JCI**"), through Somkhele Prospecting Co. (Pty) Ltd, acquired a concession over an area extending from the Nongoma /Mtubatuba road in the south to the south-eastern corner of the Hluhluwe Game Reserve, constituting an area of 168 square kilometres. Between 1966 and 1976, JCI drilled numerous boreholes in search of anthracite in what is now Somkhele Areas 1, 3, 4, 5 and 9. The results of the exploratory drilling in Area 1 alone showed a total extractable reserve of 7.9 million tons of anthracite to a depth of 300 metres in an area of 330 hectares with open pit potential.

28.3 Between 1976 and 1982, JCI drilled further boreholes and conducted geophysical surveys in what is now Somkhele Area 2 and identified further potential anthracite reserves. In 1979, JCI acquired prospecting rights and authorisations in respect of what is now Somkhele Area 3 and drilled more boreholes in search of further anthracite reserves. In 1986 and 1987, further drilling activities were undertaken by JCI in Somkhele Area 1. Between 1994 and 2004, AfriOre Ltd ("**AfriOre**") acquired vaious mining interests in Somkhele. Between 2001 and 2003, AfriOre drilled numerous boreholes in what is now Somkhele Area 2 pursuant to a mining licence issued in terms of the now repealed Minerals Act. In 2004 AfriOre sold its interests in Somkhele to a consortium led by the New Africa Mining Fund ("**NAMF**").

28.4 In 2005, Petmin Limited, the holding company of Tendele, purchased all of the anthracite interests held by the NAMF in Somkhele. Tendele commenced mining operations in Somkhele Area 2 in 2006 pursuant to the grant of a mining licence and subsequently a mining right and the approval of an Environmental Management Programme ("**EMP**") as described in more detail below. Mining operations also commenced in Area 1 in 2007 pursuant to the grant of a mining right as further discussed below. Similarly, Tendele commenced mining operations (comprising drilling activities) in Areas 8 and 9 in July 2007, as set out above.

Somkhele mine and socio-economic development

[29] The Somkhele mine is located approximately 18km to the west of Mtubatuba and 52km north east of Richards Bay within Reserve 3 (Somkhele No. 15822 in the Magisterial District of Mtubatuba, KwaZulu-Natal Province). Although mining operations commenced in the Somkhele area in the mid-1880's Tendele commenced mining operations at the Somkhele mine in 2006. The mineral mined at Somkhele is anthracite – a hard, compact variety of coal which has the highest carbon content, the fewest impurities and the highest energy density of all types of coal except for graphite.

[30] Somkhele has one of the largest resources of open-pit mineable anthracite reserves in South Africa. Tendele currently sells the higher quality anthracite mined at Somkhele (constituting 50% of total production) to local ferrochrome producers and is, in fact, the principal supplier of anthracite to ferrochrome producers in South Africa. The high quality anthracite is a critical component of the reductant mix used in smelters by ferrochrome producers. At present Tendele sells 730 000 tons of anthracite per annum to local ferrochrome producers.

[31] The production of ferrochrome requires anthracite that is low in sulphur and phosphorus which is in increasingly short supply in South Africa. Tendele is said to be unique among South African anthracite producers as other anthracite producers cannot produce the qualities and quantities consistently required by ferrochrome producers. If Tendele does not supply anthracite to the local ferrochrome market, it is likely that local ferrochrome producers would be required to import its reductants (being either anthracite or low sulphur coke breeze) 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. Increased production costs may, for example, result in retrenchments which will negatively affect South Africa's trade balance and have associated regional and national economic impacts. South Africa is the second largest producer of ferrochrome in the world, with China being the largest.

[32] According to Mr Du Preez, Somkhele has had a significant and positive impact on the communities surrounding the mine through, *inter alia*, investment, training and job creation. Tendele currently employs over 1 000 people at Somkhele, with 83% of employees residing in the impoverished Mpukunyoni Area surrounding Somkhele. This means that 830 households in the Mpukunyoni Area (Somkhele's hosting community) benefit from employment at Somkhele. Not only does Tendele employ over 1 000 people at Somkhele through training initiatives, Somkhele has procured services from local entrepreneurs from the Mpukunyoni Area. These entrepreneurs employ in excess of a further 200 people from the local community. Such services include, *inter alia*, the transportation of anthracite to the Richards Bay port, laundry services at Somkhele and local transport and taxi services for Somkhele employees.

[33] The Mtubatuba Local Municipality Integrated Development Plan ("**IDP**") for 2017/2018 – 2022 provides, at 13.1 that

> "…mining is one of the major employment sectors in Mtubatuba Municipality through Somkhele Coal Mine … [I]t is a well-known fact that the majority of people working in this mine are locals (within Mtubatuba Municipal area, Mpukunyoni Traditional Council in particular".

It is further recognised in the IDP, *inter alia*, that

> "[T]he unemployment rate within Mtubatuba Municipality was at 59.7% in 2001, however in 2011 there … [was] a significant improvement as it is estimated to be at 39%. This may be due to the coal mining operation taking place in the Mpukunyoni Traditional Council area, Somkhele Mine".

It is further stated at 13.1.1 of the IDP that the Mtubatuba Municipality's economy is driven by the performance and structures of, *inter alia*, mining at Somkhele.

[34] Tendele asserts that to date 800 households in the Mpukunyoni Area have received training in farming activities through an initiative introduced by it. The majority of these households are female-headed households. Tendele has undertaken to construct a trade hub at which these farmers can sell their produce. Through the Municipal Local Economic Development division, Tendele is in the process of procuring tractors and other equipment to support local farming in the Mpukunyoni area.

[35] In addition (and amongst other training programmes), Tendele offers adult basic education and training which has been completed by 935 people between 2010 and 2017 at both the training centre constructed by Tendele at Somkhele and at an education centre in a nearby area that was refurbished by Tendele and is rented from the Mtubatuba Municipality. The education centre provides mathematics and science programmes for school children and matric study support. Tendele provides student teachers in community schools to assist with education. Sixteen (16) apprentices have completed learnerships at Somkhele, 7 of whom have been employed at Somkhele. To date, 817 people have obtained National Certificates: N1

– N3 Engineering Studies (mechanical) from the Umfolozi TVET College in Richards Bay at the Somkhele education centre. In addition, Tendele offers bursaries for tertiary studies to students in the various local communities, eighty four (84) bursaries were awarded by Tendele between 2008 and 2017.

[36] Between December 2006 and December 2016, Tendele spent R719m paying local community employee salaries; R54m on community projects in accordance with approved Social and Labour Plans attaching to each of the Tendele Mining Rights; and R300m on procuring services from community based black economic empowerment companies.

[37] In addition, Tendele has, *inter alia*, constructed new homes with water as well as sewerage and electricity infrastructure for community members who were required to be relocated by Tendele; provided local communities with potable water delivered by water tankers since 2015 at a cost of R100 000.00 a month as the Mtubatuba Municipality was unable to provide water to certain areas surrounding Somkhele; constructed the Siphelele Primary School and a soccer field, at a cost of approximately R10m and assisted with the provision of teachers as well as basic maintenance and water (when required); constructed the Somkhele Maternity Ward at the Somkhele clinic at a cost of R3.5m after consultation with the Department of Health; constructed large community halls in Dubelenkunzi, Machibini, KwaMyeki and Esiyembeni (which are community areas surrounding Somkhele); and constructed community roads and bridges.

[38] In 2015 Tendele concluded a R350m transaction giving local communities surrounding Somkhele as well as Tendele employees a 20% stake in Somkhele. As a result, a BEE special purpose vehicle holds 20% of the shares in Tendele which in turn is held 80% by a trust established for the benefit of the youth in the Mpukunyoni community and 20% is held by a trust for the benefit of all employees of the Somkhele mine. As a result, the Mpukunyoni community and Tendele employees directly benefit from the continued operation of Somkhele.

