



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

Case no: 3518/2023P

In the matter between:

MFOLOZI COMMUNITY ENVIRONMENTAL JUSTICE ORGANISATION	FIRST APPLICANT
THE TRUSTEES FOR THE TIME BEING OF GLOBAL ENVIRONMENTAL TRUST MINING AFFECTED COMMUNITIES UNITED IN ACTION	SECOND APPLICANT
SOUTHERN AFRICAN HUMAN RIGHTS DEFENDERS NETWORK	THIRD APPLICANT
ACTIONAID SOUTH AFRICA	FIFTH APPLICANT

and

TENDELE COAL MINING (PTY) LTD	FIRST RESPONDENT
THE MINISTER OF MINERAL RESOURCES AND ENERGY	SECOND RESPONDENT
THE MINISTER OF ENVIRONMENTAL AFFAIRS MEC FOR TRANSPORT, COMMUNITY SAFETY AND LIAISON, KWAZULU-NATAL	THIRD RESPONDENT
MPUKUNYONI TRADITIONAL COUNCIL/ MPUNKUNYONI TRADITIONAL AUTHORITY	FIFTH RESPONDENT
MPUKUNYONI MINING FORUM	SIXTH RESPONDENT
ASSOCIATION OF MIINWORKERS AND CONSTRUCTION UNION	SEVENTH RESPONDENT
NATIONAL UNION OF MINEWORKERS	EIGHTH RESPONDENT

Coram: Koen J
Heard: 9 June 2023
Delivered: 13 July 2023

ORDER

The following order is granted:

The application for the relief in part A of the Notice of Motion is dismissed.

JUDGMENT

Koen J

Introduction

[1] The applicants¹ seek an interim interdict, in terms of Part A of the notice of motion, the relevant part reading as follows:

‘2. The First Respondent is interdicted and restrained from undertaking [or] commencing with any mining and mining-related activities listed in its notices dated 14 February 2023 and 15 February 2023, as supplemented by its letter of 24 February 2023, which related to the First Respondent’s mining right described as **“Part of Remainder or Reserve 3, No 158822, Hlabisa Magisterial District, measuring 21 233 0525 hectares, 222km² KZN30/5/1/2/2/10041MR”** and the related mining areas, pending the finalisation of Part B of this Notice of Motion.

3. Any Respondent opposing the application is ordered to pay the Applicants’ costs, including the costs of three Counsel.’

[2] Part B of the notice of motion provides:

¹ The first applicant is the Mfolozi Community Environmental Justice Organisation. The second applicant is the trustees for the time of the Global Environmental Trust. The third applicant is the Mining Affected Communities United in Action. The fourth applicant is the Southern Africa Human Rights Defenders Network. The fifth applicant is Actionaid South Africa,

'5. The First Respondent is interdicted and restrained from undertaking any mining and mining related activities, including the activities listed in its notices dated 14 February 2023 and 15 February 2023, as supplemented by its letter of 24 February 2023, pertaining to the First Respondent's mining right described as "**Part of Remainder or Reserve 3, No 158822, Hlabisa Magisterial District, measuring 21 233 0525 hectares, 222km² KZN30/5/1/2/2/10041MR**" and the mining areas related thereto unless and until they have:

5.1 complied with the order of the North Gauteng High Court under case number 82865/2018 by:

5.1.1 Completing an Environmental Impact Assessment process as contemplated in Section 39(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA");

5.1.2 Compiling and delivering a scoping report, environmental impact assessment report and environmental management program that adheres to Regulations 49, 50 and 51 of the MPRDA Regulations, Reg 527 of GG 26275 of 2004;

5.1.3 Obtaining consent, in terms of section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 ("*IPILRA*"), specifically from the persons who may be deprived of their informal rights to land by the execution of the First Respondent's mining and related activities.

5.2 Complied with or amended its Environmental Management Programme (EMPr) and as far as it relates to the activities as set out in the 14 and 15 February 2023 Notices, supplemented by Tendele's letter of 24 February 2023.

5.3 Conducted public participation processes compliant with the Public Participation Guidelines in terms of NEMA and Chapter 6 of the EIA Regulations, 2014 and any other legislative requirements, with members of the First Applicant and all interested and affected persons who:

5.3.1 Shall or may be resettled or relocated in the process of the First Respondent commencing its mining and/or related activities;

5.3.2 Reside or use land within the area where the intended haul road and temporary roads will be constructed or altered in any way;

5.3.3 Reside or use land within the areas where the intended fences will be erected;

5.3.4 Shall or may be relocated;

5.3.5 Reside or use land within the areas to which persons or infrastructure may be relocated;

5.3.6 Reside or use land in the biodiversity off-set areas;

5.3.7 Reside or use land in any other area to be affected by the mining or mining related activities.

6. Any Respondent opposing the application is ordered to pay the Applicants' costs, including the cost of three counsel.

7. Further and/or alternative relief.'

[3] The application is opposed by the first respondent Tendele Coal Mining (Pty) Ltd (Tendele), the fifth respondent the Mpunkuyoni Traditional Authority, the sixth respondent the Mpunkuyoni Mining Forum, the seventh respondent the Association of Mineworkers and Construction Union, and the eighth respondent the National Union of Mineworkers. The application is not opposed by the Minister of Mineral Resources and Energy (the Minister) who is the second respondent, the Minister of Environmental Affairs, the third respondent, or the MEC for Transport, Community Safety and Liaison, KwaZulu-Natal, the fourth respondent.

Background

[4] The mining right referred to in the notice of motion, which has been issued to Tendele, relates to an area of the Somkhele Mine (the mine) to which Tendele wishes to extend its operations. The mine is an open cast coal mine which Tendele has operated since 2006.² It is situated some 27 kilometres west of Mtubatuba in KwaZulu-Natal. It has one of the largest resources of open pit mineable anthracite reserves in South Africa. Tendele has played a crucial role in supplying local manufacturers with anthracite and facilitating the production of ferrochrome³ and the manufacture of stainless steel.⁴ It has been a major contributor to social and economic development in the area. It alleges that prior to it being placed on care and maintenance in July 2022, some 20 000 people benefited from employment and procurement opportunities at the mine,⁵ and that since 2006 it has spent more than R1.2 billion establishing infrastructure and purchasing equipment at the mine, and some R6.5 billion developing the open mining pits.⁶ It alleges that since it was placed on care and maintenance, following gradual retrenchment of mine employees, the

² The correctness of this factual allegation is not denied by the applicants. Tendele currently holds three mining rights, the first in connection with an area known as Area 1 which was granted in May 2007 and the applicable Environmental Management Plan approved in June 2007, the second in connection with Areas 2 and 3 originally granted in February 2011 and amended to include additional regions in March 2013, and then the present mining right featuring in this application covering Areas 4 and 5. Although Tendele holds different licences for the various areas, the mine is conducted as one operation by one management.

³ The mine was the principal supplier of anthracite to ferrochrome producers in South Africa. Ferrochrome is a critical component in the production of stainless steel and the inability of the Mine to supply anthracite has consequences for the South African construction, transportation, energy, and manufacturing industries where stainless steel is used.

⁴ The correctness of this factual allegation is not denied by the applicants.

⁵ The applicants do however claim, but without substantiation, that the employment figures are inflated. It stands to reason however that a reduction in production will increase unemployment.

⁶ The correctness of these factual allegations is not denied by the applicants.

unemployment rate in the Mtubatuba Local Municipality area has increased to between 70 and 80 per cent, and is now possibly higher.

[5] The mine is a single operation that consists of mining pits divided into five areas, with separate mining rights and environmental management programmes (EMPr) applying to each area. Tendele mined in two areas until 2022. These two areas have now been depleted. It accordingly intends extending its mining operations to the Emalahleni, Ophondweni, and Mahujini areas (commonly also referred to as areas 4 and 5), the respective areas of which are 2.5836; 5.5585 and 1.5168 square kilometers.

[6] Tendele's proposed expansion into these areas is alleged to be necessary to enable it to continue operations for approximately another 10 years, to ensure its survival. The mining method and infrastructure which Tendele will use in the new areas will be the same as it has previously used. Should the mine intend to operate after this time, it would be obliged to apply afresh for a new mining right and environmental authorisation for any further new areas.

[7] Mining activity impacts on the environment and has the potential for adversely affecting persons living and working in the vicinity of such mining operations. Mining activities, and decisions permitting such activities, implicate and create a tension between and amongst a number of constitutional rights and principles. At a bare minimum, these include inter alia the principle of legality,⁷ the right to an environment that is not harmful to health or well-being,⁸ the right of the mining entity to freedom of trade and to earn an income, and the right of the parties and the public generally to

⁷ Section 1(c) of the Constitution provides:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

. . .

(c) Supremacy of the Constitution and the rule of law . . . '

Section 2 of the Constitution provides: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

⁸ Section 24 of the Constitution provides:

'Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and
 (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 (i) prevent pollution and ecological degradation;
 (ii) promote conservation; and
 (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

earn an income,⁹ just administrative action¹⁰ and the right to have disputes resolved by the application of law before a court.¹¹ Accordingly, the right to mine, and activities associated therewith, have come to be regulated by various statutory provisions, which themselves have been subject to amendments over time, which seek to strike a balance between these competing and other rights.

