IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 82865/18

DOH:10-12 November 2021

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED.

SIGNATURE

2022/05/04
DATE

In the matter between:

MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	First Applicant
THE TRUSTEES FOR THE TIME BEING OF GLOBAL ENVIRONMENTAL TRUST	Second Applicant
MINING AFFECTED COMMUNITIES IN ACTION	Third Applicant
SOUTHERN AFRICAN HUMAN RIGHTS DEFENDERS NETWORK	Fourth Applicant
ACTIONAID SOUTH AFRICA	Fifth Applicant

And	
MINISTER OF MINERALS AND ENERGY	First Respondent
REGIONAL MANAGER, DEPARTMENT OF MINERAL RESOURCES, KWAZULU-NATAL	Second Respondent
DIRECTOR GENERAL, DEPARTMENT OF MINERAL RESOURCES	Third Respondent
TENDELE COAL MINING (PTY) LTD	Fourth Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fifth Respondent
MTUBATUBA MUNICIPALITY	Sixth Respondent
HLABISA MUNICIPALITY	Seventh Respondent
INGONYAMA TRUST	Eigth Respondent
EZEMVELO KZN WILDLIFE	Ninth Respondent
AMAFA-AKWAZULU- NATAL HERITAGE COUNCIL	Tenth Respondent
MPUKUNYONI TRADITIONAL COUNCIL/MPUKUNYONI TRADITIONAL AUTHORITY	Eleventh Respondent
MPUKUNYONI COMMUNITY MINING FORUM	Twelfth Respondent
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU)	Thirteenth Respondent
NATIONAL UNION OF MINE WORKERS (NUM)	Fourteenth Respondent

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 4 MAY 2022

BAM J

A. Introduction

1. The applicants, relying on the provisions of the Promotion of Administrative Justice Act[1], (PAJA), launched the present proceedings on 15 November 2018, to review and set aside three decisions. The three decisions pertain to the award of the fourth respondent's Tendele Coal Mining's (Tendele) Mining Right and the dismissal of their internal appeal. Owing to Tendele's disregard for the law during the various stages of its application, the applicants say the DMR[2] decision makers should have never awarded the Right. This disregard, according to the applicants, is evidenced from the very paper work that Tendele submitted to the DMR. Ultimately, the applicants contend that their constitutionally guaranteed rights to an environment that is not harmful to their health or well-being, as well as not being deprived of property, were undermined. I begin by introducing the parties.

B. The Parties

2. The first applicant, Mfolozi Community Environmental Justice Organisation (MCEJO), is a not-for-profit association with a constitution, operating within the areas of Mfolozi and Somkhele in KwaZulu-Natal. The second applicants are the Trustees for the Time Being of the Global Environmental Trust. The Trust has the general object of pursuing and

[1] Act 3 of 2000.
[2] Department of Mineral Resources.

supporting environmental causes, with power to bring legal proceedings to advance its objects. The third applicant, the Mining Affected Communities United in Action (MACUA), was formed in response to the need to protect the integrity and interests of the people impacted by mining. The fourth applicant, the Southern African Human Rights Defenders Network (SAHRDN) was established as a strategic response to the shrinking civic space and increase in the systemic and systematic assaults on civil society and human rights defenders across Southern Africa. As such, SAHRDN works to protect human rights defenders, civil society organisations and grassroots movements whose lives are at risk as a result of promoting and defending human rights. The fifth applicant is Actionaid South Africa, a registered non-profit company that works with the youth, grassroots and communities to develop initiatives and campaigns to address poverty, injustice and equality in South Africa. The second to the fifth applicants made common cause with MCEJO, thus, I use the word applicants or MCEJO when referring to the five applicants.

3. The first, second, third, fifth to the tenth respondents took no part in these proceedings. The ninth respondent, Ezemvelo Wildlife KwaZulu- Natal[3], (Ezemvelo), other than filing its answering affidavit, took no part in the proceedings. The application is opposed by the fourth respondent, Tendele, together with the eleventh to the fourteenth respondents. The eleventh respondent, Mpukunyoni Traditional Council, (MTC) which operates as Mpukunyoni Traditional Authority (MTA) is established in terms of section 3 of the Traditional Leadership and Governance Framework Act[4]. The eleventh respondent is constituted by 30 iziNdunas of the 30 izigodi (communities) of the Mpukunyoni area. According to the deponent of the eleventh to the fourteenth respondents, the eleventh respondent represents the entire community of Mpukunyoni area through the 30

[3] This is the body mandated to direct the management of nature conservation within the Province, including protected areas, PAs, and the development and promotion of ecotourism facilities within the PAs. Ezemvelo derives its mandate from the KwaZulu-Natal Nature Conservation Management Act.
[4] Act 41 of 2003.

iZindunas standing as leaders in the respective 30 communities within Mpukunyoni. The twelfth respondent is Mpukunyoni Community Mining Forum, a structure established by Tendele in the Mpukunyoni community at the recommendation of DMR, KwaZulu Natal. The thirteen and fourteenth respondents, the Association of Mineworkers and Construction Union together with the National Union of Mineworkers represent about 90% of the unionised workers employed by Tendele. Since the main contender is Tendele, the mining right holder, I shall use the word respondent or Tendele when referring to Tendele and specify when I refer to any other respondent. Finally, I should point out that in order to assist this court, the parties filed a Joint Practice Note, a comprehensive set of Heads of Argument together with a Table of Concessions. For these, I am immensely grateful.

C. Background

4. A high level detail of the history of this case is needed so that matters are viewed in the correct context. I begin by setting out some pertinent information regarding the Tendele and its rights.

5. The Mining Right is described in the papers as Part of Remainder of Reserve 3, No 158822, Hlabisa Magisterial District, measuring 21 233 0525 hectares, 222 km^2. Tendele, in terms of its Mining Right is authorised to mine the coal within the concession area. The mine is situated at about 23 km west of Mtubatuba and 72 km west of Richards Bay, in the Magisterial District of Mtubatuba, in KwaZulu-Natal. The mine is generally referred to by the local community as the Somkhele mine, named after the place where the mine is situated. Mining in this area began in the mid1880s, albeit by different entities. Tendele itself is no newcomer to mining. It has been mining in Somkhele since 2005/6 and currently holds three Mining Rights. The first Mining Right is in connection with Area 1, which right was granted in May 2007, with the applicable Environmental Management

Plan (EMP) approved in June 2007. Tendele also holds a Mining Right for Areas 2 and 3 converted, which was originally granted in February 2011. The right was amended to include the KwaQubuka and Luhlanga regions in March 2013. The original EMP was approved in March 2011 and amended in May 2012. The present Mining Right covering Areas 4 and 5, the subject matter of these proceedings, was awarded to Tendele on 31 May 2016. Although Tendele holds different licences for the various areas, the mine is conducted as one operation and managed by the same management cohort.

6. With regard to the application process and the statutory requirement to consult I&APs, there appears to be no dispute that virtually all the public facing documents, namely, the Notice issued by Tendele on 20 September 2013 to inform I&APs of the imminence of the Scoping Report, EIA and EMPr processes; the Mining Works Programme, (MWP); and the Background Information Document, (BID), to mention a few, all described the project as an extension of the existing Somkhele mine, involving 32 km^2, as opposed to the massive 222 km^2 that the mining right application covered. Tendele's EMPr was submitted in March 2014 while the Scoping Report was submitted to the RM on 17 October 2013.

7. There is no dispute that Tendele's EMPr was supported by 7 expert studies, with impacts such as air quality, vibration, and climate impact, amongst others, having not been assessed at all. As for the noise impact, Tendele relied on expert studies prepared in 2002 and 2009. I mention that the applicants complain that it was inappropriate of Tendele to rely on outdated studies. They referred to the Western Cape decision of *Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local Government*[5] case where the court rejected outdated studies. In this case, it is not only the age of the studies but the vast area of the land covered by the mining right that makes the applicants

[5] (16779/17) [2020] ZAWCHC 8; 2020 (3) SA 486 (WCC) (17 February 2020).

question their relevance. It is common cause that Tendele commissioned about 27[6] experts studies post the award of the mining right. Of the 27, contend the applicants, only 11 were subjected to public participation. The applicants refer to the *ex post facto* studies in their papers as 'floating studies'. They argue that, given their timing, these studies have no connection to the EMPr. Following on a number of exercises and reports, including the report on financial provision, the Right was awarded to Tendele on 31 May 2016 and the EMP approved on 26 October 2016. I should add before going further that the applicants complain that Tendele is able to demonstrate financial provision for only one of the ten mining sites, contrary to the requirement to make provision for each of the sites. On or about 22 August 2017, the applicants became aware of the extent of the mining right. They lodged their appeal against the grant of the mining right on 31 August 2017. That appeal was disposed of by the Minister, on 15 June 2018, wherein the Minister dismissed MCEJO's internal appeal. The response provided by the Minister gives no indication whether the Minister had interrogated any of the grounds raised by the applicants. The applicants launched the present proceedings on 15 November 2018.