[39] A further recent development highlighted by Mr Du Preez is the establishment in early 2017 of a community structure, known as the Mpukunyoni Community

Mining Forum ("**MCMF**"). This was established after numerous consultations with various interest groups including, *inter alia*, traditional structures in the Mpukunyoni Area, local entrepreneurs and businesses, Tendele employees, non-governmental organisations and non-profit organisations operating in the Mpukunyoni Area and representatives of the Mtubatuba Municipality. Tendele claims that the MCMF represents the interest of the communities in the Mpukunyoni Area in respect of the mining operations undertaken at Somkhele and has the following representatives (amongst others) – the Inkosi (representing the 8 Royal Houses (related to the Zulu King) of the Mpukunyoni Area, the Traditional Council and the Traditional authority); the Indunankulu, Chief Induna of the Mpukunyoni Area; the Mayor of the Mtubatuba Municipality (or his/her nominee), in his/her capacity representing the entire Mtubatuba Municipality; the 8 Indunas of the areas in which the mine operates; representatives of local entrepreneurs; full-time shop stewards; and faith-based organisations.

[40] In each of the 8 areas surrounding Somkhele, Tendele points out that a democratically elected mining area committee ("**MAC**") has been established to ensure that the wider community is represented. The various MACs are consulted through the MCMF, ensuring that the interests of each of these communities are protected. Tendele has developed a roadmap with the input of MCMF representatives which was subsequently signed by, *inter alia*, community leaders on 29 March 2017. The road map outlines the purpose of the MCMF and provides a platform through which, *inter alia*, community leaders and individuals are consulted with regard to activities undertaken at Somkhele; complaints can be raised regarding the activities at Somkhele; social and labour plans are developed (to the benefit of the community); and compliance with Tendele's black economic empowerment obligations are ensured to the long-lasting benefit of the community.

Applicant's founding papers

[41] As I pointed out above, the applicants' founding papers were deposed to by Mr Dladla who resides in an area known as Nkolokotho near the site of the coal mining conducted by Tendele at Somkhele. Much of the founding affidavit is taken up by a reference to the various pieces of legislation in respect of which the applicants allege that Tendele is acting unlawfully. I will deal with this legislation in

due course as they pertain to the issues identified for determination above. For now it is convenient to highlight some of the difficulties being encountered by Mr Dladla and other members of the second applicant who are all resident in close proximity to the mining operations at Somkhele and are directly affected thereby.

[42] Mr Dladla points out that he and his family were opposed to coal mining in the area from inception. The quality of life has changed completely since Tendele commenced its mining operations. The entire area was used for grazing purposes before Tendele arrived. In 2009 the area was fenced off by Tendele without notice. In 2014 Mr Dladla's family lost 2 head of cattle due to mining operations. This was because the fence that was put up was not properly maintained. No compensation was given by Tendele. Goats belonging to his family would enter the mining area and not return. At one point the family owned 15 goats and now it has none.

[43] Rainwater which is stored in drums for drinking purposes becomes contaminated with dust from the mining operations. Drinking water now has to be extracted from the Mfolozi River. However, when this river ran dry in 2016, the residents were without water for months. While Tendele went ahead and sank 4 to 5 boreholes alongside the river, these were for its mining operations only. The Nkolokotho stream that feeds the Mbukwinini Dam is often polluted from the wash down areas and pollutes the dam in the process.

[44] Mr Dladla avers that blasting occurs about twice a week – an alarm is sounded to warn residents and within 30 minutes blasting takes place. Blasting results in the houses shaking and windows rattling. In 2010 and as a result of the blasting taking place close to his house, cracks were caused around the doorframes. The walls and houses of some residents also collapsed. Mining operations have now also resulted in less firewood due to fencing by the mine or trees being removed for mining purposes. According to Mr Dladla Tendele's mining operations have had a serious impact on the environment. On the mining site there are massive stockpiles of waste rock and the production of coal sludge. This is known as slurry and is the liquid coal waste produced by coal mining activities. The waste slurry water is toxic containing elements of mercury, arsenic, beryllium, cadmium, nickel and selenium.

[45] All in all, Mr Dladla points out that the quality of the environment has been materially affected by the mining operations. What was once a quiet rural setting alongside the Wilderness area is now a vast industrial rock dump. Efforts by his late father in 2013 to engage the regional manager of DMR about Tendele's operations proved futile.

[46] On the issue of graves Mr Dladla avers that the site of the mining is the residence of the communities that have always lived there. The fenced-off areas of the mine include some houses of people who always lived there. This has given rise to conflict over the issue of graves in these areas. For instance, the cemetery of one group of residents is located inside the Area 1 portion of the mining operations. In respect of the extended Area 2 at KwaQubuka the cemetery has been fenced into the mining operations. As such they are inaccessible to the local residents who wish to visit them. Notices are posted at the site of the graves which inform the residents that they have a right to negotiate with Tendele on the relocation of their family graves. However, the notices themselves are inaccessible to the local residents as they are within the fenced off security area. Furthermore, the access area is extremely dangerous with trucks and earthmoving equipment working in the vicinity. The graves are marked by plastic tape only. The graves at KwaQubuka are being damaged and altered although they have not as yet been relocated. Many graves have been moved in other areas.

[47] Against this backdrop I turn to consider whether the applicants have made out a proper case for the relief sought.

Environmental authorisations

[48] The two pieces of legislation that are relevant here are NEMA (1998) on the one hand and the MPRDA (2002) on the other. Both statutes have undergone substantial and significant changes over the years. It is perhaps convenient to pause briefly in order to deal with the issue of environmental authorisations and listing notices prior to the amendments which came into effect on 8 December 2014. In terms of NEMA an applicant who intends to commence an activity specified in a listing notice, needs an environmental authorisation as contemplated in s 24. The listing notices are promulgated by the Minister of Environmental Affairs. The listing

notices identify the competent authority for granting the environmental authorisation. It seems that prior to 8 December 2014 mining *per se* was not a listed activity, however anyone intending to embark on mining would of necessity have to perform certain activities which were listed activities (e.g. establishing infrastructure for bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 hectare, etc.) and would therefore have required environmental authorisation for those activities in terms of s 24.

[49] The primary purpose of the MPRDA is to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources. In its preamble the MPRDA, *inter alia*, affirms the State's obligations to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development. The objects of the MPRDA are set out in section 2.[15]

[50] Prior to 8 December 2014 the environmental impacts of mining were regulated exclusively through the MPRDA (2002) and through a requirement under that Act to obtain an environmental management plan (EMP) prior to commencing mining and to ensure that mining takes place in accordance with such an approved

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[15] Section 2 of the MPRDA provides that the objects of the MPRDA are to –
(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
(f) promote employment and advance the social and economic welfare of all South Africans;
(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the arears in which they are operating.

EMP. Section 22[16] of the MPRDA deals with applications for a mining right. Although the application is made to the Minister in charge, it is lodged with the office of the regional manager in whose area the land is situated. In terms of section 23 the Minister of Minerals and Energy must grant a mining right if the conditions specified in sub-section (a) to (h) are met.

[51] Prior to 8 December 2014, s 28(5) of the MPRDA provided that a mining right came into effect on the date on which the environmental management programme was approved in terms of s 39(4). Section 37 prescribed that the environmental management principles set out in s 2 of NEMA (1998) applied (a) to all prospecting and mining operations, as the case may be, and any matters relating to such operations and (b) served as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. Section 38[17]

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[16] Section 22 provides as follows:

(1) Any person who wishes to apply to the Minister for a mining right must lodge the application –
  (a) At the office of the Regional Manager in whose region the land is situated;
  (b) In the prescribed manner; and
  (c) Together with the prescribed non-refundable application fee.

(2) The Regional Manager must accept an application for a mining right if –
  (a) The requirements contemplated in subsection (1) are meant; and
  (b) No other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing –
  (a) To conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and
  (b) To notify and consult with interested and affected parties within 180 days from the date of the notice.

(5) The Minister may by notice in the Gazette invite applications for mining rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted.