[8] At the risk of oversimplification, these statutory provisions require a mining company, in the position of Tendele, to comply with a myriad of legislation, including, inter alia the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), and the requisite regulations, the National Environmental Management Act 107 of 1998 (NEMA), and the requisite regulations, and the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), and the requisite regulations, which prescribe various administrative procedures before an entity can mine on a particular portion of land. Without purporting to provide a comprehensive list of the requirements,¹² the administrative procedures required to be complied with entail, inter alia, the following:

- (a) An application by Tendele, followed by a decision by the Director General of the Department of Mineral Resources and Energy (the department),¹³ to award the mining right to it;
- (b) The preparation by Tendele of an EMPr relating to such mining, and a decision by the Regional Manager of the department approving the EMPr.

⁹ Section 22 of the Constitution provides: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

¹⁰ Section 33 of the Constitution provides:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

¹¹ Section 34 of the Constitution provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

¹² The details of the procedures to be complied with and whether they were complied with arose in Bam J's review judgment in the Gauteng Division of the High Court under case no. 82865/18 dated 4 May 2022, and reported as *Mfolozi Community Environmental Justice Organisation and others v Minister of Minerals and Energy and others* [2022] ZAGPPHC 305 (the review). Although the applicants allege that some of these requirements have still not been complied with, as a ground for granting the interdict requested, in the view I take of the matter, they need not be dealt with in this judgment.

¹³ The Minister of Mineral Resources and Energy, representing the Department of Mineral Resources and Energy, was cited as the second respondent.

[9] The issue of a mining right in terms of s 22 of the MPRDA requires inter alia an application in the prescribed manner, accompanied by an environmental impact assessment (EIA) and an EMPr. If the regional manager accepts the application, he must within 14 days notify the applicant for the mining right to conduct an EIA, submit an EMPr for approval under s 39, notify and consult interested and affected persons (I&APS) within 180 days, and make it known that an application for a mining right had been accepted in respect of the land in question. He must also call on I&APs to submit their comments for consideration within 30 days of notice. In terms of the MPRDA regulations an EIA requires the compilation of a scoping report and an EIA report, and finally a scoping report must be finalised in regard to the proposed mining operation dealing with a number of prescribed issues.¹⁴

[10] Tendele applied for, and on 31 May 2016, was awarded the mining right in respect of Part of Remainder of Reserve 3 (Somkhele No 15822), which includes areas 4 and 5, by the director general of the department. In addition, the EMPr applicable to this mining area was approved by the regional manager of the department for the KZN region on 26 October 2016. The decision of the director general to award the mining right and the decision of the regional manager of the department to approve the EMPr shall hereinafter be referred to individually by name, and collectively as ‘the decisions’.

[11] It is not disputed that members of the first applicant who reside in the area, would be affected by such mining, and have *locus standi in iudicio*¹⁵ to object to the mining operations. Similarly, that the second applicant, the third applicant, the fourth applicant, and fifth applicant would have the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, has not been placed in dispute.¹⁶

¹⁴ See generally the review reported as *Mfolozi Community Environmental Justice Organisation and others v Minister of Minerals and Energy and others* [2022] ZAGPPHC 305 para 8.

¹⁵ The extent of its representation was however disputed. But nothing turns on this.

¹⁶ Section 38 of the Constitution provides:

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

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

[12] The applicants, having become aware of the extent of the mining right, on 31 August 2017 lodged an appeal, as they were entitled to do, with the Minister, in terms of s 96(1)(b) of the MPRDA, read with regulation 74 of the Mineral and Petroleum Resources Development Regulations.¹⁷

[13] Section 96 of the MPRDA provides:

‘(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days becoming [sic] aware of such administrative decision in the prescribed manner to-

(a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act;

(b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency.

(2) (a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section.’

[14] The Minister dismissed the appeal on 15 June 2018.

[15] The applicants thereafter launched a review in the Gauteng Division of the High Court, Pretoria, under case number 82865/18, reported as *Mfolozi Community Environmental Justice Organisation v Minister of Minerals and Energy* (the review),¹⁸ before the Honourable Madam Justice Bam, to set aside the director general’s decision to grant the mining right to Tendele; the regional manager’s decision to

(e) an association acting in the interest of its members.’

¹⁷ Mineral and Petroleum Resources Development Regulations GN R527 in GG 26275 of 23 April 2004.

¹⁸ *Mfolozi Community Environmental Justice Organisation and others v Minister of Minerals and Energy and others* [2022] ZAGPPHC 305.

approve the EMPr in respect of the new areas; and the decision of the Minister to dismiss their appeal against the two aforesaid decisions. The review was opposed by Tendele,¹⁹ and the respondents opposing this application, but not by the Minister,²⁰ the Minister of Environmental Affairs,²¹ or the MEC for Transport, Community Safety and Liaison, KwaZulu-Natal.²²

[16] The review was heard on 10 to 12 November 2021. During the argument Tendele conceded that there were certain grounds of review that it could not defend²³ and it abandoned what it describes as 92% of the mining right, persisting only with a mining right to conduct mining activities in the Emalahleni, Ophondweni, and Mahujini areas. It accordingly came to be accepted that the decision of the director general of 31 May 2016 granting the mining right to Tendele, the decision of the regional manager of 26 October 2016 approving the environmental management program in terms of s 39 of the MPRDA, and the decision of the Minister of 15 June 2018 dismissing the internal appeal lodged by the applicants, were unlawful and fell to be declared invalid.²⁴

[17] On 4 May 2022, Bam J, handed down her judgment in the review. She recorded that it was:

'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 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.'²⁵

[18] The judgment recorded some of the concessions made by Tendele. These related, inter alia, to there being no evidence that the Minister consulted with the Department of Environmental Affairs, as was required by the now repealed s 40 read with s 39 of the MPRDA, imperfections in the public participation process, and deficiencies in the scoping and the EIA process.

¹⁹ Cited as the fourth respondent in the review.

²⁰ The first respondent in the review.

²¹ The third respondent in this application, and cited as the fifth respondent in the review.

²² Being the fourth respondents in this application and they were not a party in the review.

²³ The review fn 18 paras 15 and 16.

²⁴ The review fn 18 para 16.

²⁵ The review fn 18 para 17.

[19] The judgment proceeded:

'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 [the first applicant] 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.'²⁶

[20] The learned judge continued:

'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 intertwined with the ground dealing with defects in public participation. As such I dispose of the two grounds immediately here below.'²⁷

[21] The learned judge then found that the scoping report, the environmental impact assessment, and the public participation processes were defective, and that the necessary consent as required by s 2 of IPILRA had not been obtained.

[22] She was very critical of Tendele's shortcomings, describing Tendele as 'misguided in its view',²⁸ that its attempt to justify the exclusion of groups required to be consulted by the regulations as part of the public participation was 'nothing short of egregious';²⁹ that its defective notices had unduly limited the public's participation; that Tendele 'flouted the law with regard to public participation',³⁰ and that its attitude during the scoping phase was 'offensive' and portrayed Tendele as 'an "unbridled horse" that showed little or no regard for the law.'³¹

²⁶ The review fn 18 para 21.

²⁷ The review fn 18 para 24.

²⁸ The review fn 18 para 32.

²⁹ The review fn 18 para 33.

³⁰ The review fn 18 para 36.

³¹ The review fn 18 para 37.

[23] As regards non-compliance with IPILRA, the judgment found that it was a matter of interpretation, but that Tendele's interpretation epitomises:

'the "blinkered peering at an isolated provision in a statute" that the court warns against in *Scribante* as opposed to reading the statute purposively, even where a word has a readily discernible meaning;' (footnote omitted)³²

That

'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;³³

Concluding that

'Tendele did not obtain consent as envisaged in section 2 of IPILRA.³⁴

[24] Section 172(1) of the Constitution provides:

'(1) When deciding a constitutional matter within its power, a court-

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[25] Faced with the inevitable consequence that the decisions and the Minister's dismissal of the appeal fell to be declared invalid as required by s 172(1)(a) of the Constitution, it remained for Bam J to model a just and equitable remedy to the extent that one might be called for. She stressed the constitutional principle of separation of powers and judicial deference,³⁵ and then referred to the following quotation from *Khumalo and Another v Member of the Executive Council for Education KwaZulu-Natal*:³⁶

'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

³² The review fn 18 para 56.

³³ The review fn 18 para 56.

³⁴ The review fn 18 para 70.

³⁵ The review fn 18 para 71.

³⁶ *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) para 53 onward.

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.*' (emphasis added, footnote omitted)

[26] The judgment thereafter consists of a summary of the respective submissions of the parties,³⁷ on what would constitute a just and equitable remedy.

[27] The applicants' submissions were paraphrased as follows in the review:

'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 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.'

[28] Tendele's submissions were summarized in the review judgment as follows:

³⁷ The review fn 18 para 75ff, particularly para 81.

'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 anthracite to the ferrochrome producers in South Africa. The higher quality anthracite 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.'

[29] Tendele thus stressed the financial impact of a decision that the mining could not continue would have on it and the community. It contended that the irregularities in the process leading up to the grant of the mining right by the director general and

the approval of the EMPr by the regional manager could be addressed during a wide appeal before the Minister.³⁸

[30] The learned judge's reasoning on the issue of just and equitable relief was couched as follows:³⁹

I have reflected on the parties' cases *including the reasons placed by the applicants*.⁴⁰ 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". (emphasis added, footnote omitted, new footnote added)

[31] The order granted on 4 May 2022 reads as follows:

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

³⁸ The review fn 18 para 21.

³⁹ The review fn 18 para 81.

⁴⁰ That presumably refers to the argument of the applicants quoted in paragraph 75 of the judgment, referred to in paragraph 27 above, that a referral to the Minister rather than the mining right being set aside and the process starting afresh, would result in the mining continuing.

of the Environmental Impact Assessment Regulations, 2014 as Published in *Government Gazette* No 38282 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'

[32] The judgment has not been taken on appeal. The findings are accordingly binding on the parties.