The Application process

8. It is necessary to first describe the application process as provided for in the MPRDA as it was at the time of Tendele's application. In terms of section 22 of MPRDA, any person applying for a mining right must: (i) submit an application in the prescribed manner, accompanied by an EIA and an environmental management programme report (EMPr)[7] with the office of the RM in whose region the land is situated; (ii) if the RM accepts the application, he must within 14 days thereof notify the applicant in writing to (a) conduct an EIA and submit the EMPr for approval under section 39, and (b) notify and consult with

[6] The number may be incorrect but it is common cause that the later studies were somewhere in this range of twenties.
[7] The requirement to submit an EIA and EMPr came with the amendments to the MPRD Amendment Act 49 of 2008, which came into effect on 7 June of 2013. As a matter of policy, the process under sections 22 and 39 run simultaneously.

I&APs within 180 days of receiving the notice[8]; (iii) within 14 days of such acceptance, the RM must make known[9] that an application for a mining right has been accepted in respect of the land in question; and call upon I&APs to submit their comments regarding the application within 30 days from the date of the notice; (iv) if any person objects to the granting of the mining right, the RM must refer the objection to the Regional Mining Development Environmental Committee (REMDEC) to consider the objection and to advise the Minister thereon; (v) Sec 39 of the MPRDA requires the applicant for a mining right to conduct an EIA and to submit an EMPr within 180 days of the aforesaid notice from the RM. The EMPr is the main tool used to mitigate and manage the environmental impacts resulting from the mining operations; (vi) in terms of the MPRDA Regulations[10], an EIA requires the compilation of a scoping report[11] as well as an EIA report[12]. These reports consider the impacts of the proposed activity, the cumulative impacts; the social and cultural impacts of the activity on the environment; and the identification and comparative assessment of the land use alternatives; arrangements for monitoring and managing identified impacts; and information on the scientific integrity of the information contained in the reports; and, (vii) finally, a scoping report, in relation to a proposed mining operation, must: (i) describe the methodology applied to conduct the scoping (b)... (f) describe the process of engagement of the identified I&APs, including their views and concerns; and (g) describe the nature and extent of further investigations required in the environmental impact assessment report...'

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[8] Sec 22(4) MPRDA.

[9] Sec 10(1) of the MPRDA: The relevant Mineral and Petroleum Resources Development Regulations (the MPRDA Regulations), Reg 527 of GG 26275 of 2004, state that the notice referred to in section 10(1) must be placed on a notice board of the Regional Manager or designated agency, as the case may be, that is accessible to the public. The RM must also make known the application by at least one of the following methods, publication in the applicable Provincial Gazette, notice in the Magistrates Court in the magisterial district applicable to the land in question or advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates is situated.

[10] Regulation 48.

[11] Regulation 49.

[12] Regulation 50.

Tendele's Mining Right Application

9. About nine years ago, on 13 June 2013 to be precise, Tendele submitted its application for a mining right to the Regional Manager (RM) of the Department of Mineral Resources in KwaZulu-Natal. On 9 September 2013, the RM notified Tendele of his acceptance of its application, in writing, and called upon Tendele to: (i) provide a scoping report not later than 17 October 2013 or within a period of 30 days from date of his letter; (ii) upload a copy of the EIA and EMP on or before 23 January 2014; and (iii) notify in writing and consult with land owner(s) or lawful occupier(s) and all I&APs and upload the results of such consultation on or before November 2013 or within 60 days from date of the RM's letter. The RM duly published the notice by placing it in the Magistrate's Court for the District of KwaHlabisa in line with regulation 3(3) and described the land in question as, "Part of Rem Reserve 3, no 15822, Hlabisa Magisterial District" and invited all I&APs to submit their comments within 30 days.

10. I mention that the applicants take issue with both the content of the notice published (the manner in which the land was described in the notice) and the place where the notice was published by the RM. In this regard, the applicants state that the RM failed to follow the MPRDA Regulations. The regulations oblige the RM to make known the application by at least one of the following methods: publication in the applicable Provincial Gazette[13], and by advertisement in a local or national newspaper[14] circulating in the area where the land or offshore area to which the application relates is situated. The objective is to inform I&APs that an application for a mining right has been received and invite them to participate in the process by submitting their comments. This objective, according to the applicants, was frustrated. They cite *inter alia*: (i) the vast area of 21 233.0525 hectares,

[13] Regulation 3(3)(a).
[14] Regulation 3(3)(c).

and the scale of the application's subject matter; (ii) the significant environmental impacts of the proposed activity; (iii) the rural character of the local community; and (iv) the local community's high levels of illiteracy. They say that the notice could not have reasonably alerted the I&APs of the specific location and the vast area of the proposed mining right. In response to this specific complaint, Tendele resisted it because it could not plead to this ground as it was raised for the first time in the applicants' Heads of Argument. Tendele adds that any complaints related to the vast area that the Mining Right covers now pale into oblivion give the decision to abandon 92% of the right. I now make reference to some of Tendele's papers as filed of record.

Tendele's published its Notice of Commencement of EIA and EMP process

11. On 20 September 2013, Tendele published a notice of commencement of their EIA & EMP process in the Zululand Observer in both English and isiZulu. This notice says nothing about the size of the land covered by the mining right. Thus, the applicants argue that this notice was misleading. The notice reads:

> 'Notification of Commencement of Environmental Authorisation under the Minerals Resources Petroleum Act, (Act 28 of 2002) for the expansion of Mining activities at Somkhele Anthracite Mine near Mtubatuba, KwaZulu-Natal.
>
> Notice is hereby given of the commencement of an Environmental Impact Assessment (EIA) and Environmental Management Programme, (EMP) for the proposed expansion of the existing mining operations at Somkhele Anthracite Mine located approximately 52 kms north-north east of Richards Bay in KwaZulu-Natal. GCS (PTY) LTD has been appointed as independent consultants on behalf of the applicant, Tendele Coal (Pty) Ltd, the owners of Somkhele Anthracite Mine. This is in compliance with Minerals and Petroleum Resources Development Act...
>
> The proposed mine expansion will extend operations to the north of the existing mining operations within the tribal land administered by the Ingonyama Trust. The expansion will incorporate open case mine development and associated road access infrastructure. No new washing plants will be developed as the existing infrastructure will be utilised.... All interested and/or affected parties (I&APs) are invited to register in writing with GCS in order to receive further information and correspondence on the project including notification and updates. I&APs are further invited to submit written comments related to the project together with their name, contact details...'

Tendele's Background Information Document

12. On the same day of 20 September 2013, Tendele distributed its background information document, BID. The BID's purpose, as professed in the document, was to provide 'all interested and affected parties (I&APs) with information about the Somkhele Mine Northern Expansion and to introduce and explain the Environmental Impact Assessment (EIA) and the Environmental Management Plan that forms part of the Mining Right application' as required by the MPRDA. The BID also says nothing about the 212 km^2 right. Instead, it states that the 'proposed mining area consists of TEN (10) different regions where coal reserves have been discovered. Table 1 outlines the extent of the different areas.' The BID then mentioned the areas (in km^2) as Machibini (5.3755); KwaQubuka North (2.81893); Emalahleni (2.5876); Mahujini (1.5 168); Ophondweni (5.5585); Tholukuhle (3.2795); Gwabalanda (6.5907); Mvutshini East (2. 038); Mvutshini Central (1.631)1; and Mvutshini West (1.1639).

13. The applicants argue that the BID could not have reasonably alerted I&APs that they are to participate in the process. Firstly, it was published only in English; secondly, it refers to the 32 km^2 made up of the ten sites. Tendele argued that given its abandonment application, flaws relating to the size of the mining right are no longer relevant as the area sought to be retained is about 8% of the original extent applied for.

14. The defective public notices issued by Tendele during September 2013 were only a precursor to the scoping phase, where the wheels came off. The wheels came off when the regional manager DMR, KwaZulu-Natal (RM), allowed Tendele's consultants, GCS, to dictate to him how Tendele intended to carry out the exercise that would lead to its Scoping Report, instead of insisting on compliance with the law. Indeed, the record shows that the RM accepted Tendele's Scoping Report, even though it had been compiled

without consultation with interested and affected parties (I&APs) and without providing proof of the information shared during the consultation, which was clearly in violation of the law.