[17] Section 38(1) provided as follows:

Integrated environmental management and responsibility to remedy (1) The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit –

(a) must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National environmental Management Act, 1998 (Act No. 107 of 1998);

(b) must consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment as contemplated in section 24 (7) of the National Environmental Management Act, 1998 (Act No. 107 of 1998);

(c) must manage all environmental impacts –
  (i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate;
  and
  (ii) as an integral part of the reconnaissance, prospecting or mining operation, unless the Minister directs otherwise;

provided for an integrated environmental management and responsibility to remedy. The holder of a mining right was required to consider, investigate, assess and communicate the impact of its mining on the environment as contemplated in s 24(7) of NEMA and had to manage all environmental impacts in accordance with its approved mining EMP.

[52] Section 39 (now repealed) of the MPRDA dealt with an environmental management programme and environmental management plan. In terms of s 39

> "(1) Every person who applied for a mining right in terms of section 22 was required to conduct an environmental impact assessment and to submit an environmental management programme within 180 days of the date on which he or she was notified to do so by the regional manager.
>
> (2) An applicant who prepared an environmental management programme or an environmental management plan was required to
>
> (a) establish baseline information concerning the affected environment to determine protection, remedial measures and environment objectives;
>
> (b) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations to
>
> (i) the environment;
>
> (ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operations; and
>
> (iii) any national estate referred to in s 3(2) of the National Heritage Act, 1999 (Act No. 25 of 1999), with the exception of the national estate contemplated in section 3 (2) (i), (vi) and (vii) of that Act."

[53] Section 40 provided that when considering an environmental management plan or environmental management programme in terms of section 39, the Minister must consult with any State department which administers any law relating to matters affecting the environment. In terms of section 39(6) an environmental management plan or an environmental management programme could be amended

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(d) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and

(e) is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.

by the Minister after consultation with the holder of a reconnaissance permission, prospecting right, mining right or mining permit, as the case may be.

[54] In light of the above, it is evident that the position prior to 8 December 2014 was that the Minister of Minerals and Energy's decision to approve an applicant's mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. In terms of section 39(4)(b) of the MPRDA the Minister may not approve the environmental management programme or the environmental management plan unless he or she has considered (i) any recommendation by the regional mining development and environmental committee; and (ii) the comments of any State Department charged with the administration of any law which relates to matters affecting the environment.

[55] As I pointed out above NEMA and the MPRDA underwent significant changes in 2008 and subsequently the 'One Environmental System' was introduced by Government on 8 December 2014 through a number of legislative amendments. These included amendments to NEMA and to the MPRDA. NEMA was amended by the National Environmental Amendment Act 62 of 2008[18] (NEMA Amendment Act, 2008) and the National Environmental Management Laws Second Amendment Act 30 of 2013 and the National Environmental Management Laws Amendment Act 25 of 2014. The MPRDA was amended by the MPRDA Amendment Act 49 of 2008 (MPRDA Amendment Act, 2008).

[56] The amended EIA regulations and the new listing notices which accommodated the inclusion of mining among the listed activities for purposes of

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[18] The preamble to the NEMA Amendment Act, 2008 reads as follows:
To amend the National Environmental Management Act, 1998, so as to insert certain definitions and to substitute others; to further regulate environmental authorisations; to empower the Minister of Minerals and Energy to implement environmental matters in terms of the National Environmental Management Act, 1998, in so far as it relates to prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area; to align environmental requirements in the Mineral and Petroleum Resources Development Act, 2002, with the National Environmental Management Act, 1998, by providing for the use of one environmental system and by providing for environmental management programmes, consultation with State departments, exemptions from certain provisions of the National Environmental Management Act, 1998, financial provision for the remediation of environmental damage, the management of residue stockpiles and residue deposits, the recovering of cost in the event of urgent remedial measures and the issuing of closing certificates as it relates to the conditions of the environmental authorisation; and to effect certain textual alterations; and to provide for matters connected therewith.

NEMA were promulgated on 4 December 2014 and came into effect on 8 December 2014. The amendments to NEMA relating to mining and the amendment to the MPRDA came into effect on 8 December 2014. In a government press release on 6 December 2014 it was stated that the roll out of the One Environmental System would start on 8 December 2014. As the preamble to the NEMA Amendment Act, 2008 provides, some of the objects of the Act are to further regulate environmental authorisations, to empower the Minister of Minerals and Energy to implement environmental matters in terms of NEMA (1998) insofar as it relates to prospecting, mining, exploration or related activities on a prospecting, mining, exploration or production area; and to align environmental requirements in the MPRDA (2002) with NEMA (1998) by, *inter alia*, providing for environmental management programmes.

Discussion and findings

[57] It is common cause that Tendele's mining operations commenced at Somkhele in 2006. These operations commenced pursuant to the grant of a mining right and subsequently a mining licence. The approval of EMP's for the respective mining areas were dealt with by the regional manager of the DMR on the dates already mentioned above. In the absence of any evidence to the contrary from the applicants, it must be assumed that all the EMP's were approved because they met the requirements as prescribed by the MPRDA at the time. It must be borne in mind (as alluded to earlier) that at that stage and prior to the implementation of the One Environmental System in 2014, the environmental impacts of mining were regulated exclusively through the MPRDA. It was a strict requirement under that Act for an applicant to obtain an EMP prior to commencing mining so as to ensure that mining takes place in accordance with an approved EMP.

[58] In attempting to make out a case for the relief claimed, the applicants make the following allegation without any substantiation in paragraph 36 of their founding affidavit:

> "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). This is procured by making an application in terms of section 24 of NEMA which is adjudicated by the Minister of Environment (sic) (Ninth Respondent) or the MEC

(Third Respondent). Section 24 provides a detailed and precise procedure for the application in respect of EA. Such process is referred to as EIA."

[59] This is followed by the following statement in paragraph 37:

> "Under the former Act, the Environmental Conservation Act 73 of 1989 (ECA) a similar authority was required."

[60] Both in its answering affidavit and in argument before me Tendele has contended that the allegations as relied on by the applicants in paragraphs 36 and 37 above are patent errors when one has regard to the issue of environmental authorisation in relation to listed activities as contained in the statutory framework. Tendele points out first that applications for environmental authorisation for mining operations or activities directly related thereto were adjudicated by the Minister of Mineral Resources and not by the Minister of Environmental Affairs, and second that under the ECA (1989) which preceded the introduction of the One Environmental System in 2014, environmental authorisation under any environmental legislation was not required for mining operations or activities directly related thereto.

[61] To place matters in perspective it is necessary to have regard to certain provisions of NEMA in its present form. Chapter 5 of NEMA deals with "integrated environmental management". The purpose of the chapter as outlined in s 23(1) is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management activities. Section 23(2) of the chapter details the general objectives of integrated environmental management which are to:

"(a) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section (2);

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

(e) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and

(f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management."

[62] Section 24 of NEMA is important as it deals with environmental authorisations. The section provides as follows:

> "**Environmental authorisations** – (1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act
>
> (1A) Every applicant must comply with the requirements prescribed in terms of this Act in relation to –
>
> (a) steps to be taken before submitting an application, where applicable;
>
> (b) any prescribed report;
>
> (c) any procedure relating to public consultation and information gathering;
>
> (d) any environmental management programme;
>
> (e) the submission of an application for an environmental authorisation and any other relevant information; and
>
> (f) the undertaking of any specialist report, where applicable."

[63] In terms of s 24(2)(a) of NEMA, the Minister or an MEC with the concurrence of the Minister is empowered to identify activities which may not commence without environmental authorisation from the competent authority. The sub-section contains a proviso which provides that where an activity falls under the jurisdiction of another Minister or MEC, a decision in respect of paragraphs (a) to (d) of the section must be taken after consultation with such other Minister or MEC. In terms of the definitions

contained in section 1, a "listed activity" when used in Chapter 5 means an activity identified in terms of section 24(2)(a) and (d).