[33] Since the judgment was delivered, Tendele alleges that it has made strident progress in addressing some of the deficiencies raised in the judgement. The mine is presently not operational, but is on what is termed 'care and maintenance,' which is said to leave it in a precarious financial position. It is washing discard to produce low quality anthracite, which is providing it with sufficient revenue to continue employing a few employees (mainly on a temporary basis) to partially service the interest on its debt. The processing of the discard will continue for a maximum of seven months from 1 April 2023, where after the mine will have no revenue and all 22 full time employees and all 58 temporary employees and all 192 contractors will have lost their jobs. It is also alleged that funders require confirmation that Tendele is able to gain access to the new mining areas.

[34] Additional specialist studies were foreshadowed and have also been undertaken. Tendele acknowledges that these studies have not yet been subjected to a public participation process. It undertakes that it will provide all interested and affected persons with an opportunity to comment on the studies during the EIA phase of the appeal process in s 96 of the MPRDA, and maintain that this is what the review judgment contemplates.

[35] Tendele has also given instructions for a scoping report. The draft scoping report must be subjected to a public participation process of at least 30 days, as required by regulation 40 of the Environmental Impact Assessment Regulations.⁴¹ This publication participation process must follow the requirements of the Public

⁴¹ Environmental Impact Assessment Regulations, 2014 GNR 982 in GG 38282 of 4 December 2014.

Participation Guidelines. This process is apparently currently underway. A revised draft scoping report is to be circulated to interested and affected persons in May 2023 for their comment. All comments received from interested and affected persons in respect of the draft scoping report and the revised scoping report will have to be incorporated into a final scoping report. It is anticipated that such report will be submitted to the Minister for consideration and approval in July 2023. If approved then Tendele will proceed with the preparation of an EIA report, as part of the EIA phase of the appeal process in s 96 of the MPRDA, and a revised EMPr. The draft EIA report, the revised EMPr, and the specialist studies will be provided to interested and affected persons for their comment in October/November 2023. It is anticipated that an EMPr will be submitted to the Minister for purposes of deciding the appeal process in s 96 of the MPRDA, in December 2023. The appeal is therefore, on Tendele's own version, not yet ready for hearing.

[36] As ordered in paragraph 6 of the order of Bam J, the Public Participation Guidelines in terms of NEMA and chapter 6 of the Environmental Impact Assessment Regulations will need to be complied with in preparation for a hearing of the appeal.

[37] During February 2023 Tendele issued three letters, dated 14, 15 and 24 February 2023 (the letters), pursuant to which it intends resuming certain activities relating or ancillary to the mining. On the argument now adopted by Tendele, it could have issued these letters immediately after the judgment by Bam J was delivered, although it did not do so. Indeed, the applicants have referred to a document prepared for Tendele headed 'Steps to be taken in terms of Judge Bam's order before we can start to mine', which, they say, shows that Tendele had also held the view that it could not proceed with mining until the appeal was finalised. Whether the order of Bam J allowed mining to continue is however a matter of law, and is not determined by the parties' respective (and possibly erroneous) interpretation of the judgment. It is the question of law that needs to be addressed.

[38] In the letter of 15 February 2023 Tendele, inter alia gave notice of its intention to commence 'other activities, fencing, the building of a new access road, and the widening of existing roads.' In the letter of 24 February 2023 Tendele gave notice

inter alia of an increase in the scope of activities it intended to commence, including the relocation of people, clearance of vegetation, building of temporary access roads, relocation of the Ophondweni Community Hall, relocation of the Emalahleni Community Dam, open cast mining and stockpiling of anthracite and waste material.

[39] Although the mining right granted was in respect of the three areas, Tendele has, in its answering affidavit, confined the work it wishes to undertake, contemplated in the letters, to the Emalahleni and Ophondweni areas. It has undertaken not to commence any work in the Mahujini area until the appeal before the Minister, provided for in the order of the North Gauteng High Court, referred to in paragraph 5.1 of part B of the notice of motion, has been determined.

[40] The applicants seek to stop the activities threatened to be proceeded with, not limited in accordance with the undertakings. They seek to do so, based on the judgment of Bam J and the alleged non-compliance with certain further statutory requirements, notably relating to non-compliance with the provisions of IPILRA and the lack of consultation with interested parties. Tendele denies these contentions and argues that the order of Bam J did not preclude mining from continuing.

[41] Tendele and the opposing respondents further contend that although clothed as an interim interdict, the interdict sought would have final effect and would result in the closing of the mine which has significant employment and revenue-generating capacity. They accordingly contend that the application should be adjudicated as such, and that the applicants would have to establish a clear right. The applicants do not deny that the interdict they seek could result in the closure of the mine.⁴² As the applicants claim an interim interdict the matter will be adjudicated as such.

The requirements for an interim interdict

[42] It is trite law that the requirements for an interim interdict are:

(a) A prima facie right on the part of the applicant.⁴³

⁴² The applicants suggest that another mining company might be able to do “a better job” than Tendele at mining the coal.

⁴³ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC) para 253. As Tendele contends that the relief claimed in the interim interdict will be final in effect, it submitted that the applicants must satisfy the test for final relief by establishing a clear right on the basis of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). However, for the purpose of argument, it addressed the less stringent requirements for an interim interdict.

- (b) A well-grounded apprehension of irreparable harm if interim relief is not granted, and final relief is ultimately granted.⁴⁴
- (c) The applicant must have no other satisfactory remedy available.⁴⁵
- (d) The balance of convenience must favour the granting of interim relief.⁴⁶

The four requirements are inter-related in the sense that the weaker the applicants' *prima facie* right, the greater the need for the applicant to demonstrate prejudice, and the stronger the *prima facie* right, the less the need to demonstrate prejudice. Further, the weaker the applicants' prospects of succeeding with the final relief sought, the greater the need for the other requirements to favour the applicants.⁴⁷ Even if all the requirements for an interim interdict are satisfied, a court retains an overriding wide discretion to refuse to grant an interim interdict.⁴⁸ Public-interest factors can be taken into account in the exercise of the court's discretion. In cases like the present, Tendele argued, that the discretion should be influenced by the public interest in the survival of the mine and economic upliftment of the local community, which would be harmed if the relief sought by the applicants was granted.⁴⁹

A prima facie right

[43] A court will grant an interim interdict upon a degree of proof less exacting than that required for a final interdict. An applicant for an interim interdict must prove a right which, though *prima facie* established, is open to some doubt. According to *Webster v Mitchell*,⁵⁰ as qualified in *Gool v Minister of Justice*,⁵¹ the test is whether the applicant has furnished proof which, if uncontradicted at the trial (or the final interdict in part B of the notice of motion), would entitle the applicants to final relief.

The proper approach is:

'to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to

⁴⁴ *Eskom Holdings SOC Ltd v Vaal River Development Association* para 291.

⁴⁵ *Eskom Holdings SOC Ltd v Vaal River Development Association* para 218.

⁴⁶ *Economic Freedom Fighters v Gordhan and others; Public Protector and another v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) para 48.

⁴⁷ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another* 1973 (3) SA 685 (A) at 691F; *Radio Islam v Chairperson, Council of the Independent Broadcasting Authority, and another* 1999 (3) SA 897 (W) at 903G.

⁴⁸ *Hix Networking Technologies v System Publishers (Pty) Ltd and another* 1997 (1) SA 391 (A) at 399A.

⁴⁹ *Cipla Medpro (Pty) Ltd v Aventis Pharma SA and related appeal* [2012] ZASCA 108; 2013 (4) SA 579 (SCA) para 52.

⁵⁰ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

⁵¹ *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688.

the inherent probabilities, the applicant [should] on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to “some doubt”. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.⁵²

[44] The applicants say that on the facts it is not so much a question of proof, as the right on which they rely primarily is a question of law involving legality; and that they have established a *prima facie* right, if not a clear right, as the activities Tendele intends to commence with are unlawful:

- (a) Because Bam J declared the decisions resulting in the grant of Tendele’s Mining Right and EMPr to be invalid, the Mining Right and EMPr have ceased to exist;
- (b) that, in any event, Bam J *inter alia* required Tendele to complete an EIA and a scoping report, neither of which has occurred as yet;⁵³
- (c) that until the order of Bam J has been complied with, no mining may continue and the activities threatened in the letters would be in contravention of the judgment; and
- (d) Tendele has failed to comply with certain statutory requirements before it can start the proposed activities.⁵⁴

[45] Tendele in turn maintains that the original decisions granting the mining licence and approving the EMPr, although declared invalid, were ‘not set aside.’ Accordingly, that:

‘The effect of Bam’s decision is that the Mining Right and EMPr continue to exist in fact and in law.’⁵⁵

⁵² *Webster v Mitchell*, words in square brackets inserted by *Gool v Minister of Justice* (note that *Gool v Minister of Justice* merely quoted the headnote of *Webster v Mitchell*).

⁵³ The scoping report and EIA would need to be circulated to interested and affected parties, which would only occur during May/June 2023 with the EIA process to be finalised in December 2023.

⁵⁴ The applicants also complain that no consent has been sought in the Mahujini community as required in terms of s 2 of IPILRA, that the biodiversity off-set plan remains in draft and has not been finalized, and that Tendele has not developed a resettlement plan. Tendele has undertaken not to undertake any work in the Mahujini area until the appeal remitted to the Minister has been determined.

⁵⁵ The appeal process, which was preserved by the review judgment remitting it to the Minister, would not, in terms of the provisions of s 96(2)(a) of the MPRDA, suspend the operation of the original decisions, if as a fact, they continued to exist.