Tendele recants after filing its answering affidavit

15. At first, Tendele fiercely resisted the relief sought by the applicants. With the passage of time, and taking into account the rising tensions in the Somkhele area where the mine is located, Tendele decided to table certain carefully considered concessions, including its pursuit of an application in terms of section 102 of the Mining and Petroleum Resources Development Act[15] (MPRDA), pursuant to its decision to abandon the majority of the 222 km² mining right. Tendele took a decision to abandon approximately 195 km² or about 92% of the existing mining right.

16. Pursuant to Tendele's concessions, it is now common cause that the decision of the Minister of Minerals and Energy, the first respondent, of 15 June 2018, in which the Minister dismissed the internal appeal lodged by the applicants; the decision of the Director General, (DG), the third respondent, of 31 May 2016, in which the DG granted the said Mining Right to Tendele; and the decision of the Regional Manager of the Department of Mineral Resources, (RM), the second respondent, of 26 October 2016, in which the RM approved Tendele's Environmental Management Programme (EMPr) in terms of section 39 of the MPRDA, were all unlawful and fall to be declared invalid.

17. It is necessary to affirm here and now that the central question of legality of the Minister's, the DG's and the RM's decisions is no longer the focal point of this judgement. That part of the case has been conceded already. What remains is the determination of

[15] Act 28 of 2002.

the extent to which the remainder of the grounds not conceded by Tendele need to be determined as well as the just and equitable remedy.

D. Tendele's concessions and abandonment

18. I consider it appropriate to first set out, in broad terms, Tendele's concessions and abandonment.

19. In 2021, having reassessed its position, Tendele accepted that there are several grounds of review, which it is not in a position to defend. In the first instance, Tendele accepts that there is no evidence that the Minister consulted with the Department of Environmental Affairs as required by the now repealed section 40 read with section 39 of the MPRDA. Tendele also accepts that the public participation process conducted during its application process was imperfect. It says the primary defects in the public participation process arose because the mining right area applied for and granted was larger than the areas publicised during the public participation process. Thirdly, Tendele accepts that the Scoping and the Environmental Impact Assessment (EIA) process were deficient in various aspects. In particular, the studies conducted to assess the impacts of the proposed extension of the mine, including the specialist studies, did not adequately cover the entire area included in Tendele's Mining Right application and certain impacts that had to be assessed were not assessed at all.

20. In relation to the Environmental Management Programme (EMPr), Tendele accepts MCEJO's contention that its internal appeal against the grant of the mining right must be considered to be an appeal against both the grant of the Mining Right and the approval of the EMPr. In substance and effect, the Minister was considering MCEJO's complaints against the decisions of the DG and the RM, and dismissed both appeals. These

concessions, according to Tendele, render it unnecessary for this court to consider the constitutional challenge to section 96(3)[16] of the MPRDA. The concessions also make it unnecessary to consider whether MCEJO has made out a case in terms of section 7(2)(c) of PAJA for condonation for their failure to lodge an internal appeal against the approval of the EMPr.

21. Against the concessions, as I shall show, Tendele implores the court to set aside the decision of the Minister and remit the appeal back to the Minister for reconsideration together with any directives the court may consider necessary. As to the numerous irregularities in the process leading up to the grant of the Mining Right, Tendele contends that all those can be addressed in the course of the wide appeal before the Minister. Tendele submits that all the new material, expert reports, as well as comments, inputs, and submissions by MCEJO and other I&APs can be taken into account in the appeal process. With regard to the failure to make adequate financial provision for each of the retained areas, as the law requires, Tendele submits that, in any event, the mining right holder is required by law to assess annually, whether the financial provision is adequate and top up where necessary. Tendele suggests that this deficiency too can be addressed be cured in the course of the wide appeal.

22. The applicants are indifferent to Tendele's concessions and abandonment. They contend that Tendele's abandonment strategy merely obfuscates the issue of the size of its mining right *visa-a-vis* the area that was assessed for environmental impacts and management. As a consequence, the applicants, notwithstanding the abandonment, persist with some of their grounds. They are: (a) the mining area; (b) the defects in the Public Participation process; (c) non-compliance with section 40 of the MPRDA. In this

[16] As part of the relief it sought in its Notice of Motion, MCEJO sought to challenge the constitutionality of section 96 (3) of MPRDA.

regard, the applicants contend that the RM failed to take into consideration the input from the Department of Forestry and Fisheries, DAFF; (d) failure to obtain consent in terms of the IPILRA (Interim Protection of Informal Land Rights Act[17]; (e) the defective Scoping and Environmental Impact Assessment Processes; and (f) the failure to make adequate financial provision.

E. Issues

23. Both parties agree that the grounds based on IPILRA must be determined. MCEJO, as I had mentioned early in this judgement, persists with the remainder of its grounds. The last ground, according to Tendele, was not raised by the applicants in their HOA, while the ground dealing with failure to take into account the comments of DAFF was only raised for the first time in MCEJO's HOA. Thus, Tendele was not afforded the opportunity to plead. The issue involving financial provision however, was fully canvassed by both sides during argument. As such, nothing precludes this court from entertaining it[18]. Whether this court must necessarily determine it is another issue. The record speaks for itself in this regard and suggests that Tendele did not make financial provision for each of the areas it seeks to retain.

24. I am of the view that it is critical for this court to determine three grounds, namely: (i) the defective Scoping and EIA; (ii) the ground based on IPILRA; and (iii) defects in public participation. The ground dealing with defective scoping and EIA is, in my view, integrally

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[17] Act 31 of 1996.

[18] *Minister of Safety & Security v Slabbert* 668/2008)[2009] ZASCA 163 (30 November 2009]) at paragraphs 11-12:

'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. [12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd, this court said:
'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue'.

intertwined with the ground dealing with defects in public participation. As such I dispose of the two grounds immediately here below.

(i) Defective Scoping and Environmental Impact Assessment Processes & (ii) Defects in Public Participation

25. The applicants argue that it is common cause that the Scoping Report / EIA processes do not comply with regulation 49. They further add that the public notices issued by Tendele limited the area to only 32 km². The processes are not only non-compliant for the bigger area of 222 km², they are non compliant even for the three areas for which the mine seeks to reduce its activities. These are Emalahleni, Ophondweni and Mahujini. Tendele accepts that its Scoping and the EIA processes were deficient in various aspects, and so was the public participation process. In particular, the studies conducted, to assess the impacts of the proposed extension of the mine, including the specialist studies, did not adequately cover the entire area included in Tendele's Mining Right application and certain impacts that had to be assessed were not assessed at all. Tendele, however, states that with regard to the retained areas, it conducted rigorous and comprehensive consultations. For this reason, it is necessary to determine these grounds.

26. What is a Scoping Report /EIA process and where does it fit in the application process? The MPRDA regulations do not define what a Scoping Report/EIA is. Rather, they state that an EIA is a process that results in the compilation of a Scoping Report and an EIA Report. The regulations further state that a Scoping Report in relation to a proposed mining operation must contain, inter alia, the following:

'(a) describe the methodology applied to conduct scoping; (b) the existing status of the environment prior to the mining operation; (c) identify and describe the anticipated environmental social and cultural impacts, including the cumulative effects where

applicable; (d) describe the process of engagement of identified interested and affected persons, including their views and concerns; and describe the nature and extent of further investigations required in the environmental impact assessment report.'

27. I had earlier indicated that the wheels came off during the scoping exercise. In their founding affidavit, the applicants contend that Tendele's engagement of IA&Ps failed to meet the mandatory requirements of Regulation 49(1)(f) and the DMR Guidelines for Compilation of a Scoping Report[19], in that Tendele failed to identify the landowners, the lawful occupiers of the land or any other IA&Ps. Tendele, according to the applicants, also failed to keep a list for submission to the RM. Tendele merely identified the lawful occupiers as 'the Zulu Nation as determined by the Ingonyama Trust' and further relied upon a list of IA&Ps it had developed in previous mining applications. This approach, the applicants aver, was inadequate and there are obvious examples of IA&Ps who were excluded by Tendele's list of IA&Ps. Tendele, according to the applicants, failed to consult and submit proof of such consultation meetings with landowners, lawful occupiers of the land and IA&Ps (which include the community per paragraph G3 of the Consultation Guidelines).