[64] The legislative framework set out above relating to environmental authorisations and activities, is very similar to that contained in the predecessor to NEMA *viz* the ECA (1989) under which the Minister was required to identify activities which have a detrimental impact on the environment and required anyone intending to undertake such an activity to go through an EIA process in order to assess such impacts. Part of that process involved public participation and only once an applicant had ultimately satisfied the requirements of the EIA process could it proceed with the proposed activity.

[65] Section 24F of NEMA deals with prohibitions relating to the commencement or continuation of listed activities and provides in sub-section (1)(a) that

> "notwithstanding any other Act, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity."

[66] From all of the above it becomes apparent that the statutory framework under the ECA dealing with environmental authorisations required the actual listing of activities which could not commence without such authorisation first being obtained. The listed activities were generally published by the Ministers of Environmental Affairs (and Tourism) from time to time. An examination of the listed activities as they were published between 1998 and 2006 reveals that mining *per se* was not part of such listing. The first listing of activities and competent authorities identified in terms of sections 24 and 24D of NEMA were published by then the Minister of Environmental Affairs and Tourism on 21 April 2006. Items 7 and 8 of the schedule relate specifically to mining: Item 7 deals with reconnaissance, exploration, production and mining as provided for in the MPRDA (2002), as amended in respect of such permits and rights; item 8 deals with permits and rights granted in terms of item 7 above or any other right granted "in terms of previous mineral legislation, the undertaking of any reconnaissance exploration, productions or mining related activity

or operation within a exploration, production or mining area", as defined in terms of section 1 of the MPRDA (2002).

[67] In argument Mr *Lazarus* pointed out, correctly in my view, that despite the inclusion of items 7 and 8 in the 2006 listing notices, these items never came into effect. It seems that this was solely because until 2014 when the two statutes underwent the significant changes alluded to already, the environmental impacts of mining were regulated exclusively under the MPRDA (2002) in terms of approved EMP's.

[68] In light of the above one of the fundamental difficulties facing the applicants is that they have simply failed to identify precisely what activities Tendele has embarked upon without obtaining the necessary environmental authorisations therefor. In my view the general statement contained in paragraph 36 of their founding affidavit does not go far enough to establish a proper cause of action on the issue of any illegality on the part of Tendele. In reply and whilst the applicants concede that there are no listed activities relating to mining as a special category, they nonetheless aver that there are a host of listed activities which are associated with mining. They rely in this regard on a table put up as annexure 'R1' to the replying affidavit. Again, no attempt is made by them to identify these activities or when they commenced. In sub-paragraph 4.3 of their heads of argument they attempt to put up some sort of list by making the following submission:

> "4.3 Though mining only became a listed activity following the NEMA amendments which came into effect in December 2014, the First Respondent would have had to execute a number of listed activities pursuant to engaging in mining operations, these would include the following listed activities, amongst a list of others:
>
> 4.3.1 The construction of facilities or infrastructure for the storage of coal;
>
> 4.3.2 The construction of facilities or infrastructure for the storage of hazardous waste;
>
> 4.3.3 The construction of facilities or infrastructure for the off-stream storage of water, including dams and reservoirs."

[69] The general rule in motion proceedings is that an applicant must stand or fall by the founding affidavit and the facts alleged in it. It is certainly not permissible to make out a case or allege new grounds in reply. In the present matter the applicants have not only failed to make out a proper case in their founding affidavit but their belated attempt in their replying affidavit in putting up a document (annexure R1) without any elaboration of its contents in the affidavit itself, cannot be permitted. In any event, even if they were permitted to make such a case, they have failed to pinpoint when these activities were listed (whether in terms of the ECA regulations in 2006 or in terms of NEMA in 2010) and when Tendele commenced with them without obtaining the necessary environmental authorisations.

[70] The second and perhaps the most important hurdle facing the applicants on the issue of environmental authorisations relates to the transitional arrangements contained in the One Environmental System that came into effect on 8 December 2014. These are contained in section 12 of the NEMA Amendment Act, 2008 and read as follows:

> "12. Transitional provisions –
>
> (1) Anything done or deemed to have been done under a provision repealed or 25 amended by this Act—
>
> (a) remains valid to the extent that it is consistent with the principal Act as amended by this Act until anything done under the principal Act as amended by this Act overrides it; and
>
> (b) subject to paragraph *(a), is* considered to be an action under the corresponding 30 provision of the principal Act as amended by this Act.
>
> (2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of the principal Act and that is pending when this Act takes effect must, despite the amendment of the principal Act by this Act, be dispensed with in terms of Chapter 5 of the principal Act as if Chapter 5 had not been amended. 35
>
> (3) Section 24G of the principal Act applies with the changes required by the context in respect of any activity undertaken in contravention of section 22 of the Environment Conservation Act, 1989 (Act No. 73 of 1989), if such activity is a listed activity under the principal Act.

(4) An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 22 of 2002) immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act.

(5) (a) Notwithstanding sub-section (4), the Minister of Minerals and Energy may direct any holder or any holders of an old order right, if he or she is of the opinion that the prospecting, mining, exploration or production operations in question are likely to result in unacceptable pollution, ecological degradation or damage to the environment, ecological degradation or damage to the environment, to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of the principal Act as amended by this Act.

(b) For the purposes of this sub-section, "Minister of Minerals and Energy", "holder" and "holder of an old order right" have the meanings assigned to them in section 1 of the principal Act as amended by the Act.

(6) Any appeal lodged in terms of section 96 of the Mineral and Petroleum Resources Development Act, 2002, against a decision in respect of environmental aspects, that is pending on the date referred to section 14 (2) (b) of the National Environmental Management Amendment Act, 2008 must be dealt with in terms of the Mineral and Petroleum Resources Development Act, 2002.

(7) 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."

(My emphasis)

[71] It would seem to me that the transitional provisions contained in s 12 above adequately caters for the position of a mining operator such as Tendele as at 14 December 2014 when the amendment took effect. I am accordingly in agreement

with the submissions advanced on behalf of Tendele which are to the following effect:

71.1 The <u>first</u> is that properly interpreted, section 12(4) of the NEMA Amendment Act has the consequence that an EMP approved in terms of the MPRDA before the coming into effect of the NEMA Amendment Act has the status of an environmental authorisation under NEMA. Section 12(4) of the NEMA Amendment Act provides that an EMP approved in terms of the MPRDA immediately before the commencement date of the provisions of the NEMA Amendment Act, 2008 dealing with prospecting, mining and related activities, must be regarded as having been approved in terms of NEMA as amended. The purpose of the transitional provision is no doubt to entitle the holder of an EMP that was lawfully conducting mining operations in terms of the applicable statutory provisions as at 8 December 2014 to continue to do so after that date. One can well imagine what would have happened if this was not the case: the result would have been to render existing lawful mining operations unlawful overnight. This would have been an unreasonable, insensible and unbusinesslike result.[19] Section 12(4) clearly seeks to avoid such a consequence.

71.2 This argument by Tendele is supported by the presumption against retrospective interpretation of statutes. A statute is retrospective "if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, into events already past".[20] Our courts have consistently established that no statute is to be construed as having a retrospective effect unless the Legislature clearly intended that result:

> "One may start the conspectus by stating the time-honoured principle formulated in *Peterson v Cuthbert and Company Ltd* 1945 AD 420 at 430, based upon the Roman-Dutch Law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly

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[19] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) which was quoted and further elucidated in *Bothma – Batho Transport (EDMS) Bpk v S Bothma en Seun Transport (EDMS) Bpk* 2014 (2) SA 494 (SCA) paras 18 – 12.

[20] *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 752A-B.

intended the statute to have that effect (see also, *inter alia*, *Bartman v Dempers* 1952 (2) SA 577 (A) at 580C)." [21]

71.3 As at 7 December 2014 Tendele had a vested right to conduct mining operations at Somkhele in terms of valid mining rights and the approved EMP's. If the enactment of the One Environmental System was intended to extinguish that right and overnight to render Tendele's existing mining operations unlawful, it would have had to contain a clear indication that this is what the Legislature intended. On the contrary s 12(4) of the NEMA Amendment Act clearly provides that a previously valid EMP is regarded as having been approved of in terms of s 24N of NEMA. As I alluded to earlier, Tendele's EMP's in relation to Areas 1, 2 and 3 were approved by the regional manager prior to 8 December 2014 and therefore must be regarded as having been approved in terms of NEMA as amended by the NEMA Amendment Act, 2008.