[46] The proper interpretation of the judgment and order, specifically what was sought to be conveyed by the order that the decisions 'are not set aside', and what issues the judgment covered, accordingly are the primary issues in this application.

[47] In the event of any ambiguity in her judgment Bam J would be best suited, pursuant to the provisions of rule 42(1)(b) of the Uniform Rules of Court, to clarify whether she intended that mining operations could continue in the interim pending the appeal being remitted to the Minister. An approach to Bam J would seem to be the best course of action, in the interest of justice, to remove any ambiguity and resolve the primary issue in this application. It would simply require a short application before Bam J. I accordingly invited the parties to consider that remedy. Regrettably, but perhaps unsurprisingly, the applicants and Tendele each advanced their favoured interpretation of what the judgment meant and denied that there was an ambiguity in the judgment. That was unfortunate.

Interpreting the judgment

[48] Courts are called upon from time to time to interpret the meaning and effect of judgments, other than their own, as I am now required to do with the judgment of Bam J. In doing so, it is important to keep in mind that this court is not sitting as a court of appeal on the judgment to be interpreted, determining whether it is right or wrong, or whether this court would have granted a similar or different order. Whether I might have granted a different order, is irrelevant. I may not add to the judgment of Bam J. I simply have to determine what the judgment intended to convey as the decision of the review court.

[49] The proper approach to interpreting a judgment requires that cognisance be taken of inter alia the following:

(a) Court orders 'are intended to provide effective relief and must be capable of achieving their intended purpose':⁵⁶

'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the

⁵⁶ *S.O.S Support Public Broadcasting Coalition and others v South African Broadcasting Corporation (SOC) Limited and others* [2018] ZACC 37; 2019 (1) SA 370 (CC); 2018 (12) BCLR 1553 (CC) para 52.

interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.⁵⁷

(b) Findings in a judgment, even if not expressly repeated or recorded in the order granted, must be given effect to. Bam J indeed expressly directed that the appeal was remitted back to the Minister for reconsideration 'in accordance with *the findings* of this judgment.'⁵⁸ Further, she directed that in reconsidering the appeal, the Minister had to consider the issues in paragraphs 4(a) and (b), 'in addition to *the findings* of this judgment' (emphasis added), and that Tendele had to comply with the obligations in paragraphs 5 and 6 of her order.

(c) A judgment must be interpreted in its entirety and in the context in which it was given with reference to the 'relevant background facts which culminated in it being made'.⁵⁹ The order granted is merely the executive part of the judgment and should not be interpreted in isolation, but in the context of the judgment as a whole.⁶⁰

(d) Accordingly, 'one should not stare blindly at the black-on-white words but try to establish the meaning and implication of what is being said. It is in this process that the context and surrounding circumstances are relevant.'⁶¹

⁵⁷ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13, as subsequently confirmed by the Constitutional Court in *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) para 29.

⁵⁸ The review fn 18 para 3 of the order.

⁵⁹ *HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd* [2022] ZASCA 52; 2022 (5) SA 373 (SCA) para 27, citing *KPMG Chartered Accountants (SA) v Securefin Ltd and another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA) para 39 (stating that 'context is everything'). In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA); [2014] 1 All SA 517 (SCA) para 12 where it was said that the 'former distinction between permissible background and surrounding circumstances, never very clear has fallen away [interpretation of a document is now] "essentially one unitary exercise". Accordingly, it is no longer helpful to refer to the earlier approach.'

⁶⁰ *HLB International v MWRK Accountants and Consultants* fn 67 para 28, citing *Elan Boulevard (Pty) Ltd v Flyn Investments (Pty) Ltd and others* [2018] ZASCA 165; 2019 (3) SA 441 (SCA) para 16, and *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 409D-H (per Trollip JA) 'The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it. Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it' (references omitted).

⁶¹ *HLB International v MWRK Accountants and Consultants* fn 67 para 28, citing a loose translation of the *dictum* of Olivier JA in *Plaaslike Oorgangraad, Bronkhorstspuit v Senekal* 2001 (3) SA 9 (SCA) para 11 at 18J-19A, by Ponnann AJ in *Elan Boulevard v Flyn Investments* fn 68 para 16, see also fn 6.

[50] Bam J made various findings in her judgment. Some of these have already been alluded to earlier in this judgment.⁶² Briefly restated:

(a) She found that ‘the wheels came off’ during the scoping phase ‘when the regional manager of 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 the Scoping Report instead of insisting on compliance with the law’⁶³ describing ‘Tendele’s attempts to justify their exclusion of groups [as] nothing short of egregious.’⁶⁴

(b) In respect of the scoping/EIA requirements she concluded that these failed to meet the demands of legislation, describing the ‘[t]he attitude displayed by Tendele during the scoping phase of its application process [as] offensive. It portrays Tendele as an “unbridled horse” that showed little or no regard for the law.’⁶⁵

(c) Regarding the lack of compliance with the provisions of IPILRA she found that: Tendele’s interpretation epitomises the ‘blinkerred peering at an isolated provision in a statute’ which the court warned ‘against in *Scribante*, as opposed to reading the statute purposively’; and that ‘Tendele’s ‘interpretation waters down, if not renders nugatory, the protection offered by IPILRA to shield the informal rights holders.’ Such interpretation she said, ‘cannot be allowed’:⁶⁶ that there was ‘no evidence to support that the applicants were lawfully deprived of their informal rights in terms of IPILRA’;⁶⁷ and ‘[i]n all, Tendele did not obtain consent as envisaged in section 2 of IPILRA’ and the applicants ‘ground therefore succeeds.’⁶⁸

Discussion

[51] The judgment remitted the appeal to the Minister for reconsideration.⁶⁹ It required Tendele to ‘notify interested and affected parties of their entitlement to participate in the appeal process’,⁷⁰ and required that Tendele:

‘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

⁶² See paras 21 – 25, 29 – 30 and 32 of this judgment.

⁶³ The review fn 18 para 14.

⁶⁴ The review fn 18 para 33.

⁶⁵ The review fn 18 para 37.

⁶⁶ The review fn 18 para 56 (paraphrased).

⁶⁷ The review fn 18 para 66.

⁶⁸ The review fn 18 para 70 (paraphrased).

⁶⁹ The review fn 18 para 3 of the order.

⁷⁰ The review fn 18 para 5 of the order.

Participation Guidelines in terms of the National Environmental Act, 1998 and (b) Chapter 6 of the Environmental Impact Assessment Regulations, 2014'.⁷¹

No time limit was given by when all that was to occur. If the interpretation of the order contended for by Tendele is correct, then, taken to its ultimate conclusion, if any of the processes required for the appeal became extended and were delayed, whether bona fide or otherwise, the mining could continue, potentially indefinitely, to a stage where the new mining areas could become extensively depleted. The appeal process would then become largely an academic exercise, with mining having continued with no valid mining right and EMPr ever having been properly authorised.

[52] According to a timeline attached to the applicants' heads of argument marked 'B', using allegations in Tendele's answering affidavit to demonstrate that 'Tendele is absolutely to blame for any predicament it may find itself in,' the applicants maintain, having regard to what was required for notification and scoping (55 days), the EIA phase (54 days) and the Minister's appeal decision (60 days), that Tendele could have started with basic mining activities in January 2023, and that this is the context in which Bam J's order was granted. Instead, the timeline now is that the notification and scoping, which was started on 1 July 2022, has taken 374 days, with an EIA phase of 137 days, and the Minister's decision on the remitted appeal taking 60 days, the process will not be completed until the first quarter of 2024.

[53] As indicated earlier, it seems that Tendele itself initially contemplated that the various requirements directed by the court order would have to be complied with before it could proceed with mining.⁷² But as also pointed out the issue involves a question of law, not conduct.

[54] The decisions by the director general and the regional manager that were declared invalid are administrative decisions. The law regarding potentially invalid administrative conduct can briefly be summarized as follows.

⁷¹ The review fn 18 para 6 of the order

⁷² The issue being one of legality, not much turns on this aspect: if the review court order permitted mining to continue pending the decision on the remitted appeal, then the work contemplated in the letters may continue, even if Tendele might originally have held a different view. The primary enquiry is what the legal effect of the court order was.

[55] Under the *Oudekraal Estates v City of Cape Town*⁷³ rule, Tendele's mining right and EMPr must be treated as valid and binding unless and until they are reviewed and set aside by a competent court. The SCA in *Oudekraal* held:

'our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'⁷⁴

The *Oudekraal* rule has since been repeatedly confirmed by the Constitutional Court.⁷⁵

In *Department of Transport v Tasima*, the Constitutional Court recognised that 'until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.'⁷⁶

[56] In *MEC for Health, Eastern Cape v Kirland Investments*, the Constitutional Court held, with reference to the *Oudekraal* rule, that an 'invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process'⁷⁷ and further, 'that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored *until properly set aside*.'⁷⁸ (emphasis added)

[57] In *Merafong v AshantiGold*, the Constitutional Court recognised that:

'The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision

⁷³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) para 26.

⁷⁴ *Oudekraal Estates v City of Cape Town* fn 80 para 26. The minority judgment of Jafta J in *Department of Transport and others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 89 in the Constitutional Court referred to the following statement in *Oudekraal Estates v City of Cape Town* fn 80 para 29 by Howie P and Nugent JA:

'In our view the apparent anomaly – which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' – is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words "...an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'

⁷⁵ See for example *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and others* [2019] ZACC 36; 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC) para 45.