28. The Scoping Report calls for answers as set out in the MPRDA regulations and the Consultation Guidelines. An extract of Tendele's Scoping Report is provided here below:

'Question 3.3 Specifically confirm that the community and the identified interested and affected parties have been consulted and that they agree that the potential impacts identified include those identified by them:

[19] Guidelines issued by the DMR For the Compilation of a Scoping report with due regard to Consultation with Communities and Interested and Affected Parties

'The mine has developed a list of I&APs through various previous Mining Right applications and EMP amendments. This I&AP list is presented in Appendix A. A newspaper advert was placed in Zululand Observer (Appendix B) as well as the Isolezwe, a Zulu medium newspaper informing people of the impending project. The communities will be engaged with through existing traditional structures. The Indunas from the various mining areas will assist in facilitating community meetings. There has to be sensitive in how information is assimilated throughout the communities. The process needs to ensure that people avoid having false expectations on when mining will commence and the extent of the impact within the area. (Own underline)

3.6 Provide a list and description of potential impacts identified on the socio-economic conditions of any person on the property and on any adjacent or non adjacent property who may be affected by the proposed prospecting or mining operation:

'Most economic activities are limited to subsistence farming. There have been no additional businesses and industries identified in the area. Potential socio- economic impacts are included in Table 3-2.'

5 Provide a description of the process of engagement of the identified interested and affected parties, including their views and concerns.

'The mine has developed a list of I&APs since the inception of the mine in 2002. The I&AP list has continually been updated as new people become interested in activities at Somkhele. A full list of people who will be involved in the project is presented in Appendix A... (Own underline)

5.1 Provide a description of the information provided to the community, landowners, and interested and affected parties to inform them in sufficient detail of what the prospecting or mining operation will entail on the land, in order for them to assess what impact the prospecting will have on them or the use of their land.

'The mine consults with communities through Mpukunyoni Traditional Authority, Izinduna, Traditional Councils and participates in development structures and forums such as the municipality's IDP and Local Economic Development (LED) Forums. The mine reports on a monthly basis to the Mpukunyoni Traditional Authority and holds monthly meetings with the Izinduna. High level quarterly meetings are held with the municipality.'

5.2 Provide a list of which of the identified communities, landowners, lawful occupiers, and other interested and affected parties were in fact consulted.

'Consultation has yet to be concluded. Please refer to Appendix A for the I&APs that will be included in the consultation process. Appendix C and Appendix D show the Izindunas and Ward councillors identified for the consultation. The traditional structures for the region will be followed and will involve all the Izindunas who represent the various regions. (Own underline)

5.4 Provide a list of their views raised on how their existing cultural, socio-economic and biophysical environment potentially will be impacted on by the proposed prospecting mining operation:

'Consultation has yet to be concluded. Consultation will include consulting the existing I&APs, local authorities and traditional authorities...These channels include various Izindunas from different areas.

5.5 Provide a list of any other concerns raised by the aforesaid parties.

Consultation has yet to be concluded.

5.6. Provide the applicable minutes and records of the consultations:

'Public Meetings have been scheduled for the beginning of November. Minutes will be provided within the consultation report. '

29. The following appendices were attached to the Scoping Report: Appendix A is a list of names and contact numbers of people whom cannot possibly be residing in Mpukunyoni, with last names such as Vorster, Barker, Fishers, Parsons, with the exception of three African names. These are the people Tendele referred to as the full list of the people who will be involved in its Scoping exercise. Appendix B is the advert placed in Zululand Observer on 20 September 2013[20] regarding the imminence of the EIA/EMPr. Appendix C is a list titled iziNduna with names and contact numbers. Appendix D is a list titled Ward Councillors and E is a copy of the BID.

[20] See paragraph 19 of this judgement.

30. As it turned out, the RM was not satisfied that Tendele's Scoping Report/EIA met the requirements of the law. Thus, on 17 December 2013, the RM issued a directive in terms of section 29 of MPRDA. The relevant parts of the directive are reproduced here-below:

> '1. The fauna and flora is reflective of a desktop analysis. There must be a site specific investigation indicating what is found on each of the proposed opencast areas...3. The consultation process is deemed to be incomplete in relation to identified Interested and Affected parties. Kindly provide a database of all people directly affected by the proposed mining, including those that are to be relocated and those adjacent to the mining area. 4. There must be proof of consultation with the individual households affected by the proposed operation. There must be proof that they were provided with relevant information in the appropriate language representative of the people in the area. The relevant information must include information on the proposed activities, potential impacts on the community and proposed mitigation measures. This office also requires proof that the description of the environment, potential impacts, proposed mitigation measures and closure objectives were compiled or developed in consultation with the interested and affected parties. It is imperative in relation to the potential sites of graves and other sites of cultural/heritage value which may be known to the community...'[21]

31. On 7 January 2014, Tendele's consultants wrote back to the RM with reference to the directive. The relevant aspects regarding Tendele is set out in this extract:

> 'As the consultant your directive ... will be complied with, with the following exceptions. The mining areas are extensive and in many areas mining will not commence within 10 years or more. The identification and engaging of specific households that will be impacted upon cannot be complied with for the following reasons. 1. The demographics collected and consultation will not be accurate by the time mining commences... 3. Managing people's expectations is hugely significant. It is imperative that information portrayed is accurate and concrete. Any alteration to information provided will result in mistrust towards the mine. ...4. Dealing and empowering local leadership structures is a policy which Somkhele has developed well within the last 5 years. All communication with those who are likely to be relocated must go through the relevant channels. 5. Relocation of infrastructure can only commence once all those affected have agreed to conditions presented by the mine. Historically people have moved into

[21] MCEJO gained sight of the RM's directive of 17 December 2013, for the first time, upon Tendele filing their answering affidavit. Nonetheless, the applicants had independently raised the defects in Tendele's Scoping report without seeing the RM's Directive. See Replying Affidavit Caselines A1641, JDP 17.

areas where mining is planned with intention of claiming compensation with the mine...'[22] (own underline)

32. During argument, counsel for the applicants made reference to an e-mail emanating from GCS dated 2 July 2014 to Ezemvelo Wildlife[23]. This email was preceded by a letter from Ezemvelo setting out several concerns about the proposed extension of the Somkhele mine[24]. In the letter, GCS informs Ezemvelo that 'the Scoping phase under MPRDA does not require input from I&AP.' This is after the RM had issued the Section 29 Directive and after GCS had replied to the RM on 7 January 2014. It suffices to say that Tendele was misguided in its view. This misdirection is adequately reflected in the answers they provided in their Scoping Report.

33. That is not all. Various paragraphs of the Scoping Report/EIA called for the description of the 'information provided to the community, landowners, and interested and affected parties to inform them in sufficient detail of what the prospecting or mining operation will entail on the land, in order for them to assess what impact the prospecting / mining will have on them or the use of their land'. As evidenced by the Scoping Report, Tendele provided nothing of that sort. Its answers to the Scoping Report were vague, evasive and irrelevant with statement such as, 'consultation has yet to be concluded', 'Public Meetings have been scheduled for the beginning of November. Minutes will be provided within the consultation report.' Yet in Tendele view, the scoping phase required no public participation[25]. This was a fundamental breach of the law with regard to public participation. Tendele's attempt to justify their exclusion of the groups aimed at by the regulations in their letter of 7 January 2014 to the RM was nothing short of egregious. In any event, Tendele had already unduly limited the public's participation through its

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[22] Annexure JDP18 Caselines: A1647.
[23] Caselines A191.
[24] SD 6: Caselines pages A184-5.
[25] See paragraph 32 above.

defective notices. This is evident from the very first notices it issued during September 2013, namely, the Notice of Commencement of EIA and EMP processes; the MWP; and the BID (which was published only in English), all of which described the project as covering a small fraction of the 222 km² of the mining right. The fact that some people participated later in the EMPr process does not address the material defects. They were left out during a critical process of scoping. The words of the court in *Cape Town City v South African National Roads Agency Ltd & others*, are on point:

> 'The resultant breaches of the principle of legality are stark, especially when they are considered cumulatively. It is of special concern that the nature of the unlawful conduct that has been identified in these proceedings goes in material part to a failure to give proper effect to the right of public participation. That is something that is fundamental to the effective expression of everyone's right to administrative action that is lawful, reasonable and procedurally fair. It also a feature of the decision-making that puts it strikingly at odds with the founding values of accountability, responsiveness and openness, which are meant to underpin democratic government in this country and critically distinguish it from the authoritarian system that prevailed in the pre-Constitutional era.'[26]

34. With regard to Tendele's contention that it conducted rigorous and comprehensive consultations in the retained areas, there is no evidence on record that there was a different Scoping Report/EIA for those areas. The Scoping Report/EIA failed to meet the demands of Regulation 49 of the MPRDA regulations and the Guidelines on Compilation of Scoping Reports. The date of submission of the Scoping Report is 17 October 2013. I will return to the significance of the date.