71.4 The new s 38B of the MPRDA, inserted by Act 49 of 2008 contains what may be regarded as a further transitional provision, however it has not yet come into operation. Section 38B reads as follows:

"38B. **Approved environmental management plans and environmental plans.** –

(1) An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of the National Environmental Management Act, 1998, shall be deemed to have been approved and an environmental authorisation been issued in terms of the National Environmental Management Act, 1998.

(2) Notwithstanding subsection (1), the Minister may direct the holder of a right, permit or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in unacceptable pollution, ecological degradation or damage to the environment, to take any action to upgrade the environmental

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[21] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet (Autonet Division) v Chairman National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 12.

management plan or environmental management programme to address the deficiencies in the plan or programme.

(3) The Minister must issue an environmental authorisation if he or she is satisfied that the deficiencies in the environmental management plan or environmental management programme in subsection (2) have been addressed and that the requirements in Chapter 5 of the National Environmental Management Act, 1998, have been met."

71.5 The second is that if there were any defects in the manner in which Tendele was conducting its mining operations in terms of its pre-existing EMP's, the Minister of Minerals and Energy is empowered to take action against Tendele to address such deficiencies. This power is exercised by the Minister in terms of s 12(5). In terms of the sub-section, if the Minister of Minerals and Energy forms the opinion that the prospecting or mining operations are likely to result in unacceptable pollution, ecological degradation or damage to the environment, the Minister may direct any holder or any holder of an old order right to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of the principal Act as amended by the NEMA Amendment Act, 2008. To date the Minister has not acted against Tendele in terms of s 12(5) of the NEMA Amendment Act, 2008. This suggests to me that the Minister is thus far satisfied about Tendele's approved EMP's and the manner in which it conducts its mining operations at Somkhele. In any event there is no evidence whatsoever on the papers that point to a complaint/s being lodged with the Minister directly in this regard.

71.6 The third relates to section 24L(4) of NEMA which empowers the Minister to regard an approved EMP to be an environmental authorisation in terms of NEMA provided certain conditions are met. Section 24L[22] deals with the alignment of environmental authorisations. Sub-section (4) provides that:

[22] '24L. **Alignment of environmental authorisations** – (1) A competent authority empowered under Chapter 5 to issue an environmental authorisation and any other authority empowered under a specific environmental management Act may agree to issue an intergrated environmental authorisation.

(2) An intergrated environmental authorisation contemplated in subsection (1) may be issued only if –

> "A competent authority empowered under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24 (4) (a) and, where applicable, section 24 (4) (b) to be an environmental authorisation in terms of that chapter."

71.7 The Minister responsible for mineral resources remains the competent authority empowered under Chapter 5 of NEMA to issue an environmental authorisation. On a proper interpretation of sub-section (4) and read in context, it is evident that Tendele's EMP's constitute "an authorisation in terms of any other legislation." As I already pointed out, Tendele's EMP's pre-date the introduction of the One Environmental System in 2008 which came into effect on 8 December 2014.

71.8 From the above it seems to me that the Minister is well aware of Tendele's operations at Somkhele and that they are conducted in terms of approved EMP's. He also seems to be satisfied that such EMP's adequately address the environmental impacts of such operations at Somkhele. If the Minister was not so satisfied he would not have granted Tendele further mining rights as he did in 2016 to expand its mining operations in Reserve 3.

71.9 In light of all the above, I must accordingly conclude that the applicants have simply failed to make out a proper case for an interdict (temporary, structural or otherwise) on this aspect. I proceed to address the further complaints raised by the applicants.

(a) the relevant provisions of this Act and the other law or specific environmental management Act have been complied with; and
(b) the environmental authorisation specifies the -
  (i) provisions in terms of which it has been issued; and
  (ii) relevant authority or authorities that have issued it.

(3) A competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority."
(repeat)

Land use approvals

[72] In support of their contentions that Tendele has no land use authority, approval or permission from any municipality having jurisdiction, the applicants aver that Tendele is undertaking mining operations in contravention of the KwaZulu-Natal PDA, the Mtubatuba By-law and SPLUMA (the Spatial Planning and Land use Management Act). In particular they contend that section 38 of the KwaZulu-Natal PDA requires municipal approval for the development of land situated outside the area of a land use scheme; section 46 of the Mtubatuba By-law similarly requires municipal planning approval for the development of land situated outside the area of a land use scheme, and lastly that section 26(3) of SPLUMA provides that:

> "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 [which include "mining purposes"] and for which such land was lawfully used or could lawfully have been used immediately before the commencement of this Act".

[73] The following further allegations are contained in paragraphs 65 and 66 of the founding affidavit:

> "65
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> The area in which mining is taking place by Tendele was hitherto part of the Hlabisa Local Municipality (Sixth respondent). On 18 January 2008 the Municipal Demarcation Board gave notice in terms of section 21 of the Local Government: Municipal Demarcation Act 27 of 1998 that the boundaries would change. The changes were set out in the Provincial Gazette dated 18 January 2008. I annex hereto a copy marked 'K' hereto.
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> 66
>
> In due course the MEC for Co-operative Governance and Traditional Affairs for KwaZulu-Natal issued a proclamation dated 16 May 2011 as Provincial Notice No. 49 altering the boundary between Hlabisa Municipality and Mtubatuba Municipality with the effect that Reserve 3 was henceforth in the Mtubatuba Municipality. I annex hereto a copy thereof marked "L". This notice refers to the demarcation notice referred to above."

[74] In paragraph 67 of the founding affidavit the applicants point out that both local municipalities (Hlabisa and Mtubatuba) advised their attorney that no planning

approval or land use approval was required for mining operations undertaken by Tendele at Somkhele. The applicants' further point out that while the land on which the mining rights have been granted is Ingonyama Trust land, the Mtubatuba Municipality had full jurisdiction over the land in the functional area of municipal planning since 16 May 2011 and before that it was the Hlabisa Municipality. The applicants contend that in terms of s 38 of the KwaZulu-Natal PDA municipal approval was required for any development of the land and that such approval was required to be given by the municipality having jurisdiction. They further contended that in terms of s 43(2) of the Integrated Development Plan (IDP) the municipality concerned was required to take into account, *inter alia*, the protection or preservation of cultural and natural resources and biodiversity and the potential impact of the proposed development on the environment, socio-economic conditions and cultural heritage.

[75] In light of the above, Mr *Dickson* submitted <u>first</u> that the exercise of a mining right in terms of the MPRDA is subject to the provisions of SPLUMA and the KwaZulu-Natal PDA and therefore such right may only be exercised if a development application has been submitted and the zoning scheme in terms of SPLUMA and the KwaZulu-Natal PDA permits mining on the said land; and that <u>second</u> this was because the municipality is the exclusive authority in respect of municipal planning which includes land use. In support of these submissions Mr *Dickson* placed reliance on the judgments of the Constitutional Court in the matters of *Maccsand (Pty) Ltd v City of Cape Town and Others*,[23] and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.[24]

[76] The *Johannesburg Metropolitan* matter had to do with the meaning of "municipal planning" a term not defined in the Constitution. The court found that "planning" in the context of municipal affairs

> "is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the work carries a meaning other than the

[23] 2012 (4) SA 181 (CC) paras 34 and 40 – 51.
[24] 2010 (6) SA 182 (CC) paras 49 – 57.