⁷⁶ in *Department of Transport and others v Tasima (Pty) Ltd* fn 81 para 147 (in the majority scribed by Khampepe J).

⁷⁷ *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 101.

⁷⁸ *MEC for Health, Eastern Cape v Kirland Investments* n 84 para 103.

has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective *until properly set aside*.⁷⁹ (emphasis added, footnote omitted)

[58] More recently the Constitutional Court in *Magnificent Mile v Celliers NO* held: 'The *Oudekraal* rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences *for as long as it has not been set aside*. The operative words are that it exists "in fact". This does not seek to confer legal validity to the unlawful administrative act. Rather, it prevents self-help and guarantees orderly governance and administration.'⁸⁰ (emphasis added, footnote omitted)

[59] Thus, administrative conduct that has been found to be invalid, as Bam J found in respect of the decisions, may nevertheless be ordered to continue to apply. Giving effect to administrative conduct that has been declared invalid produces what has been described as an anomalous result. The Constitutional Court has observed that:

'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake.'⁸¹ (footnote omitted)

[60] The question then more specifically becomes whether a court which has found administrative conduct invalid, nevertheless intended, as a just and equitable remedy, that the administrative conduct should continue to exist and that effect be given thereto. Whether that is the intended result depends on the terms of the judgment.

⁷⁹ *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 41.

⁸⁰ *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and others* [2019] ZACC 36; 2020 (4) SA 375 (CC); 2020 (1) BCLR 41 (CC) para 51.

⁸¹ *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 85.

[61] The general principle is that when a court declares an administrative decision invalid, the decision is a nullity, and has no effect in law;⁸² it is as though that administrative decision never existed.

[62] Bam J issued a declarator that the director general's decision of 31 May 2016, in awarding the mining right to Tendele, and the regional managers decision of 26 October 2016, in approving Tendele's EMPr, were invalid. If the order of Bam J ended simply with the declaration of invalidity, without any further qualification, then the finding of invalidity of the decisions would have the legal consequence that they would be regarded as a nullity from the outset, no mining activities could commence, and there would also be no decisions in respect of which a further appeal could lie to the Minister.

[63] Although the words 'set aside' are often used in conjunction with a declaration of invalidity, they need not necessarily follow a declaration of invalidity. If following the declaration of invalidity the decisions were expressly said to be set aside, the result, in the absence of any other indications, would be the same as if there was simply a declaration of invalidity unqualified. It would be as if the decisions have expressly been declared to be set aside.

[64] Having issued the order of invalidity Bam J would have been aware of the legal effect of her order of invalidity, and that she has the power, if appropriate and to the extent required, to prevent the consequences of nullity being visited on the decisions, by making any order that is just and equitable in terms of s 172(1)(b) of the Constitution. Section 172(1)(b) is a provision, it has been held, which:

'clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).'⁸³

⁸² *Kruger v President of the Republic of South Africa* [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) para 52.

⁸³ *Electoral Commission v Mhlope and others* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) para 132.

[65] That is what Bam J did. Her order did not end simply with a declaration of invalidity. She was asked to and did consider what would be a just and equitable remedy. She did not set aside the decisions she had found to be invalid; on the contrary, she expressly declared that the decisions were 'not set aside.'

[66] In the portion of her judgment dealing with a just and equitable remedy⁸⁴ Bam J recorded that the applicants had argued that the appropriate remedy was one that Tendele commence its application for a mining licence afresh. The applicants had argued that this would be the only remedy that would suit the circumstances of the case, as opposed to a remittal of the appeal to the Minister, as was sought by Tendele, and that as such an appeal would not suspend the administrative decision resulting in the grant of the mining licence, unless the mining right was suspended by the Director General or Minister, it would mean that the mine could go ahead and mine in the new areas.

[67] If Bam J wished her order to have the effect that mining could not continue, she simply could have set the decisions aside. She chose not to do so.

[68] Bam J specifically set her mind against an order which would result in Tendele having to commence its application for the mining right afresh, by providing that the process effectively would continue from the appeal stage. By doing so she reflected on 'the reasons placed by the applicants'⁸⁵ which would include the submission advanced before her alluded to in paragraph 66 above. The order she granted carries a strong inference that she was not wanting the mining to stop, all the more so also, by expressly directing that the decisions 'are not set aside.'⁸⁶

[69] The applicants have argued that the normal consequences of nullity *ab initio* would follow on the declaration of invalidity, unless, as provided in s 172(1)(b)(i), the order of invalidity was suspended, and that as Bam J had not suspended the operation of her order of invalidity, the mining right and EMPr were therefore in any event a nullity. Such a strict interpretation, requiring that an order suspending the invalidity was required, would in my view ignore the wording of s 172(1)(b) which

⁸⁴ The review fn 18 para 75.

⁸⁵ The review fn 18 para 81.

⁸⁶ The review fn 18 para 1 of the order.

empowers a court granting a just and equitable remedy to do so in the form of ‘any order.’ Any such order could ‘include’ an order providing for the suspension a declaration of invalidity, but a court is not confined to the specific orders provided in s 172(1)(b)(i) and (ii) in modelling a just and equitable remedy. A court has a wide discretion in terms of s 172(1)(b) to make ‘any order’ to ensure a just and equitable remedy if it does not wish administrative conduct which has been declared invalid to be a nullity. Froneman J in *Bengwenyane Minerals v Genorah Resources*⁸⁷ held that the manner of conveying such an intention should not be ‘straight-jacketed.’ The issue is whether in providing that the decisions were not set aside, but also not suspending the declarations of invalidity (which she could have done), Bam J intended that the mining right and EMPr would continue to exist.

[70] The applicants argued, as a further alternative, that although Bam J had not expressly said so, by stating that ‘[t]he decisions are not set aside’ she intended an order limiting the retroactive effect of her order of invalidity of the decisions, as the decisions would otherwise be a nullity following on the declaration of invalidity. This it was argued, was to preserve the invalid decisions for the purposes of the appeal she was remitting to the Minister, and only for that purpose, as the remittal of the appeal would otherwise not be logically competent - there cannot be an appeal in respect of decisions by the director general and regional manager if those decisions did not, at least, continue to exist in fact.

[71] That argument was not dealt with in the judgment of Bam J. It might fit in with the scheme of the judgment, but the question then becomes, if the decisions were preserved prospectively as a jurisdictional fact for the purposes of the appeal, why should the prospectivity be preserved for that limited procedural purpose only, and the words, ‘not set aside’, according to their general meaning, not be construed as permitting the administrative decisions to continue as a fact, hence also preserving the mining right. That would permit mining to continue, and not preclude the work Tendele wishes to undertake as foreshadowed in the letters.

[72] On the other hand, although Bam J ordered that ‘[t]he decisions are not set aside’, the brief reasoning in the judgment does not include any further unequivocal

⁸⁷ *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 82.

statement that her intention was, notwithstanding the various glaring deficiencies she had found in the grant of the mining right and the approval of the EMPr processes, that mining should continue. She could easily have said that much, which would have clarified the position without any doubt. Alternatively, the order of invalidity could simply have been suspended, on appropriate terms and until an appropriate time, particularly as that is a just and equitable remedy expressly provided in s 172(1)(b) of the Constitution to ameliorate the effects of a declaration of invalidity. The fact that she had not done so, is however also not conclusive.

[73] In the final analysis, the words ‘The decisions are not set aside’ cannot be ignored. Section 172(1)(b) of the Constitution does not require a setting aside of an administrative act following a declaration of invalidity. Nullity of the administrative act would normally follow *ex lege* from a declaration of invalidity. To then, in addition, expressly set aside the administrative act might be unnecessary, or superfluous. But it has come to be recognised that the nullity of the administrative decision need not follow in every instance where there has been a declaration of invalidity. As the learned authors, Professors Hoexter and Penfold explain:

‘Though *setting aside* with retrospective effect is the default remedy on review and thus the logical starting point, it is nevertheless a discretionary remedy that may be withheld in certain circumstances. As explained in *Oudekraal*, legality may on occasion be overridden by competing considerations such as certainty, finality and practicality. This proposition has been illustrated most vividly in cases concerning public procurement, some of which are discussed in what follows.

While *the Constitutional Court has declined to “articulate a general formulation” for the exercise of its discretion*, factors that the courts have taken into account in deciding not to set aside an award (or other decision) include the undesirability of disrupting an important public service; the effect of setting aside would have on the public purse; questions of fault and fairness; and considerations of *practicality and pragmatism*, such as the nature and extent of the work remaining to be completed. Further relevant factors mentioned by the courts and highlighted by Freund and Price include the seriousness of the illegality, delay, and the failure to pursue alternative remedies.¹⁸⁸ (emphasis added)

[74] Tendele argues that it was not necessary for Bam J to have suspended the declaration of invalidity in order to avoid the consequences of nullity being visited upon the decisions she had declared to be unlawful, but that she could, and did,

¹⁸⁸ C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 773 – 774.

achieve the same result by simply directing that the decisions were not set aside. It relied in this regard on the decision of the Constitutional Court in *Bengwenyama Minerals v Genorah Resources* where the court held that where a decision is declared unlawful but the court declines to set it aside, the practical effect is final, and not merely a temporary suspension of invalidity. Froneman J held that:

'There is much merit in counsel's reminder that invalid administrative conduct must be declared unlawful, but it seems to me that it would be unnecessarily inflexible and difficult to explain further discretionary relief as a form of suspension of the invalidity of administrative action, in all cases. *If the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity.* In my view it is not necessary to place the just and equitable relief that may be granted under PAJA into this kind of conceptual straitjacket in order for that relief to be constitutionally acceptable.'⁸⁹ (emphasis added)

[75] Tendele accordingly argues that there is nothing mysterious or unusual about an order simply providing that the administrative act is 'not set aside', without any further qualification, such as suspending the invalidity thereof. It contends that not setting a decision aside has the effect of permanently suspending the declaration of invalidity. It referred to the Constitutional Court having granted relief in similar terms in *Minister of Defence and Military Veterans v Motau*⁹⁰ where, having found that the termination of services of board members of Armscor was unlawful due to the failure to follow the procedure set out in s 71(1) and (2) of the Companies Act 71 of 2008, and that as a result, the Minister to that extent had acted unlawfully and that this had to be pointed out to the Minister,⁹¹ the exceptional circumstances of the case before it, which included that the term of the board members had in any event expired and that the Minister had been prompted to terminate their services due to their continuous failings, that she had good cause to terminate their services. For those reasons it was held that it would not be just and equitable to confirm the relief granted by the high court which set aside the termination of their services because of the unlawful manner in which their services were terminated.⁹² The Constitutional

⁸⁹ *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 82.