35. It is appropriate at this point to refer to what the courts have said of the need to consult landowners, lawful occupiers and I&APs. In *Bengwenyama Minerals (Pty) Ltd and Others* v *Genorah Resources (Pty) Ltd* and *Others*, albeit the court in that instance was dealing with the issue in the context of a prospecting right, it said:

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[26] 2015 (6) SA 535 (WCC), at paragraph 205.

'These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen...

One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.

Another more general purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. **The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.**'[27] (own emphasis)

36. The Rule 53 record filed by the State Attorneys' Office was supplemented four times. Despite reasonable effort, one could not find any evidence that there had been any corrective action undertaken by Tendele post the RM's directive. It would appear that the

[27] 2011 (3) BCLR 229 (CC) (30 November 2010) at paragraphs 63; 65

RM relented to Tendele's dictates of how they proposed to approach the scoping exercise and accepted their Scoping Report, flawed at it was. This was an affront to the law and it should have never been allowed. I conclude that Tendele flouted the law with regard to public participation by unduly limiting the extent of the mining area to the specific sites. Further, the fact that some people participated during the EMPr stage does not cure the fact that those people were left out during the critical phase of scoping.

37. The attitude displayed by Tendele during the scoping phase of its application process is offensive. It portrays Tendele as an 'unbridled horse' that showed little or no regard for the law. As for the stereotyping comments in GCS' letter[28], the following remarks made by the court in *Hoffmann v South African Airways*, albeit in a totally different context, are apposite to mention:

> 'Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected....Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place.'[29]

(iii) Failure to obtain consent as required by IPILRA

38. With that setting of how the Scoping/EIA process unfolded, it is now time to consider the ground relating to IPILRA. Both Tendele and MCEJO agree on what I will loosely refer to as the jurisdictional requirements for the application of the IPILRA, are all met in this case. Although the scoping phase demonstrated short comings with regard to consulting with I&APs, counsel for Tendele was adamant that the concessions Tendele has made, do not bleed over to the process of obtaining consent as envisaged in IPILRA. I now proceed to set out each of the parties' case.

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[28] See extract from GCS' reply to the RM, paragraph 31 this judgement.
[29] *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17, paragraphs 34 & 37.

The applicants' case

39. The applicants accuse Tendele of riding roughshod on the rights of its members. They raise the following:

(i) Their members were neither consulted nor did they consent to the deprivation of their communal rights to the land. They attached several affidavits deposed to by their members stating that they were not consulted at all by Tendele.

(ii) From the uncontested affidavits, it is plain that the consent of the actual rights holders was never sought by Tendele nor the Mpukunyoni Traditional Council (MTC). On this basis, the DMR decision makers, in granting the impugned mining right, failed to consider that a material procedure aimed at protecting their constitutionally entrenched rights had not been complied with.

(iii) The applicants accept that in the case of communal land rights, the community can be deprived of their constitutionally entrenched rights at a meeting where the disposal of their rights would be tabled and only by a majority vote of the right holders present or represented at the meeting. They state that their members were not notified of a meeting where the disposal of their rights would be discussed and, Tendele does not even allege that such a meeting occurred. It merely refers to the traditional council having held a meeting itself, and points to the council's recordal that all relevant persons had been consulted. They add, that even if it were true, which it is not, Tendele has not complied with the peremptory provision of holding a meeting with sufficient notice with an opportunity to participate.

(iv) They add that other than making sweeping statements, Tendele has placed no proof that the requirements of IPILRA were complied with.

(v) The applicants add that section 2(3) requires that when there is a community decision to deprive a person of land rights, the community shall pay appropriate compensation. There is no discussion of compensation in the Traditional Council's

resolution. The resolution is not compliant with section 2(3) and the consent obtained by Tendele does not meet the requirements of IPILRA as interpreted by the Constitutional Court in *Maledu*[30].

(vi) Finally, MCEJO contends that the traditions and customs of the community do not allow the Inkosi to made decisions that concern the households without involving or talking to the members of the individual households.

(vii) Finally, during argument, counsel for the MCEJO referred to the fact that by the time Tendele submitted its EMPr, it had only 7 expert studies, and raised the pertinent question of material information. In this regard counsel asked the question, '*what did the Inkosi consent to*?' In other words, what material information was provided by Tendele prior to the Inkosi granting consent.

Tendele's case

40. Tendele placed two documents before this court. They are: (i) A Resolution of the MTC signed by the late Inkosi Mzokhulayo Mayson Mkhwanazi, (late Inkosi); and (ii) an affidavit deposed to by a Mr Musawenkosi Qhina Mkhwanazi (Mr MQM), a member of MTC. Mr MQM served as the deputy chairperson of the MTC when the consent was granted to Tendele to mine in Areas 4 and 5, on 7 February 2013. The MTC, as I had earlier mentioned, functions as the MTA and is constituted by 30 iziNdunas of 30 communities in Mpukunyoni area, representing about 220 000 community members. I shall soon refer to the content of the affidavit.

41. Tendele says that it was not required to obtain consent from every individual holder of an informal right to land within the Areas 4 and 5. It did, however, obtain consent from the MTA, which it says, is the legally recognised traditional authority that has the authority

[30] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* CCT 51/13) [2013] ZACC 45; (12 December 2013).

to represent the Mpukunyoni community. Tendele adds, with reference to the affidavit, that according to customary laws and practices of the Mpukunyoni community, the late Inkosi, who was at the relevant time the chairperson of the MTA had the authority to allocate land or grant rights in land (including the right granted to Tendele to mine on the land) on behalf of the Mpukunyoni community.

42. Tendele submits that section 2 of IPILRA draws a distinction between deprivation of an informal right to land on the one hand, and on the other, the disposal on of a right to land. It is only where, so the submission goes, the deprivation of a right to land is caused by the disposal that the obligation to compensate as contemplated in section 2(3), arises. It is only where a 'decision to dispose of any such right', is to be taken that the deemed requirement — set out in section 2(4) — (i) that such decision may only be taken by a majority of the holders of such rights present or represented (ii) at a meeting convened for the purpose of such disposal and of which (iii) they have been given sufficient notice, and (iv) in which they have had a reasonable opportunity to participate, arises. Simply according to Tendele the requirements of section 2(4) of IPILRA will only arise when the deprivation is caused by a disposal.

43. Tendele adds that since the grant of a mining right does not extinguish the right of a landowner or any other occupier of the land in question, and at most constitutes a deprivation to such landowner, occupier or holder of an informal right, neither compensation nor a decision of the majority of the holders of such rights at a duly convened meeting is required.

44. For completeness, I should add Tendele addressed the allegation made by the applicants on the authority of the Inkosi or the Council regarding making a decision without

consulting the individual households. Tendele dealt with this allegation and addressed the law on mutually destructive version as set out in *Stellenbosch Farmers' Winery Group Limited and Stellenbosch Farmers' Winery Limited* v *Martell & Cie SA*[31]. I am persuaded that a decision can be made on this point of IPILRA based on Tendele's own version and I now proceed to do so. Thus, there is no need to traverse the merits of the mutually destructive grounds raised by the parties.

Interpretive approach

45. This case implicates section 25(6) of the Constitution of the Republic. The section reads:

> 25 (6) 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

46. Section 2 of IPILRA deals with "Deprivation of informal rights to land" and it reads:

> "(1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.
>
> (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
>
> (3) Where the deprivation of a right in land in terms of subsection (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any person who is deprived of an informal right to land as a result of such disposal.
>
> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate."

[31] Case No: 429, 06 September 2002, at paragraph 5.

47. The Constitutional Court in *Minister of Mineral Resources and Others* v *Sishen Iron Ore Company (Pty) Ltd and Another* said:

'It is a fundamental principle of our law that every statute must be interpreted in a manner that is consistent with the Constitution, insofar as the language of the construed provision reasonably permits. In addition, section 39(2) of the Constitution enjoins every court when interpreting legislation to promote the spirit, purport and objects of the Bill of Rights. This Court has described the principle as a "mandatory constitutional canon of statutory interpretation". In Phumelela Gaming and Leisure Ltd, Langa CJ said:

"A court is required to promote the spirit, purport and objects of the Bill of Rights when 'interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights."'[32]

48. In *Maledu and Others* v *Itereleng Bakgatla Mineral Resources (Pty) Limited and Another:*

'As this Court made plain in Goedgelegen, albeit in a different context, the purpose of the legislation underpinning the provisions being interpreted plays a critical role in statutory interpretation. There, Moseneke DCJ emphasised that:

"It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices 'in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation."

'Finally, section 233 of the Constitution enjoins every court to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law...

'Section 211 of the Constitution provides:

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[32] (CCT 51/13) [2013] ZACC 45; (12 December 2013), at paragraph 40.