> common meaning which includes control and reputation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning. As a result I find that the contested powers fall part of 'municipal planning.'"[25]

[77] At the heart of the dispute in the *Maccsand* matter was the interplay in the mining sector between the MPRDA (2002), on the one hand, and on the other, the Land Use Planning Ordinance (LUPO) and NEMA (1998). LUPO is a pre-Constitution Legislation which came into force in July 1986. It constitutes provincial legislation that was enacted by the Provincial Council of the former Cape of Good Hope. The interim Constitution permitted it to continue in force subject to amendment or repeal by the competent authority. While as national legislation the MPRDA applies throughout the country, LUPO on the other hand applied only in three provinces: the Western Cape, parts of the Eastern Cape and parts of the North West Province. While the MPRDA governs mining, LUPO regulated the use of land. However, it had no application in KwaZulu-Natal where land use was regulated primarily by the KwaZulu-Natal Town Planning Ordinance, 27 of 1949 ("the KwaZulu-Natal Town Planning Ordinance"). The KwaZulu-Natal PDA only came into operation on 1 May 2010. I deal hereunder with the relevant provisions of these two pieces of legislation insofar as they have a bearing on the issue of land use as raised by the applicants.

[78] Section 11(2)(a) of the KZN Town Planning Ordinance provided that:

> "No 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 …"

[79] In the matter *of Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and another*,[26] the Durban High Court (per Vahed J) considered the ambit of the above 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

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[25] Per Jafta J, para 57.
[26] 2013 (4) BCLR 467 (KZN).

for mining specifically), the commencement of such activities prior to October 2008 did not require municipal consent for the purposes of the Ordinance.

[80] As already mentioned, Tendele's operations commenced before 10 October 2008. Prior to Tendele's involvement in mining operations at Somkhele in 2006, other mining companies and entities were already mining in that area pursuant to, *inter alia*, mining rights issued under the now repealed Mineral's Act (see the "history of mining in the Somkhele area" as outlined above). In *Tronox*, *supra,* Vahed J concluded, correctly in my view, that mining authorisations granted in terms of the Minerals Act were only subjected to that Act and no other. Whilst Tendele took over some of those mining rights as well as prospecting rights which were later converted to mining rights in some of the reserves (see the various mining rights held by Tendele in the areas concerned as outlined above), no municipal consent was required in terms of the Ordinance.

[81] As far as the KwaZulu-Natal PDA is concerned, this Act came into operation on 1 May 2010. Section 38(1) of the Act provides that:

> "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."

[82] Section 38(3) of the Act 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".

[83] It is evident from the above definition of "development" that KwaZulu-Natal PDA did not intend to regulate existing, lawful mining (or building, construction or engineering operations) but only those operations which involve a material change to the existing use of any building or land without subdivision. This is no doubt that in keeping with the general principle that statutes should not be construed as having a retrospective effect unless it is clear that the Legislature intended that result and furthermore, when the words "develop" and "development" are used in Chapter 4 of

the KwaZulu-Natal PDA,[27] it is evident that they are intended to refer to proposed developments and not intended to cover existing developments. That seems to appear from the references in the Chapter to persons who may "initiate the development of land",[28] the procedure that must be followed for the development of land and in particular what the "proposal for the development of land" may include,[29] the duties of the municipality in considering a "proposal" for the development of land,[30] the matters the municipality must take into account when considering the merits of a "proposal to develop land",[31] the discretion afforded to the municipality in deciding on the "proposed development of land"[32] and when and in what circumstances the right granted by the municipality for the development of land will lapse.[33] (My emphasis).

[84] The above interpretation is consistent with and accords with the ordinary meaning of the word "development" which means "the process of converting [land] to a new purpose by constructing buildings or making use of its resources".[34] I accordingly agree with Mr *Lazarus* that since Tendele was already conducting its mining operations at Somkhele at the time that the KwaZulu-Natal PDA came into operation on 1 May 2010 and at the time when the Act was assented to on 5 December 2008, it is apparent that its operations do not fall within the definition of "development" contained in section 38(3) and as such they do not require municipal consent to continue.

[85] As far as the Mtubatuba By-law is concerned, section 46 thereof provides that municipal approval is required for the undertaking of mining operations outside the area of a land use scheme. Section 46 of the By-law read with Schedule 3 defines a "mining operation" to mean:

> "the processing of any mineral as defined in section 1 of the Mineral and Petroleum Resources Developement Act on, in or under the earth, water or residue deposit, whether by underground or open workings or otherwise –

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[27] Sections 38 – 49 which deal with the development of land situated outside the area of a scheme.
[28] Section 39(1).
[29] Section 40(1) and (2).
[30] Section 41.
[31] Section 42.
[32] Section 43(1).
[33] Section 49(1).
[34] *Oxford Dictionary of English*, 3ed, Oxford University Press.

(a) if a mining right contemplated in section 22 of the Mineral and Petroleum Resources Development Act is required or has been granted for the operation, but processing has not commenced by 10 October 2008, or

(b) if a mining right has been granted in terms of a repeated law for the operation, but processing has not commenced by 10 October 2008."

[86] The operative date in the above definition is 10 October 2008. The factual position is that Tendele's mining operations which include "processing" (as defined in the MPRDA)[35] commenced in 2006 and as such do not fall within the definition of "mining operation" as contained in the Mtubatuba By-law. Additionally, the mining operations at Somkhele are recognised within the Mtubatuba's municipality's special development framework for the Mtubatuba municipal area ("Mtubatuba SDF"). There is no dispute that the Mtubatuba SDF is a principle strategic special planning instrument which guides and informs all planning, land and management, development and spatial decision-making by the municipality. In fact the Mtubatuba SDF recognises (a) that Somkhele's coal mining operations constitute an important economic base for the area and (b) that Somkhele will serve as a nucleus for further development and rural settlement in order to improve quality of life and access to services. In the circumstances it seems that Tendele's operations are being undertaken in accordance with all applicable land use planning tools and are expressly recognised in the Mtubatuba IDP as well as the SDF.

[87] As far as the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) is concerned, this Act came into effect on 1 July 2015. Section 26 of SPLUMA is titled "Legal effect of land use scheme". It provides in subsection 2 that land may be used only for the purposes permitted by a town planning scheme (until such scheme is replaced by a land use scheme) "or in terms of subsection (3)". Section 26 (3) provides for the continuation, after the commencement of SPLUMA, of certain land uses in certain circumstances. It provides that:

> "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

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[35] In terms of section 1 of the MPRDA, the word "processing", in relation to any mineral means the winning, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.

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."

[88] Schedule 2 of the SPLUMA 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." 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. It seems to me that the only way it can achieve this is 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. From a factual point of view Tendele's mining operations at Somkhele pre-dated the commencement of SPLUMA and were lawful at the time that SPLUMA commenced. As the applicants attorneys were informed by the respective municipalities, (Hlabisa and Mtubatuba), no municipal consent was required as no town planning scheme or land use scheme applies to land where mining operations are being conducted by Tendele. Accordingly, it seems that the continuation of mining operations is not in breach of the provisions of SPLUMA.

Issue of graves

[89] The case made out by the applicants is that Tendele has damaged, altered, exhumed and removed traditional graves from their original positions without the necessary written approval in terms of section 35 of the KZN Heritage Act. Section 35 reads as follows:

"35. **General protection**: Traditional burial places. - (1) No grave –

(a) not otherwise protected by this Act; and

(b) not located in a formal cemetery managed or administered by a local authority, may be damaged, altered, exhumed, removed from its original position, or otherwise disturbed without the prior written approval of the Council having been obtained on written application to the Council.

(2) The Council may only issue written approval once the Council is satisfied that–

(a) the applicant has made a concerted effort to consult with communities and individuals who by tradition may have an interest in the grave; and

(b) the applicant and the relevant communities or individuals have reached agreement regarding the grave."

[90] The KZN Heritage Act defines "council" as being the AMAFA a KwaZulu-Natali Heritage Council (AMAFA) established in terms of section 5(1) of the KZN Heritage Act.