⁹⁰ *Minister of Defence and Military Veterans v Motau and others* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC).

⁹¹ *Minister of Defence and Military Veterans v Motau* para 84.

⁹² *Minister of Defence and Military Veterans v Motau* para 86.

Court accordingly set aside the decision of the high court and replaced it with the following orders:

‘(a) It is declared that the Minister acted unlawfully insofar as she terminated the services of General Motau and Ms Mokoena on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act.

(b) The Minister’s decision to terminate the services of General Motau and Ms Mokoena on the Armscor Board *is not set aside*.⁹³ (emphasis added)

[76] Tendele argued that the high court did the same thing in *Allpay Consolidated Investment v CEO of the South African Social Security Agency* when it granted an order that:

‘80.1 The tender process is declared illegal and invalid.

80.2 The award of the tender to the third respondent is not set aside.’⁹⁴

As much as that was the order granted in the high court, the Constitutional Court granted an order in different terms, expressly providing for the suspension of the order of invalidity.

[77] By analogy with these two decisions Tendele argues that this is what Bam J did: the administrative decisions were declared invalid (in terms of s 172(1)(a)); but it was then expressly provided that despite their invalidity, they would not be set aside. Tendele submits that applying the principles to be discerned from the aforesaid cases, Bam J declared the administrative decisions unlawful and invalid (as she was bound to do in terms of s 172(1)(a) of the Constitution), but that she then exercised her just and equitable remedial discretion in terms of s 172(1)(b) of the Constitution and expressly ordered that notwithstanding the invalidity, ‘the decisions are not set aside,’ thereby keeping the mining right and EMPr which would otherwise have been void *ab initio* alive, notwithstanding their illegality. It submits that Bam J considered and rejected the applicants’ argument that the just and equitable remedy of declining to set-aside the mining right and EMPr would impermissibly allow Tendele to

⁹³ *Minister of Defence and Military Veterans v Motau* para 94.

⁹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* [2012] ZAGPPHC 185 para 80. The Constitutional Court ultimately upheld Matojane J’s approach, though it added additional just and equitable relief to deal with subsequent developments in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) and *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

continue to mine in terms of the unlawful right, and that the learned judge granted a *pragmatic* order, declaring invalid, but not setting aside the mining right and the EMPr precisely because she upheld Tendele's submissions for a just and equitable remedy which recognised that notwithstanding the unlawfulness, there were overwhelming practical considerations in favour of keeping the mining right and EMPr alive. It argues that the interdicts that the applicants seek are therefore premised on a misreading of the review judgment; that Bam J was persuaded that it would not be just and equitable to extinguish Tendele's entitlements under the mining right and EMPr, as this would lead to the closure of an operational mine; and that this is the basis upon which Bam J declined to set aside Tendele's mining right and the EMPr. They accordingly remained extant and give rise to legal consequences.

[78] The words 'not set aside,' in their ordinary sense would convey that the effect of nullity of administrative conduct following a declaration of invalidity, is permanently suspended. But the words, 'The decisions are not set aside', must always be assessed in the context in which they are used. Each case must be decided on its own facts.

[79] In *Motau* the declaration of unlawfulness due to non-compliance with the provisions of the provisions of the Companies Act, was not visited with any suspensive effect or nullity. On the contrary. The decision to dismiss the two board members was considered to be justified on other grounds and their dismissal was declared not to be set aside based on those reasons, rather than their dismissal being set aside *in toto*, as the high court did, due to invalidity for not following the relevant provisions of the Companies Act. The declaration of unlawfulness due to the relevant provisions of the Companies Act not having been followed, was not affected by the order not to set aside the termination of the board members' services, and the declaration of unlawfulness remained.

[80] Similarly, in *All Pay* it is significant that the Constitutional Court was not, like the high court, in the factual context of that case, content with simply not setting aside the relevant decisions. It provided expressly for the suspension of the decisions.

[81] As much as the Constitutional Court has held that the just and equitable relief need not be placed in a 'conceptual straightjacket', for example necessarily employing the language of s 172(1)(b)(i) or (ii), it is equally significant that the Constitutional Court concluded that where an administrative act is declared unlawful, but 'all its consequences are not set aside,' then 'the effect is that the order will be final, not merely a temporary suspension of invalidity.' Therefore, where an invalid administrative act is, in totality, not set aside, all the consequences of the invalid administrative act are not set aside, and the effect of that order would be that it is final, and would not amount to a temporary suspension of those consequences.

[82] But might that mean that Tendele could continue mining indefinitely notwithstanding the declaration of invalidity of the decisions, and the omissions which should have been complied with for a valid mining right to be granted? This raises the question whether there are any peculiar facts or indications in the judgment of Bam J which should lead me to conclude that a result, other than the 'permanent suspension' of the declarations of invalidity of the decisions, was intended by Bam J.

[83] It had been submitted before Bam J by the applicants that if the decisions were not set aside, Tendele would be able to continue mining. She was therefore alive to that consequence. That notwithstanding, she nevertheless declined to set the invalid decisions aside, thus strongly pointing to an intention that the normal result that would follow where administrative conduct is not set aside, would apply, namely that the decisions would continue in fact. Tendele has pointed out correctly that if the applicants' interpretation of Bam J's judgment was correct, there would have been no, or little purpose in declining to set aside the mining right and EMPr - Bam J could instead simply have declared the decisions invalid and set them aside. That would have produced the result that the applicants now pursue by way of interdict: that no mining could take place until a new mining right had been applied for and granted.

[84] The process which had resulted in the grant of the mining right and the approval of the EMPr was found by Bam J, to be deficient. Indeed, the relevant legal principles were in many instances seemingly flouted. Tendele's conduct was criticized in strong language: 'egregious', etc. The public participation process was

also deficient. Plainly Bam J, because of the public interest in the continuation of the mining operation, wanted the entire process to be regularised, if possible, by an abbreviated process, by providing for the rights transgressed in many instances when the decisions were obtained, being revisited properly during the appeal process, which she was remitting to the Minister. But in the interim she was seeking, in her words, to strike ‘the correct balance of the various competing interests.’

[85] The applicants further also argued that the judgment of Bam J precludes the commencement of mining activities unless and until Bam J’s directives in paragraphs 5 and 6 of her order had been fully complied with and completed. These paragraphs of the order require Tendele to notify interested and affected parties of their entitlement to participate in the appeal process and to ensure that the public participation processes complied with guidelines and regulations. They govern the conduct of the appeal process. It was however not provided expressly in the order that these requirements had to be completed before any activities could commence in terms of the mining right and EMPr. Whether any mining activities could be continued in the interim pending the determination of the appeal, is a question of law – the proper interpretation of the judgment – and it is not dependent on whether the processes resulting in the decisions were flawed. Bam J had found that they were but issued what she considered to be a just and equitable order, notwithstanding the shortcomings having resulted in a finding of invalidity. That is what causes the anomaly.

[86] Seemingly on what was placed before Bam J, it was contemplated that the remitted appeal process could be completed by January 2023. The reality however is that it still is not completed. If mining could have been continued from May 2022 to January 2023 while the directions in the judgment would be implemented, then the position would probably be not much different to mining activities, as contemplated in the letters, proceeding from now until a corresponding future date early in 2024, after the elapse of a similar period of time.

[87] As this issue arose mainly from the attachment to the applicants’ heads of argument, I extended an invitation to the parties after argument had been heard, to file additional argument on the following questions:

'If the judgment of Bam J contemplated that the time-line for the remitted appeal process (paragraph 3 of the court order) would be that in annexure B to the applicants' heads of argument, commencing from 4 May 2022 and being completed by January 2023:

- (a) Do the respondents agree that the appeal process could have been completed by January 2023, alternatively by the time when the present application was launched?
- (b) If not, by what date, according to the respondents could the appeal process have been completed?
- (c) What is the effect, if any, on the order of Bam J if the appeal process was not completed by the dates in sub paragraphs (a) and (b) above?

I am grateful to counsel for the supplementary heads of argument that were filed.