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[33]'

49. Also relevant to the circumstances of this case is the caution sounded by the Constitutional Court, in *Daniels* v *Scribante and Another*:

'..."The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in *Thoroughbred Breeders' Association* v *Price Waterhouse*, the SCA has reminded us that:

'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.'[34]

50. The mischief sought to be addressed with the promulgation of IPILRA and how IPILRA is to be interpreted is elegantly captured in *Maledu* in the passage set out immediately below. I am persuaded that looking for different words to express the same thing would be supererogatory:

'The general principles of statutory interpretation canvassed above have three implications for how IPILRA must be read and understood. First, the purpose of IPILRA, which must be scrutinised, is not hard to find for IPILRA itself spells it out. It is to provide for the protection of informal rights to and interests in land that were not adequately protected by the law because of racially discriminatory laws of the past. Second, the provisions of IPILRA have to be interpreted benevolently in order to afford holders of informal rights to land the fullest possible protection. Third, during the interpretative exercise the mischief that IPILRA seeks to remedy must be kept uppermost in the mind. Allied to this is the constitutional imperative to construe legislation in a manner that is consistent with the Constitution.'[35]

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[33] *Maledu* note 30 *supra* paragraphs 45, 46 and 48.
[34] (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017) at paragraph 28.
[35] note 28 *supra* at paragraph 63.

51. I deal with Tendele's defence in three ways. I start with a disturbing point that since 'the grant of a mining right does not extinguish the right of a landowner or any other occupier of the land in question', the question of compensation does not arise. According to Tendele's interpretation of section 2(3) of IPILRA, compensation arises only when deprivation is caused by a disposal. Likewise, the deemed requirements in section 2(4) are triggered only when the deprivation is caused by a disposal.

52. Upfront, I am not persuaded that this interpretation embraces and advances the objects set out in section 25(6) of the Constitution. For one, it is true that the grant of a mining right does not extinguish the landowner's or occupier's rights, the Constitutional Court in *Maledu* said as much. But the context in which the Court made these remarks must be understood to avert misdirection. The dispute in *Maledu* centred around the lawfulness of eviction of persons who occupied certain farm land, as envisaged in IPILRA, and to which the mineral right held by the respondents related. The respondents contended that whilst the award of a mining right — as set out in section 23 of MPRDA — does not amount to expropriation as understood in the legal sense of the word, the effect of the grant of the mineral right and its practical effect is that it deprives the landowner and or lawful occupier of certain incidents of their rights to ownership or occupation.

53. The respondents in *Maledu* readily accepted that they could not mine while the applicants remained on the farm. The court agreed that given the intrusive nature of the mining right, there can be no doubt that when exercising his mining rights, the mining right holder would intrude into the rights of the owner or occupier. The more invasive the nature of the operation, the greater the extent of subtraction to the landowner's dominium it will entail. However, because the respondents have a valid mining right, it did not mean that the applicants are occupying the land in question unlawfully because, the existence of a

valid mineral right — which the court assumed in favour of the respondents — does not extinguish the rights of the landowner or any other occupier of the land in question. It is in that sense that the court's remarks must be understood.

54. Just because a party holds a mineral right in relation to land, it does not mean the occupiers or owners of the land to which the mineral right relates, are occupying the land in question unlawfully, because their ownership or right to occupy would not have been extinguished by the grant of a mineral right.

55. The court in *Maledu* went on to reason:

> 'A somewhat curious feature of IPILRA is that whilst it provides that no person may be deprived of any informal right to land without consent, it does not itself spell out what constitutes a deprivation. The Concise Oxford English Dictionary defines the verb "deprive" as meaning: "Prevent (a person or place) from having or using something. The noun deprivation is defined as, 'The damaging lack of basic material benefits; lack or denial of something considered essential". This, to my mind, is the definition that should be adopted for purposes of section 2 of IPILRA.
>
> Before Mkontwana, this Court had earlier, in the context of section 25(1) of the Constitution, said that:
>
> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned." '[36]

56. Tendele's interpretation appears to lose sight of the fact that it is the interference with the use, enjoyment or exploitation or diminution to the occupation or ownership that brings about compensation. For this reason, how the deprivation arises should not water down the compensation element provided for in IPILRA. Tendele's interpretation epitomises the 'blinkered peering at an isolated provision in a statute' that the court warns against in

[36] *Maledu* note 30 *supra* paragraph 98, and 100.

Scribante[37] as opposed to reading the statute purposively, even where a word has a readily discernible meaning. Tendele's interpretation waters down, if not renders nugatory, the protection offered by IPILRA to shield the informal rights holders. Such interpretation cannot and should not be allowed.

57. Secondly, Tendele says it did not need to obtain consent, but it still sought and obtained it from the Inkosi. Tendele says it was granted consent by the Inkosi, in accordance with the customary laws and practices of the Mpukunyoni community. To demonstrate the consent, Tendele attached Mr MQM's affidavit[38]. The affidavit was deposed to on 29 May 2020.

58. In brief the content of the affidavit confirms that the deponent is a member of MTC and the mining portfolio head for the Traditional Council (responsible for mining in the area). The affidavit describes the customs and practices of the Mpukunyoni community as regards the authority of Inkosi, as the chairman of the MTC, to allocate land. The deponent then goes on to recount what occurred in February 2013 and how the now late Inkosi was excited about the development and how he went about granting consent. According to the deponent they first met with Petmin Limited, on behalf of Tendele, where Petmin requested approval from the Inkosi to start the Mine. The affidavit goes on to set out what was relayed to Petmin and later the Inkosi met Tendele. He further describes the consultations with the iZindunas of the various izigodis and mentions that the geologist spoke to them. He then refers to the meeting or meetings with members of the community, the questions the community had asked and the decision to finally grant the mine consent, after the Inkosi had obtained advice from the MTC.

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[37] Note 32 *supra*.
[38] Caselines page 3576-77.

59. Under what circumstances the consent was granted, the affidavit does not say. There is neither an agenda, dates for any of the meetings, nor information on where they were held, or who attended. Clearly, no minutes were maintained for each of the different meetings, nor is there any paper trail of how the invitations were sent to the communities to attend the meetings the deponent says he chaired. The deponent says nothing about the absence of records from the MTC.

60. The Ingonyama Trust to which the land concerned is entrusted is an organ of state and so is the MTC. It was said by the Court in *Ethekwini Municipality* v *Ingonyama Trust*[39] that the latter is an organ of state. The MTC is created by the Traditional Leadership and Governance Framework Act, (TLGFA). This is clearly set out in the introductory part of the Statute itself which states, *inter alia*,

> 'To provide for the recognition of the traditional communities; to provide for the establishment and recognition of traditional councils …'

The Preamble states:

'Whereas the State in accordance with the Constitution, seeks to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;...transform the institution in line with constitutional imperatives and to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices....'

61. Section 4 of the TLGFA sets out the functions of traditional councils. Section 4(2) provides amongst others, that:

> 'Applicable provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to:
> (a) keep proper records;
> (b) have its financial statements audited;
> (c) disclose the receipts and gifts; and
> (d) adhere to the code of conduct...'

[39] CCT80/12 [2013] ZACC 7 at paragraph 44.

62. The KwaZulu Natal Traditional Leadership and Governance Framework Act[40], which was assented to on 1 December 2005 provides for, amongst others, the functions of traditional councils in section 8. Section 8(2) mirrors the national framework, TLGFA, in this regard and it states: A traditional council must:-

(a) keep proper records,

(b) have its financial statements audited by the Auditor General;

(c) disclose gifts ...'

63. These functions, amongst others, are aimed at strengthening governance and promoting accountability and transparency, to thwart precisely what Tendele seeks to do in this case. And that is, to retrieve from one person's memory, in 2020, - when this application is already pending — details of the MTCs business, which occurred more than seven years ago. No doubt, this must have been important business for the MTC and so the details of the visit, the agenda for the meeting or meetings, and minutes, all form part and parcel of the MTC's business. For that reason, the information sought to be proved by this affidavit should have come directly from the records that the MTC is mandated by its own statute to maintain. I must conclude from the submission of the affidavit in place of records of the MTC, that the MTC failed to maintain those records. Since the MTC violated its own governance framework in failing to maintain records relating this particular issue, the affidavit cannot be accepted as an official record of the MTC and accordingly, must be rejected.