[91] In its answering affidavit Tendele has openly accepted that it has previously removed or altered traditional graves without being in possession of the necessary authorisations from AMAFA. It points out, however, that all relocations of traditional graves that have taken place have nevertheless occurred in consultation with the affected families and communities. It goes on to aver that in more recent times it has engaged in extensive consultations with AMAFA in an effort to ensure that its continued conduct in relation to traditional graves is wholly within the law. The process undertaken by Tendele in relation to the graves has been dealt with extensively by Mr *Du Preez* in sub-paragraphs 123.1 – 123.14 of the answering affidavit (none of which have been contested). I see no need to repeat same herein save to state that it is evident therefrom that whilst Tendele had, in the past, conducted relocations of traditional graves without the necessary authorisation from AMAFA, as soon as its omission was realised it began engaging with AMAFA on how to remedy the omission going forward.

[92] AMAFA has been cited in these proceedings as the ninth respondent. I have no doubt that it would have said something regarding Tendele's conduct if it was not satisfied with the manner in which traditional graves were being relocated in terms of the KZN Heritage Act. Mr Du Preez has pointed out in the answering affidavit that there has been a series of engagements and interactions between AMAFA and Tendele and that Tendele has repeated its undertaking that it will continue to work with AMAFA to ensure that any future relocations will comply with the letter and spirit of the law.

[93] In light of the above, I consider that on the uncontested facts in the answering affidavit, the applicants have simply failed to make out a proper case for an interdict. There are, in my view, no facts put up by the applicants that would justify any

reasonable apprehension that Tendele will continue to relocate or exhume traditional graves without the appropriate statutory safeguards.

Waste Management Licences

[94] The applicants complain that Tendele's mining operations are unlawful as it does not have a waste management licence in respect of its activities as required under the Waste Act. Like NEMA the Waste Act is really environmental legislation sourced in terms of section 24 of the Constitution. The Waste Act (s 20) prohibits any person carrying on a waste management activity from doing so except in accordance with the standards set out in section 19(3) for that activity or in terms of a waste management licence issued in respect of that activity.

[95] "Waste" in terms of the Waste Act is defined to include all the waste included in schedule 3 to the Act. Schedule 3 includes:

(a) "hazardous waste" which includes residue stockpiles and Item 4 which includes the activity of the "Pyrolytic treatment of coal.";

(b) "residue stockpile" which includes the waste from a mining operation, and which include in Item 1, waste from mining.

[96] The applicants accordingly contend that section 20 read with the definition of "waste management activity" and the various categories of waste associate with mining operations requires a waste management licence.

[97] In paragraph 94 of their founding affidavit the applicants assert the following:

> "On the site of Tendele's mining there are massive stockpiles of waste rock and the production of coal sludge. This is known as slurry and is the liquid coal waste produced by coal mining activities. When the coal is crushed and washed this liquid waste is generated, along with the huge stockpiles of solid waste. Even the waste slurry water is toxic containing mercury. Arsenic, beryllium, cadmium, nickel and selenium."

[98] The applicants contend that Tendele's non-compliance in the respects set out above evidences proof that it is conducting mining operations in Reserve 3 illegally.

[99] Tendele on the other hand avers first, that the applicants have failed in the founding papers to identify any aspect of Tendele's operations that would require a waste management licence and that this ground of alleged unlawfulness is unsustainable on the pleadings; and, second, that even if their pleadings were not defective, Tendele does not require a waste management licence to continue its operations at Somkhele.

[100] I consider that there is some merit in the case made out by Tendele for the reasons set out hereunder:

100.1 A "waste management activity" is defined as any activity listed in Schedule 1 or published by notice in the *Government Gazette* under section 19.[36]

100.2 Section 19 empowers the Minister by Notice in the *Gazette* to publish a list of waste management activities. On 29 November 2013 the Minister published the list of waste management activities that have or are likely to have a detrimental effect on the environment ("the 2013 listing notice")[37]

100.3 The 2013 listing notice contains transitional provisions the purpose of which are 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.

100.4 Regulation 7(1) of the 2013 listing notice provides 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 the *Gazette* calls upon such person to apply for a waste management licence."

[101] From the above it is apparent a person who was conducting a listed waste management activity lawfully as at 29 November 2013 (when the 2013 listing notice

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[36] Section 1 of the Waste Act.

[37] National Environment Management: Waste Act, 2008 (Act No 59 of 2008) Regulations, GN R921, *GG* 37089, dated 29 November 2013.

came into effect) or on 24 July 2015 when the 2013 licence notice was amended to include activities related to residue stockpiles and residue deposits, is entitled to continue conducting such activity without a waste management licence until such time as they are called upon by the Minister by Notice in the *Gazette* to apply for such licence.

[102] I accordingly find that on the available evidence Tendele's mining operations at Somkhele were undertaken lawfully in terms of approved EMP's as already dealt with above. The Minister of Environmental Affairs has not yet called upon Tendele to apply for a waste management licence as provided for in regulation 7(1) of the 2013 listing notice (as amended on 24 July 2015). The Minister of Environmental Affairs has been cited as the fourth respondent in these proceedings. I have no doubt that he/she would have had something to say if it was found that Tendele was acting unlawfully.

Maledu **judgment and parties' submissions**

[103] As I mentioned at the commencement of this judgment counsel were afforded an opportunity of making further submissions in light of the findings in *Maledu* and whether these have any material bearing on the issues in the present matter. Placing reliance on *Maledu* counsel for the applicants made the following submissions which I quote in full here below:

"1. ….

2. The issues which arise in the judgment which are supportive of Applicants' case are the following:

 2.1 The Members of Second Applicant and Third Applicant are Occupiers of Land whose tenure is legally insecure. The protection for such occupiers is confirmed in the Constitutional Court Judgment ("the Judgment") at paras 1 – 5.

 2.2 In the Courts analysis of the MPRDA set out in paragraphs 50 to 59 the following findings are recorded:-

  2.2.1 That Section 22 of the MPRDA provides that a person who wishes to apply for a mining right must simultaneously apply for an environmental approval (para 53).

  2.2.2 A mining right holder is obliged to exercise his rights *civiliter modo* causing the least possible inconvenience (para 58 – 59).

2.3 The importance of the notification and consultation with affected parties was emphasized with reference to the Bengwenyama Minerals case at paragraphs 78 – 81. A fundamental part of the EIA process under NEMA is the consultation process.

2.4 Usually a mining right is a limited real right on the land to which the right relate. It usually only grants the right-holder access to the land. Where the nature of the mining right is invasive (it is submitted that open cast mining is totally invasive) it would intrude totally on the rights of the occupier. In these circumstances the mining-right holder must comply with IPILRA (The Interim Protection of Informal Rights Act 31 of 1996) (Paragraph 101 – 105).

2.5 Similarly, a mining-rights holder must comply with all applicable law which has a bearing on the right, such as planning or zoning law which requires Land Use permission (paragraph 106). This issue was fully argued in the instant case with regard to SPLUMA, the PDA, the AMAFA Act, the Waste Act and NEMA.

2.6 It is also inherent that the actual occupiers must be consulted and deals may not be made on their behalf with Traditional Leaders. (Paragraph 22 and 108).

3. It is submitted that these aspects covered in the judgment support Applicants' case."

[104] I pointed out already that the *Maledu* matter dealt primarily with two competing rights in the context of evictions. The competing rights were those of holders of informal rights to land to occupy and enjoy their land on the one hand and on the other the rights of the holder of mining rights issued in terms of the MPRDA to mine on the same land. The issue thus arose in the context of an interdict application in which the holders of the mining right sought to evict the holders of informal rights to land from their land for mining purposes. The judgment turned largely on the interpretation of section 54 of the MPRDA which the court held provides a mechanism for the resolution of these competing rights, which mechanism must first be exhausted before recourse is had to the courts.

[105] In the present matter the primary issue is whether Tendele had the necessary statutory authorisations to conduct mining operations at Somkhele. Just to recap: the

applicants' complaints were that Tendele had no environmental authorisation in terms of NEMA, no land-use authorisation from any municipality having jurisdiction, no waste management licence and no written approval to damage, alter, exhume or remove any traditional graves in terms of the KZN Heritage Act. The applicants according sought an interdict in the terms set out above. The role and interpretation of s 54 of the MPRDA was never raised in this matter and accordingly plays no role in the relief sought by the applicants.