[88] Briefly, in the supplementary heads of argument, Tendele contends that the order granted by Bam J purposefully did not specify a time frame in paragraphs 4, 5 and 6 of her order for the completion of the appeal process, because the direction to the Minister was to reconsider the appeal 'in accordance with the findings of this judgment', which included also a consideration as to whether the consent required in terms of IPILRA had been obtained. It points out that IPILRA does not prescribe any time frame. Tendele accordingly disputes that the appeal process could have been completed by January 2023, alternatively by the time the present application was launched on 6 March 2023. The fifth to eighth respondents similarly dispute that there was an agreed time frame to complete the appeal by January 2023, or that Bam J's order contemplated a time frame within which to complete the appeal process. Otherwise, they associated themselves with the submissions by Tendele. The applicants submit that they do not contend that the appeal process should have been completed by January 2023, but that it 'could have been completed by the first quarter of 2023 if not earlier as initially anticipated by Tendele . . .' but in any event before mining activities commenced. They state the purpose of annexure B as illustrating that Tendele is absolutely to blame for any predicament it may find itself in. They point out that Tendele is still in Scoping, the first phase of the EIA process, now 14 months after Bam J's judgment, and that the EIA report will be pushed out to February 2024 with a decision by the Minister anticipated only at the end of April or beginning of May 2024. That they contend, is as opposed to the time frame had the mining right been set aside and the process had to start from scratch, which would have resulted in the final EIA report in December 2022 and a decision being received from the DMRE in April 2023. They point out that Tendele's current EIA schedule will

take some 571 days to complete. They further accuse Tendele of continuing to rely on a schedule that it knows to be unattainable, that its conduct is inconsistent with the assurances given to Bam J that Tendele was 'intent on doing everything reasonably possible to guard against the process on appeal before the Minister being assailed', that Tendele 'has bungled its EIA process again', and that it has not explained the delays. The applicants conclude that there can be no just and equitable remedy if Tendele is permitted to start mining without having first complied with Bam J's judgment and order.

[89] The question arising from the aforesaid competing timelines, assuming in favour of the applicants as it is disputed, that the process had become drawn out and/or unduly delayed, is what effect, if any, that would have on the order of Bam J. Bam J's order did not specify a deadline for the completion of the appeal process. She presumably, in the context of her judgment, as no judgment is granted in vacua, would have contemplated that the remitted appeal would be finalised within some reasonable time frame. Carrying on mining operations, as a just and equitable remedy, could not commence and continue in perpetuity with no appeal being prosecuted.

[90] On what has been placed before me I am unable to conclude that the delays have necessarily been unreasonable. But it also does not seem necessary to make that finding. The work contemplated in the letters has not commenced. It will be the first mining work to commence in respect of the areas to which the mining right relates. If Bam J intended to allow mining to continue in the interim pending a reasonable period being allowed for the appeal to be finalised, then such work as contemplated in the letters, and being of a limited nature and confined to the mining areas in accordance with undertakings provided by Tendele in the various proceedings, which might now occur, will be little dissimilar to any work that could have commenced immediately after the judgment was delivered and pending the appeal being prosecuted forthwith without delay. I am accordingly also not persuaded that it has been established that possible harm which could be occasioned now would fall outside the parameters which Bam J would have taken into account in fashioning her just and equitable remedy. If it does, then this is something which should be determined by any such ambiguity in the judgment being

clarified by Bam J. Going beyond what I have concluded above would go beyond simply interpreting the judgment of Bam J.

[91] Bam J would also have been aware that although the mining rights extend to new areas of the mine, the same type of operation as conducted by the mine since 2006 would occur. The mining modus would therefore not be dissimilar to what has occurred before.

[92] I am not persuaded that the applicants have as a matter of law established a *prima facie* right that Tendele was prohibited by the judgment from undertaking the work foreshadowed in the three letters, before the Minister would reconsider the appeal.

Alleged non-compliance with other statutory requirements.

[93] The applicants also argued that separate and independent from the judgment of Bam J, they have a *prima facie* right to interdict the continuation of mining in the affected areas, as Tendele has failed to satisfy a number of statutory requirements which are required to be complied with before commencing any mining or related activity. In the main these complaints relate to the requirements of IPILRA and the requirement to consult with interested parties.

[94] The applicants submit that on Tendele's own version it had not complied with IPILRA, referring also to the findings made by Bam J, specifically that she found that there was no evidence to support that the applicants were lawfully deprived of their informal rights in terms of IPILRA, as '[i]n all, Tendele did not obtain consent as envisaged in section 2 of IPILRA'.⁹⁵ They also stressed that invitations to participate in IPILRA meetings were only delivered to homesteads identified to be within the ZOI, that is within a 1000 meter radius of the mining pits, and that this excluded a large part of the affected local community as defined in, amongst others, *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*,⁹⁶ and thus fell foul of the MPRDA definition. The applicants were also critical, in respect of those members of the community who might have consented, whether their consent could be informed consent, unless the studies were all available, and details had been

⁹⁵ The review fn 18 para 70.

⁹⁶ *Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and Energy and others* [2022] ZAECKMHC 55; 2022 (6) SA 589 (ECMk) para 93.

made available, so the affected members of the community would know what they were consenting to. There were also criticisms that the meetings for compensation did not mention compensation for the loss of water use and some other benefits.

[95] In my view these requirements do not stand separate from the judgment of Bam J. The issue of compliance with the provisions of IPILRA, important as they are, and the deficiencies in the consultation process, formed part of and were encompassed in the judgment of Bam J. These were decided separately from the other deficiencies in the mining right process which were conceded to have rendered the decisions invalid. Bam J held that:

‘Tendele did not obtain the consent as envisaged in section 2 of IPILRA. This ground therefore succeeds.’⁹⁷

[96] In regard to the public participation process and scoping Bam J concluded ‘that Tendele had flouted the law with regard to public participation . . .’⁹⁸ Her order specifically contains directions, to apply to the remitted appeal, ‘to ensure that the public participation process to be conducted pursuant to the Minister’s determination of the appeal process’ would comply with the requirements of the Public Participation Guidelines in terms of the NEMA and chapter 6 of the Environmental Impact Assessment Regulations.

[97] As regards IPILRA and compensation, no individual community member can be compelled to relocate, without such member having consented, and such consent will undoubtedly be informed by the compensation offered. Tendele alleges that the majority of possibly affected families have consented. If a particular individual occupier has not consented, then he/she cannot be removed. The position of each much be decided on their own preferences, choices and the merits. As I understand the judgment of Bam J, this requirement was also to be resolved during the appeal process.

[98] I am unable to conclude, even at a *prima facie* level, that these requirements stand separate and distinct from the subject matter of Bam J’s judgment. They must

⁹⁷ The review fn 18 para 70.

⁹⁸ The review fn 18 para 36.

fall together with the conclusion I have reached earlier regarding the interpretation of the judgment.

An alternative satisfactory remedy – applying for the decisions to be suspended

[99] In the light of the conclusion to which I have come that a prima facie right was not established, the other requirements for an interdict assume subsidiary importance. I however deal briefly with the issue whether the applicants have an alternative satisfactory remedy.

[100] An applicant for an interim interdict must demonstrate that it has no other satisfactory remedy.⁹⁹ The Constitutional Court held in *Eskom v Vaal River Development Association* that:

‘an applicant for an interim interdict must show that there is no other satisfactory remedy . . . the common law requirement is expansive in its reach in the sense that it brings within its sweep any other *satisfactory* remedy. The limit is whether the remedy is satisfactory; a question the answer to which depends on the circumstances of each case.’¹⁰⁰ (emphasis in the original)

[101] Tendele argues that a party who wishes to suspend mining under a mining right and EMPr which are subject to an appeal before the Minister, has a remedy under s 96(2)(a) of the MPRDA. That subsection provides that an appeal to the Minister against the granting of a mining right or approval of an EMPr:

‘does not suspend the administrative decision, *unless it is suspended by* the Director-General or *the Minister*, as the case may be.’ (emphasis added)

[102] The applicants have however submitted that there are a number of difficulties with that proposition: firstly, that there is no procedure expressly provided for in the MPRDA that an interested party in the position of any of the applicants may apply to the Minister for a suspension of the decisions; secondly, that the right to suspend appears to be one which only the Minister himself may invoke; thirdly, that even if such a right to apply for a suspension on the part of an aggrieved party can be read

⁹⁹ *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another* [2018] ZACC 41; 2019 (2) SA 1 (CC); 2019 (1) BCLR 53 (CC) para 8.

¹⁰⁰ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC) para 218.

into or inferred in s 96(2)(a), the obligation to exhaust remedies before applying to court is confined to 'review of an administrative decision', as occurred before Bam J, and not to an application for an interdict, as is before this court.

[103] Regardless of s 96(2)(a) not expressly referring to an application for suspension, Tendele states in its answering affidavit that applications to suspend mining rights are frequently brought within the powers conferred by the subsection, and are determined by the Minister, while an appeal is pending before him.¹⁰¹ The correctness of this allegation was not disputed by the applicants in reply. In practice this is not a remedy which is dependent only on the Minister, of his own volition and unilaterally, deciding whether to suspend a mining right or not. In practice applications are brought to the Minister by persons affected by the grant of mining right, and these are dealt with by the Minister. Applying to the Minister to suspend a mining right is accordingly an alternative remedy available to an aggrieved party.

[104] Further, it is an appropriate remedy as any decision relating to the continuation of mining is in principle policy-laden and involves a polycentric evaluation requiring a consideration and weighing up of many considerations which the Minister, advised by technocrats in his department, is probably best equipped to answer.

[105] And finally, whether an alternative remedy should first be pursued is not simply dependent on whether that is required by s 96? Section 96(3) does require an internal appeal in terms of s 96(1) to be pursued as a remedy before a court may be approached on review, but the requirement that there must be no alternative satisfactory remedy available to an applicant for an interdict, applies to a different remedy, and in any event is a common law requirement for an interdict, which stands free of the provisions of s 96.

[106] That the applicants have this alternative remedy was raised by Tendele squarely in its answering affidavit. The applicants did not offer any explanation in reply why they have not done so.

