

SOUTH AFRICA / JUDGMENT

Stern NO and Others v Minister of Mineral Resources (5762/2015) [2017] ZAECGHC 109 (17 October 2017) [2017] ZAECGHC 109

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

5762/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE
DIVISION, GRAHAMSTOWN
CASE NO.
5762/2015
In the matter

between:

JOHN DOUGLAS
STERN
N.O. First
Applicant
ARLAND JAMES
USSHER STANLEY
N.O. Second
Applicant
DAVID HAMILTON
STERN
N.O. Third
Applicant
ELIZABETH CATHRYN
STERN
N.O. Fourth
Applicant
GRAAFF-REINET AND
DISTRICT AGRICULTURAL UNION Fifth
Applicant
PAUL STANLEY
MERIFIELD Sixth

Applicant
GRAAFF-REINET
WOOLGROWERS ASSOCIATION Seventh
Applicant
GRAHAM BRIAN
HARRIS Eighth
Applicant
HAROLD GARTH
CHARLES Ninth
Applicant
CRADOCK DISTRICT
AGRICULTURAL UNION Tenth
Applicant
DANIEL JACOBUS
JANSE VAN
RENSBURG Eleventh
Applicant
DAVID-ETTIENNE DU
TOIT Twelfth
Applicant
BUFFELSHOEK
AGRICULTURAL
UNION Thirteenth
Applicant
DAVID GRANT
SHORT Fourteenth
Applicant
JANSENVILLE
AGRICULTURAL
ASSOCIATION Fifteenth
Applicant
FRANCISCUS
AUGUSTINUS
FOURIE Sixteenth
Applicant
and
MINISTER OF
MINERAL
RESOURCES Respondent

JUDGMENT

Bloem J :

- [1] The applicants sought an order reviewing and setting aside the decision of the Minister of Mineral Resources, the respondent herein, (hereinafter referred to as the Minister, the Minister of Mineral Resources or the respondent interchangeably) to make the Regulations for Petroleum Exploration and Production, 2015[1] (the Petroleum Regulations), alternatively declaring the making of the Petroleum Regulations by the respondent

alternatively the content of the Petroleum Regulations inconsistent with the Constitution and invalid as well as an order for costs. The Minister opposed the application on the merits and also raised as an issue the non-joinder of certain entities.

- [2] The applicants' attack on the making of the regulations was twofold. Firstly, they contended that the Minister of Mineral Resources did not have the authority to make the Petroleum Regulations, that the making of the Petroleum Regulations contravened

the law or was not authorised by the empowering provisions and that the process by which the Petroleum Regulations were made was

procedurally unfair. Secondly, they contended that the aim or purpose of the Petroleum Regulations was to regulate the environmental consequences of deep drilling and hydraulic fracturing, but that such was not permitted by section 107 of the Mineral and Petroleum Resources Development Act[2] (the MPRDA).

- [3] The applicants are farmers and farmers' organisations residing, farming and doing business in the Karoo region, an area to which the Petroleum Regulations apply. The history of this matter seems to be largely undisputed. Researchers discovered the possible existence of shale gas in the Karoo region. Big international companies showed an interest. Between 2008 and 2011 three companies applied for exploration rights in terms of section 79 of the MPRDA to the Petroleum Agency of South Africa (PASA), an agency designated in terms of section 70 of the MPRDA, for the granting of petroleum exploration rights in the Karoo. The first company, Bundu Gas & Oil Exploration (Pty) Ltd (Bundu), applied in respect of an area covering parts of the Eastern Cape. The initial application was withdrawn and a second application was accepted by PASA. Interested and affected parties filed objections to Bundu's application. On 20 April 2010 Bundu's second application was refused. It submitted a third application which was accepted by PASA. There was once again objection by interested and affected parties, inclusive of some of the applicants. The objections were referred to and considered by the Regional Mining and Development and Environmental Committee of the Eastern Cape which advised the Minister thereon in terms of section 10 (2) of the MPRDA.