[106] I agree fully with the submissions advanced by Mr *Lazarus* on behalf of Tendele that *Maledu* has no direct relevance to the issues that arose in the present matter. From what follows it becomes abundantly clear that the applicants' reliance on the findings in *Maledu* is not only misplaced but is rather opportunistic:

106.1 In paragraph 2.1 of the applicants' submissions, the applicants point out that the members of the second and third applicants are occupiers of land whose tenure is legally insecure and the Constitutional Court has now confirmed the need to protect such occupiers. This issue was never in dispute in the present matter. As mentioned above, the applicants sought to interdict Tendele from mining at the Somkhele mine on the basis that Tendele was allegedly mining without the requisite statutory authorisations. The applicants did not allege that Tendele deprived them of their informal rights to land. No such relief was sought against Tendele.

106.2 In paragraph 2.2.1 of their submissions, the applicants refer to the Constitutional Court's discussion of section 22 of the MPRDA which provides, amongst others, that any person who wishes to apply for a mining right must simultaneously apply for an environmental approval. The applicants do not elaborate on how this referral supports their case. As dealt with in this judgment, the requirement to apply for and be granted an environmental authorisation prior to the grant of a mining right was introduced into the MPRDA on 8 December 2014 with the introduction of the One Environmental System. The legislative amendments provide for, *inter alia*, the continuation of mining operations lawfully conducted prior to the amendments. The effect of the transitional arrangements is that Tendele's EMPs are deemed to

constitute sufficient authorisation for its current mining operations and a separate environmental authorisation in terms of NEMA is not required.

106.3 In paragraph 2.2.2 of their submissions, the applicants refer to the Constitutional Court's observation that a mining right holder is obliged to exercise his rights *civiliter modo*, causing the least possible inconvenience. The relevance of the Constitutional Court's observation of this principle to the present matter is unclear as there are no allegations in the applicants' papers that Tendele is not mining *civiliter modo* and no relief is sought by the applicants in this regard. In particular, the applicants' case is that Tendele is mining unlawfully <u>not that it is mining unreasonably</u>.

106.4 In paragraph 2.3 of their submissions, the applicants refer to the Constitutional Court's emphasis on the importance of notification and consultations with affected parties in the grant and exercise of mining rights. Once again, the relevance of this aspect of the Constitutional Court's judgment to the present matter is unclear as none of the relief sought by the applicants is based on any allegation that Tendele did not notify and consult with the applicants or any other affected parties in its application for its mining rights or in its exercise thereof.

106.5 In this regard I must point out that there is not a single reference either in the applicants papers or in their heads of argument to the issue of "consultations" with affected parties as they now seem to be relying on. In fact they allege no breach of the requirements as prescribed either in s 10 or s 22(4)(b) of the MPRDA (2002) in this regard. Neither in their heads of argument nor in oral submissions did the applicants counsel refer to the principles set out in the matter of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 63, relating to consultations with interested and affected parties. The closest that the applicants ever got to the issue of "consultations" was in argument when the words "public participation" were used by Mr Dickson in relation to the 2016 mining rights granted to Tendele.

106.6 In paragraph 2.4 of their submissions, the applicants refer to the Constitutional Court's findings in regard to the Interim Protection of Informal Land Rights Act, 1996 ("**IPILRA**"). There are no allegations in regard to IPILRA in the applicants' papers and the applicants do not seek any relief based on their rights in terms of IPILRA. Consequently, the reference to this aspect of the Constitutional Court's judgment is unclear in the context of the present matter.

106.7 In paragraph 2.5 of their submissions, the applicants refer to the Constitutional Court's confirmation of the principle that a mining right holder must comply with all applicable law which has a bearing on the right "*such as planning or zoning law which requires Land Use permission.*" This issue, the applicants allege "*was fully argued in the instant case with regard to SPLUMA, the PDA, the AMAFA Act, the Waste Act and NEMA*." At no stage ever did Tendele dispute that it was required to comply with all applicable laws which have a bearing on its mining rights. In regard to the applicants' contention that Tendele's mining operations are unlawful because it has no land-use permission from any municipality having jurisdiction, I have found that Tendele's mining operations pre-date the introduction of mining as a land use requiring municipal approval.

Conclusion

[107] Based on the findings made above, I conclude that the applicants have failed to make out a proper case for the relief as claimed or for such other relief as was contended for on their behalf. The applicants have simply failed to put up cogent evidence to support their contentions that Tendele is mining unlawfully and without the requisite authorisations, environmental or otherwise. The various statutes relied on by the applicants create regulatory authorities who are empowered to enforce compliance with the statutes they administer. The applicants have not afforded the authorities concerned the opportunity to fully investigate their complaints before deciding to institute these proceedings. It is one thing to allege a statutory breach, it is quite another to provide proof of non-compliance. The allegations relied on by the applicants were, in my view, rather vague, generalised and unsubstantiated. This was the first problem that the applicants faced.

[108] The second is that some of the statutes they rely on contain transitional provisions and a range of adequate alternative remedies available to address their complaints. Examples of such remedies are for instance to be found in the following provisions:

108.1 Section 28 of NEMA empowers the Directors General of the Department of Environmental Affairs, the Department of Mineral Resources and a provincial head of department to direct a person causing significant pollution or degradation of the environment to cease such conduct. Section 28(12) of NEMA provides that any person may, after giving notice, apply to a competent court for an order directing the Directors General or provincial heads of departments to take any of the steps listed in s 28(4). There is no evidence that the applicants sought to make use of any of these remedial measures or to engage meaningfully with the relevant authorities about Tendele's alleged contraventions and what remedies could be applied.

108.2 The applicants complain that Tendele has never obtained municipal permission to conduct mining or to use the land for mining purposed. However, section 75 of the KwaZulu-Natal PDA provides that developing land contrary to a land use scheme or without prior approval is an offence. The remedy for the commission of such an offence is the service by the municipality of a contravention notice in terms of section 80. The municipality is required to serve such notice if there are reasonable grounds to suspect that a person is guilty of such an offence. If the contravention notice does not result in compliance, the municipality would be required in terms of section 81(2) to serve a prohibition order restraining the illegal activity. The applicants have clearly not attempted to compel the relevant municipalities to invoke these provisions.

108.3 The applicants complain that Tendele has no written approval from AMAFA in terms of section 35 of the KwaZulu-Natal Heritage Act to damage, alter, exhume or remove any traditional graves from their original position. In terms of section 6 AMAFA is empowered to identify, conserve and protect the heritage resources of the province. In terms of section 7(b)(iii) AMAFA is

required to provide for and facilitate community and stakeholder involvement in heritage matters. AMAFA remains the body responsible in the province for issuing approvals in terms of section 35 relating to the alteration, exhumation and removal of traditional graves. There is no evidence from the applicants' side to show that they have engaged with AMAFA about their remedial measures relating to traditional graves. The applicants complaints about traditional graves relates to Tendele's historical conduct in relation thereto which as I said Tendele has openly admitted to. As I have pointed out Tendele now works closely with AMAFA and the affected families to ensure that any relocation of traditional graves take place in accordance with the law.

[109] All in all, I consider that the applicants have not made out a proper case for an interdict. They seem to have adopted a "scatter gun approach" hoping to hit one target or another. As I said their reliance now on the *Maledu* judgment is rather opportunistic given the fact that none of the issues dealt with in that judgment were either raised or dealt with by the applicants in their papers or in argument. It follows that the only appropriate order to be made in this matter is one dismissing the application. As far as the issue of costs are concerned I see no reason why costs should not follow the result.

Order

[110] In the result I make the following order:

The application is dismissed with costs, such costs are to be paid by the applicants jointly and severally and are to include the costs of two (2) Counsel.

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SEEGOBIN J

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