64. The court in *Cape Town City* v *South African National Roads Agency Ltd & Others* adopted the same reasoning in rejecting an affidavit deposed to by Sanral's CEO to prove

[40] Act 5 of 2005.

that the Board of Sanral had adopted a particular resolution, in the absence of proper records:

> 'These features, considered together, irresistibly compel the conclusion that no decisions, as required by s 27(4), were taken by the Board. Mr Alli's bald assertion to the contrary is insufficient to displace their inexorable effect. He has failed even to attempt to explain how there could be such a complete absence of a document trail if the decisions had been made. He has not even been able to reconstruct from the Board's calendar when the alleged decisions would have been made. SANRAL has not been able to put up the evidence of a single director as to the occasions upon which and the circumstances in which the alleged decisions were made, or as to the content of any discussions that must have preceded them.'[41]

65. That leaves only the resolution on the table. The title of the resolution reads: 'Written Consent of the Traditional Authority. It is dated 7 February 2013 and reads:

> "At a meeting held on 7 February at the Mpukunyoni Traditional Authority Hall, the Committee of the MTA resolved that: We have no objection to the granting of a mining right or mining permit to:
>
> Name of applicant: ... Address.... All mining activities be conducted in terms of the provisions of the Mineral and Petroleum Resources Development Act, 2002 ... The MTA confirm that all persons occupying the land mentioned herein and the need to be relocated in future, will be relocated in accordance with the current agreement in place between the MTA and Tendele Coal Mining (Pty) Ltd."

66. As is evident, the resolution on its own says nothing more than that the MTA granted consent to Tendele. There is no evidence to support that the applicants were lawfully deprived of their informal right in terms of IPILRA. There is no evidence of invitation to the community and its representatives, no agenda, no minutes, no evidence of who was present. The Resolution on its own does not meet the requirements of IPILRA.

67. I now deal with the third reason why, in spite of the resolution and the affidavit, Tendele's defence must fail. Assuming that this court were to accept the affidavit as

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[41] Note 29 supra, at paragraph 171

evidence of an official record of the MTC, contrary to what the law provides, then the question is, what did the Inkosi or the MTA consent to? Was the consent preceded by material information about the proposed mining activities, such as, environmental impacts. Certainly, the affidavit makes no reference to such. That a geologist spoke to those present in the meeting does not say they were provided with material information. A decision to grant consent to mine has far reaching consequences in so far is the mining operations ability to interfere with the occupiers' and landowners' rights. It is not just another allocation for a farm dwelling or cattle grazing.

68. This consent was provided on 7 February 2013. There is nothing tendered by way of information shared by Tendele prior to obtaining consent from the late Inkosi and the MTC (in a language that the people of that community including iZindunas or members of the MTC would understand) in order to appreciate the impact mining would have on their lives, land and livestock in order to achieve genuine and informed consent. The date of the grant of consent to Tendele is significant in that as late as October 2013, when Tendele compiled its Scoping Report, Tendele could not provide an iota of evidence of information it had shared with the I&APs at that stage. It is one thing that it did not consult but Tendele had claimed to be engaged in ongoing empowerment sessions with the traditional leadership of the Mpukunyoni community. Even then, it could not provide any example/s or description of the information it used to empower the traditional leadership. Discussing this very question of consent in terms of IPILRA, the court in *Council for the Advancement of the South African Constitution and Others* v *The Ingonyama Trust and Others,* had the following to say: [It is a lengthy quotation but it is worth setting it out in full]

> '[137] The Trust and the Board deny that they concluded leases with residents of Trust-held land without their genuine and informed consent....

[138] The consent required for the deprivation of a right is a genuine and informed consent. The consent is informed if it is based on substantial knowledge concerning the nature and effect of the transaction consented to. Consent must be given freely, without duress or deception, and with sufficient legal competence to give it. This court must through an analysis of the evidence tendered before it, determine whether the consent which the Trust and the Board allegedly obtained from the residents for the conclusion of the lease agreements, met the required standard.

The court went on to say:

[139] Consent must have been properly sought and freely given, and the person whose consent is required must have full and reliable information relating to the scope and impact of the subject matter, and must have the choice to give or withhold his or her consent.

[140] The court in *Christian Lawyers 'Association* v *Minister of Health and others*[42], held that it is now settled law that 'the informed consent requirement rests on three independent legs of knowledge, appreciation and consent'. A valid consent must be given by a person with intellectual and emotional capacity for the required knowledge, appreciation and consent. As consent is a manifestation of will, 'capacity to consent depends on the ability to form an intelligent will on the basis of appreciation of the nature and consequences of the act consented to.

[141] The requirement of knowledge in the present case means that a beneficiary and resident consenting to a lease agreement must have full knowledge of the nature, extent and effect of the lease on his or her existing customary law rights to land and/or informal rights to and interests in the Trust-held land.

[142] The requirement of consent means that the consent given to the lease, 'must be comprehensive, that is extend [s] to the entire transaction, inclusive of its consequences. 'It must be shown that the effect and consequences of the lease agreement on the existing customary law rights to land and /or informal rights to and interests in the land in question, must have been realised and voluntarily consented... The evidence tendered by the third to the eight applicants establishes that the Trust and the Board, being represented by the traditional

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[42] *Christian Lawyers 'Association* v *National Minister of Health and Others* [2004] 4 All SA 31 (T) at 36i.

councils and local indunas (izinduna) attached to and serving under various councils on Trust-held land, concluded residential lease agreements without their genuine and informed consent. All these applicants state that before entering into such lease agreements, neither the Trust nor the Board informed them what the lease agreements entailed and the benefits thereof, as opposed to PTOs....

[150]...On the contrary, on the evidence of the third to eighth applicants, members of the community were threatened by their traditional councils and izinduna, the agents of the Trust and the Board on the ground, that if they were not to enter into lease agreements, they would lose their land, and that their refusal to enter into such lease agreements would amount to turning against his Majesty, the King of the Zulus. As a consequence, they would be excluded from their relevant communities....

[155] The Trust and the Board have failed to tender any evidence to the effect that their envisaged land tenure improvement plan (the PTO Conversion Project) had at any stage been unpacked to the beneficiaries and residents of Trust-held land for them to know and understand what such plan entailed, and to assess for themselves whether or not the project would impact negatively on their existing customary law rights to the land in question....'[43]

69. Indeed, the court in *Maledu* made the point that:

'... More is required to demonstrate that the IPILRA informal right holder was lawfully deprived of his or her right to occupy as required by section 2 of IPILRA.'[44]

70. Without informed consent the objective aimed at by our Constitution[45] of communities deciding what happens to their land, in which they have an interest is undermined. Tendele's defence must accordingly fail. In all, Tendele did not obtain consent as envisaged in section 2 of IPILRA. This ground therefore succeeds.

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[43] (12745/2018P) [2021] ZAKZPHC 42; (11 June 2021).
[44] note ss *supra* paragraph 106.
[45] See *Bengwenyama*, note 27 of this judgement.

F. Just and equitable remedy

71. Prior to setting out the parties' cases on the question of a just and equitable remedy, it is necessary to first canvass the principles that must guide this court. As a start, the Constitutional principle of separation of powers must guide this process. It is adequately set out in this extract from *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs and Tourism and Others*:

> 'In the SCA, Schutz JA held that this was a case which calls for judicial deference. [29] In explaining deference, he cited with approval Professor Hoexter's account as follows:
> "[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal." [30] (footnote omitted)...
> Schutz JA continues to say that "[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function". I agree. The use of the word "deference" may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'[46]

72. As to formulating an appropriate relief, the court said in in *Hoffmann* v *South African Airways* said:

> 'Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration. In the context of unfair

[46] (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004), at paragraph 46; also *SANRAL v City of Cape Town* (66/2016) [2016] ZASCA 122 (22 September 2016), at paragraph 7.

discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination. This aspect of the interests of the community can be gathered from the preamble to the Constitution in which the people of this country declared:

The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source " '[47]

73. Section 172 (1) (b) is an appropriate tool to minimise disruption and chaos in other people's lives, who may have planned and arranged their private affairs on the basis of the lawfulness of the decision to grant Tendele the Mining Right. In *Khumalo* and *Another* v *Member of the Executive Council for Education KwaZulu-Natal*:

'Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a "just and equitable" order in terms of section 172(1)(b) of the Constitution.
A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional invalid, it need not set the conduct aside.

It is significant in this context that if the full relief is granted in the MEC's favour, Mr Khumalo will lose his position. Mr Khumalo has gone on with his life, continued in his employment, presumably adapted his expenses accordingly, and invested nine years of his career in this path. At no stage has the MEC sought so much as to imply that Mr Khumalo performs inadequately in his post. ...Even if Mr Khumalo's promotion is found to have been unlawful, on the facts he bears no responsibility for it but for having the boldness to apply for a position for which he possibly did not qualify. The burden on the public administration and cost to the public purse to recommence the appointment process would be further prejudice to consider.

[47] *Hoffman* note 30 *supra* paragraphs 43 and 45.