¹⁰¹ The correctness of this factual allegation was not denied by the applicants.

[107] In their heads of argument, the applicants however argued that, because Tendele's mining right and EMPr have been declared invalid, s 96(2)(a) of the MPRDA finds no application. Tendele's argument is however predicated on the mining right and EMPr contention remaining in existence in fact. If the effect of Bam J's judgment is, as I have found, that Tendele remained possessed, as a fact, of an extant Mining Right and EMPr, which is the subject of an appeal to the Minister in terms of s 96, then s 96(2)(a) applies and affords an alternative remedy.

[108] In their heads of argument, the applicants further suggested that any appeal to the Minister, even if it may be an alternative remedy, is not a satisfactory alternative remedy. They had attempted to exhaust their remedies to the Minister by writing a letter asking him to cancel or suspend Tendele's mining right.

[109] The letter to which the applicants refer however, did not constitute an application for suspension in terms of s 96(2)(a), but was a request to the Minister on 1 June 2022, shortly after Bam J's judgment was handed down, in terms of s 47(1)(d) of the MPRDA based on Tendele having allegedly advanced inaccurate and misleading information in support of its mining right application. Because it had allegedly done so, it was said that it acted unlawfully, and the Minister was requested to suspend the mining right in terms of s 47(1)(d) of the MPRDA.

[110] Section 47(1)(d) of the MPRDA provides for a suspension, but it caters for an entirely different situation to that provided for in terms of s 96(2)(a). Section 47(1)(d) relates to the Minister suspending a mining right on the basis of past misconduct by a mining right applicant. Section 96(2)(a) provides for prospective consequences of allowing a mining right which is subject to appeal, to be suspended pending the determination of the appeal.

[111] The basis upon which the Minister was asked to exercise his s 47 powers were the findings by Bam J, rather than any prospective conduct or harm that would be suffered by any person if Tendele was permitted to commence mining in terms of its mining right in the respects foreshadowed in the letters, pending the determination of the appeal. The considerations are entirely different.

[112] The letter sent in June 2022 in terms of s 47 of the MPRDA therefore cannot be considered as invoking, and less so, exhausting the remedy in s 96(2)(a). The latter would require a different application, in which the Minister would be sought to be persuaded that mining should not take place pending his determination of the appeal.

[113] In argument, the applicants also submitted that the Minister had not reacted to the letter that was sent in terms of s 47, accordingly, that the response would have been no different in respect of an application in terms of s 96, hence that even if the remedy of a suspension of the mining right might be available in terms of s 96, the fact that the Minister did not respond to the application in terms of s 47, would hardly render the availability of an application in terms of s 96, a satisfactory remedy. Section 96 might afford a remedy, but, according to the applicants, not a satisfactory remedy.

[114] The fact that the application in terms of s 47 might have met with no response from the Minister does not mean that an appropriate application in terms of s 96 would have met with a similar response, and would hence not constitute a satisfactory alternative remedy which should have been exhausted. If the Minister was dilatory in considering the application for suspension of the mining right and EMPr pursuant to s 96, then he should be compelled to do so.

[115] I agree with the submission by Tendele that the omission to pursue the alternative internal remedy is an obstacle to the grant of interdictory relief. This is particularly so as the decision whether to suspend the mining right is a polycentric one, best determined by a statutorily ordained administrator, who can benefit from the advice and input of experts in the relevant department, who deal with the considerations involved on a policy basis.

[116] The Minister, supported by the departmental officials advising him, have the necessary technical expertise and information to make the polycentric policy decisions that are implicated in such applications. The Constitutional Court in *Koyabe v Minister of Home Affairs* remarked:

'[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before

aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a “fair” procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.

...

[37] Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information.¹⁰² (footnotes omitted)

[117] In *Dengetenge v Southern Sphere Mining*, the Constitutional Court, in the context of the duty to exhaust the s 96(3) right of appeal before bringing a review, emphasised the importance of exhausting the internal remedies provided by s 96 of the MPRDA before approaching a court.¹⁰³ As further held by the Constitutional Court in *Gavric v Refugee Status Determination Officer, Cape Town*, the importance of internal remedies in resolving complex factual issues is pronounced when these issues are such that they often arise and would benefit from the structured involvement of a decision-maker with expertise in the field, it held.¹⁰⁴

‘Providing for internal remedies is eminently sensible given the complex and specialised legal and factual issues that may arise; the number of cases concerned; the need to ensure that applicants for asylum are given a proper hearing and ventilation of their case; and the drastic and catastrophic consequences that may result if an applicant is wrongly refused asylum.’

¹⁰² *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) paras 35 – 38.

¹⁰³ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) para 115 to 136.

¹⁰⁴ *Gavric v Refugee Status Determination Officer, Cape Town and others (People against Suppression, Suffering, Oppression and Poverty as amicus curiae)* [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) para 49.

[118] In *Eskom v Vaal River Development Association*, the Constitutional Court recognised that there are circumstances where:

'either because of a combination of factors that include the complexity of the legal question, its novelty, little or no assistance from the litigants' argument, the speed with which the outcome is required and lack of sufficient time for the judge to consider the matter as best they can – the judge may not be in a position to reach a definitive decision on a legal question.'¹⁰⁵

[119] In *Johannesburg Municipal Pension Fund v City of Johannesburg*, the court held that:

'Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the considerations referred to. All the issues referred to involve "difficult questions of law" and none of them can be described as "ordinary". Nor is it desirable to rule at this interim stage that there is no prospect of success on any of these bases of review. The issues are simply too involved ("a serious question to be tried") and of such gravity that they cannot be, and should not be, disposed of in these interim proceedings.'¹⁰⁶

[120] Tendele rightly points out that if the applicants had applied to the Minister for a suspension in terms of s 96(2)(a) of the MPRDA, the position would be fundamentally different:

(a) The applicants would have provided the Minister with all the relevant facts in support of their contention that Tendele's mining right should be suspended pending the Minister's determination of the appeal; Tendele would have had the opportunity of responding; the Minister would then have considered the competing contentions; and he would have decided whether, on balance, the mining right and EMPr should be suspended pending his determination of the applicant's appeal;

(b) If the Minister decided to suspend the mining right, there would have been no need for this application and the matter, being of a polycentric nature, would more appropriately have been decided by the Minister; and if the Minister dismissed the application, the applicants would have the remedy of approaching a court for appropriate relief, probably in the form of a review coupled with interim relief.

¹⁰⁵ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC) para 251.

¹⁰⁶ *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) para 9.

(c) In a review the Minister would have been cited as a respondent, and he would be required to place his reasons for declining a suspension before the court meaning that the court would have the benefit of the Minister's reasons for his decision as well as his answering affidavit explaining why, in his judgment, the suspension should not have been granted. Instead, the applicants simply ask this court to take a first instance decision as to whether an extant mining right should be suspended pending the determination of an appeal to the Minister. In doing so they have removed the dispute from the statutory process, in terms of which Parliament has entrusted the Minister to make this decision at first instance; and deprived this court of the benefit of the Minister's first instance decision, reasons, and answering affidavit.

[121] Decisions of the kind that s 96(2)(a) of the MPRDA allocates to the Minister must be treated with appropriate judicial deference. Deference

'in these circumstances has been recommended as:

" ... 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 interpretation 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 scrutinize administrative 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."¹⁰⁷

[122] In *Minister of Environmental Affairs and Tourism v Phambili Fisheries*, the SCA said the following:

'Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds.'¹⁰⁸

¹⁰⁷ *Logbro Properties CC v Bedderson NO and others* [2002] ZASCA 135; 2003 (2) SA 460 (SCA); [2003] 1 All SA 424 (SCA) para 21, where the SCA cited C Hoexter 'The future of judicial review in South African Administrative Law' (2000) 117(3) SALJ 484 at 501 – 502.

¹⁰⁸ *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003

[123] The Constitutional Court confirmed this principle on appeal:¹⁰⁹

'In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker.'

[124] Section 96 of the MPRDA affords the applicants a satisfactory alternative internal remedy that is better suited to resolving the complex factual issues and polycentric considerations that arise in this matter.

Irreparable harm

[125] Very little needs to be said under this heading.

[126] The Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance* held that the *prima facie* right an applicant must establish is a right to which, if not protected by an interdict, irreparable harm would ensue.¹¹⁰ An interim interdict may accordingly only seek to guard against the prospective, as opposed to retrospective, violation of rights.¹¹¹

(6) SA 407 (SCA); [2003] 2 All SA 616 (SCA) para 53.

¹⁰⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 48.

¹¹⁰ *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 50.

¹¹¹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA); [2008] 4 All SA 225 (SCA).

[127] There is no doubt that if the work foreshadowed in the letters proceeded and this was not allowed in the judgment of Bam J that the affected owners could suffer harm, and probably irreparable harm.

Balance of convenience

[128] As regards the balance of convenience, the issue in this application is one of legality. The balance of convenience would have little, if any, significance. To the extent that this requirement might have relevance, the impact of mining not continue will also affect Tendele. It would probably be fair to say, that on the disputed facts on the balance of convenience, the scales are probably held equally. Other considerations are however decisive of the application for the interdict.

Conclusion

[129] The applicants have not satisfied the requirements of a *prima facie* right and no satisfactory alternative remedy.

Costs

[130] The respondents have been successful. Tendele does not seek costs against the applicants. Nor does the fifth to eighth respondents seek costs against the applicants.

[131] No costs orders are accordingly made.

Order

[132] The following order is granted:

The application for the relief claimed in part A of the Notice of Motion is dismissed.

KOEN J

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