Considering the courts' power to grant a just and equitable remedy the impact of a finding of invalidity may be ameliorated by fashioning a remedy that is fair to Mr Khumalo. In considering the factors above, particularly the lack of a complaint against Mr Khumalo's performance, a just and equitable remedy would in all likeliness result in him keeping his job, if his promotion were found to be unlawful.'[48]

74. Also relevant and closer to home are the comments of court in *Global Environmental Trust and Others* v *Tendele Coal Mining (Pty) Ltd and Others* calling for pragmatism and observance of issues pertinent to the case in formulating relief:

'Section 172(1)(a) of the Constitution applies. It provides that conduct inconsistent with the Constitution must be declared invalid. The court has no discretion. In terms of s 172(1)(b) the court has a discretion to grant just and equitable relief, either independently or together with a declaratory order. The power in s 172(1)(b) to make any order that is just and equitable is not limited to declarations of invalidity; and 'is so wide and flexible that it allows Courts to formulate an order that does not follow prayers in the notice of motion.

In the exercise of this wide remedial power, the Constitutional Court has highlighted the need for courts to be pragmatic in crafting just and equitable remedies.
A pragmatic approach that grants appropriate relief, that 'upholds, that enhances and vindicates the underlying values and rights entrenched in the Constitution...'[49]

75. The applicants submit that an appropriate remedy is one that will see the matter being referred to the Regional Manager (RM) so that Tendele commences afresh its application for a mining right. The applicants advanced a number of reasons why a referral to the RM is the only remedy that will suit the circumstances of this case, as opposed to a referral to the Minister, as sought by Tendele. In the first place, the applicants say that in terms of section 96(2)(a) of MPRDA, an appeal does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister. The applicants complain that this means the mine can go ahead and mine in the new areas (Emalahleni, Mahujini

[48] CCT10/13 [2013] ZACC 49 at paragraphs 53,54, 55, and 56.
[49] 1105/2019) [2021] ZASCA 13 (09 February 2021, at paragraphs 82 and 83.

and Ophondweni) without resolving the critical issues challenged in this application. They say that public participation requires what I may loosely refer to as 'boots on the ground'; it is not a matter that can be handled during an appeal before the Minister, in top down fashion. They point to the 27 extra (or rather the floating studies), and submit that these studies were procured, not in compliance with some requirement because they are not connected to the EMPr, but to influence the decision that will ultimately be granted by this court. On the issue of IPILRA the applicants contended from the start that their consent had not be obtained; that Tendele's application went ahead and was ultimately granted, unlawfully. On this score, the applicants contend that the Minister cannot fix something that is unlawful. On this basis alone, it is simply not competent to refer the decision to the Minister.

76. A further reason why it is not competent to refer the matter to the Minister according to the applicants is that Tendele says it needs to commence mining by June 2022 and it requires five months to prepare. The applicants submit that the mine is simply not going to meet this timeline as the amendment of the EMPr, in consequence of the amendment of the Mining Right, which on its own triggers a listed activity, make take considerably more than 180 days. The final reason deals with Tendele's failure to make financial provision for each of the areas it seeks to retain, instead of one.

Tendele's case

77. Tendele submits that the Minister is the legitimate and statutorily empowered decision-maker on appeals against the grant of mining rights. Tendele submits that the administration of this act affects a wide range of interests and the decisions are complex and polycentric, involving the conflicting views of highly qualified experts in a technical domain. Tendele says the Minister has wide powers on appeal and there would be no

limitation in his ability to call for public participation or even ordering Tendele to carry out specific remedial action. In the words of counsel for Tendele, its client is intent on doing everything reasonably possible to guard against the process on appeal before the Minister being assailed.

78. Regarding Tendele's contribution to South Africa's economy, Tendele, the mine has one of the largest resources of open-pit mineable anthracite reserves in South Africa. Tendele currently sells the higher quality anthracite to local ferrochrome producers and is the principal supplier of anthracide to the ferrochrome producers in South Africa. The higher quality anthracide is a critical component of reductant mix used in smelters by ferrochrome producers. At present, Tendele sells 600 000 tonnes of anthracite per annum to local ferrochrome producers. Tendele accordingly pleaded that an order that fails to take into account its commitment to its suppliers may bring about devastating results not only to its financial resources but to various entities that also play a major role in South Africa's economy.

79. The Somkhele mine is the only major employer in the Mtubatuba area. At present Tendele employs about 1200 people, 87% of whom reside in the impoverished Mpukunyoni area surrounding Somkhele. As a result 120 households benefit from employment and or procurement agreements at Somkhele. Assuming that each household supports 10 people, some 12 000 people directly depend on the mine.

80. According to the Mtubatuba Local Municipality's Integrated Development Plan, the Somkhele mine is one of the major employers in the Mtubatuba Municipality which has extremely high unemployment rates. Since Tendele began mining it has contributed R2.2 billion in direct benefits to local community members. This includes R1.2 billion in salaries;

R61 million in community projects; over R607 million on procurement services; R9 million for the benefit for the youth in the community as well as various training and educational initiatives. Tendele further pays hundreds of millions of rand in taxes to the South African Government.

81. I have reflected on the parties' cases including the reasons placed by the applicants. But this is a case that calls for pragmatism to guide the court. It seems to me that an order that will see the matter referred back to the Minister for reconsideration of the appeal, in line with the findings of this judgement, will strike the correct balance of the various competing interests. Such an order will 'uphold, enhance and vindicate the underlying values and rights entrenched in the Constitution...[50]'.

Costs

82. There remains the question of costs. Counsel for the applicants submitted that the applicants seek a special costs order. They say the mine defended the review when it well knew that it was not defensible. Thus, the costs from the launch of this application and all the way to March 2021 must be on a punitive scale. The remainder of the costs are to be party and party. The applicants further request the court to grant them the costs occasioned by the Rule 7 application, including the costs of two counsel, senior and junior.

83. I am prepared to grant the applicants costs including the costs of the two counsel where so employed including the costs of occasioned by the Rule 7 application. I do not agree that this is a case that warrants punitive costs.

[50] Note 49 supra.

G. Order

84. Accordingly, the following order is hereby authorized:

1. The Director General's decision of 31 May 2016, in awarding the Mining Right to Tendele, and the Regional Manager's decision of 26 October 2016, in approving Tendele's EMPr, are hereby declared invalid. The decisions are not set aside.
2. The Minister's decision of 15 June 2018 in dismissing the appeal against the grant of the Mining Right to Tendele and the Approval of Tendele's EMPr is hereby declared invalid and is set aside.
3. The appeal is remitted back to the Minister for reconsideration in accordance with the findings of this judgement.
4. In reconsidering the appeal, and in addition to the findings of this judgement, the Minister is directed to consider:

(a) any information that the Applicants and Tendele wish to place before him for that purpose.

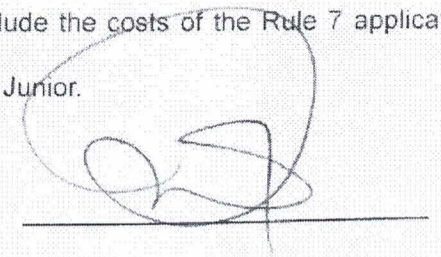
(b) any information, comments, and submissions from I&APs.

5. Tendele is directed to notify interested and affected parties of their entitlement to participate in the appeal process by publicising the contents of this widely.

6. Tendele is to ensure that public participation process to be conducted pursuant to the Minister's determination of the appeal process, complies with the requirements of (a) Public Participation Guidelines in terms of the National Environmental Act, 1998 and (b) Chapter 6 of the Environmental Impact Assessment Regulations, 2014 as Published in Government Gazette No38282 GNR 982 of 4 December 2014.

7. The First, Second, Third and Fourth respondents are hereby ordered, jointly and severally, the one paying the other absolved, to pay the costs of the applicants, including the costs occasioned by the employment of two counsel, one Senior and one Junior.

7.1 The costs mentioned in paragraph 7 include the costs of the Rule 7 application plus the costs of two counsel, one Senior and one Junior.



NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

DATE OF HEARING:	**10-12 November 2021**
DATE OF JUDGEMENT	**4 May 2022**
APPEARANCES	
APPLICANTS' COUNSEL:	**Adv A de Vos SC** **Adv L Ferreira**
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FOURTH RESPONDENT'S COUNSEL	**Adv P Lazarus SC** **Adv N Ferreira** **Adv M Salukazana**
Instructed by:	**Malan Scholes Incorporated**

ELEVENTH TO FOURTEENTH	
RESPONDENTS' COUNSEL :	**Mr D Sibuyi**
Instructed by:	**DMS Attorneys**