- [4] The second company, Falcon Oil & Gas Limited (Falcon), applied in respect of an area covering approximately 30 000 km² of parts of the Eastern, Western and Northern Cape Provinces. Interested and affected parties filed objections with PASA. The Regional Mining Development and Environmental Committee considered the objections emanating from the three provinces but must still consider further objections lodged by Renewable Energy Companies. The third company, Shell Exploration Company BV (Shell), applied in respect of an area covering approximately 90 000 km² of parts of the Eastern, Western and Northern Cape. When Shell's application became public through the public participation process initiated by Shell in terms of the MPRDA, the intended shale gas exploration activities of the three companies gained a lot more public attention. Landowners and interested and affected parties, including the applicants, filed objections with PASA. The objectors raised environmental concerns, as well as concerns about the lack of adequate legal regulation of

deep drilling and hydraulic fracturing in South Africa. In response, PASA sent a memorandum to the respondent, requesting that a moratorium be placed on the granting of exploration rights. On 1 February 2011 the respondent imposed a moratorium in terms of section 49 (1) of the MPRDA on the processing of all new applications for reconnaissance permits, technical co-operation permits, exploration rights and production rights in the areas designated in Government Notice 54 published in Government Gazette 33988 dated 1 February 2011. The designated area encompasses the Southern Karoo Basin. The moratorium did not affect the processing of applications received before the publication of Government Notice

54. The applications for exploration rights from Bundu, Falcon and Shell were accordingly unaffected by the moratorium.

[5] During December 2011, while the moratorium was in place, the respondent established an inter-departmental task team comprising

representatives from the Department of Mineral Resources, the Department of Energy, the Department of Science and Technology, SKA

South Africa, the Department of Environmental Affairs, the Department of Water and Sanitation, Council for Geoscience, Water Research

Commission, Eskom and PASA. It also had academics as its advisers.

[6] Among the aspects that the task team considered in its investigations were (a) the technical aspects of hydraulic fracturing;

(b) the environmental and socio-economic implications of hydraulic fracturing; (c) the South African regulatory framework, as it existed at the time of the studies; (d) the geographic layout of the Karoo; and (e) an assessment of the consequences of hydraulic fracturing on the South African economy. In the execution of its mandate the task team's focus was on South Africa and its specific conditions. On completion of its study, the task team compiled a report which was approved by Cabinet.

[7] The task team also conducted a survey of the relevant legislative and regulatory framework in South Africa and concluded that while it is rigorous, it needed to be robust enough to ensure that if hydraulic fracturing was approved, then any resultant negative impacts could be readily mitigated. This necessitated an assessment of the mineral and petroleum resources development regulations, with a view to augmenting them.

[8] On 7 September 2012 Cabinet released a statement wherein it was announced that it had approved the task team's report, that the moratorium on processing of applications had been lifted and that the respondent was mandated to hold a series of public consultations with interested and affected stakeholders to provide further details. The report of the task team was made public on 12 September 2012. That report contained an acknowledgement of uncertainty as to whether there is a commercially exploitable shale gas resource and, if so,

its location or the scale of development that it might support. It was furthermore acknowledged that it was not yet possible to make comprehensive assessments of the various impacts such a development might have.

- [9] Cabinet accepted the recommendations made by the task team. Those recommendations were firstly, to allow normal exploration

(excluding hydraulic fracturing), such as geological field mapping and other data gathering activities, to proceed under the existing

regulatory framework; secondly, to constitute a monitoring committee to ensure comprehensive and co-ordinated augmentation of the regulatory framework and supervision of operations; thirdly, to augment the current regulatory framework; and fourthly, once all the preceding actions had been completed, to authorise hydraulic fracturing under strict supervision of the monitoring committee, but in the event of any unacceptable outcomes the process may be halted.

- [10] On 18 September 2012 the respondent addressed the National Assembly and confirmed that Cabinet had approved the task team's report on shale gas and that the moratorium on processing of applications for exploration in the Karoo had been lifted. The respondent furthermore informed members of the National Assembly that Cabinet had decided to accept the task team's recommendations.

- [11] The monitoring committee was appointed. Among the members of the monitoring committee were representatives from the Department of Mineral Resources, the Department of Environmental Affairs and the Department of Water and Sanitation and the Department of Science and Technology. The monitoring committee produced draft regulations which the respondent published for public comment in 2013.[3] The purpose of the draft regulations was to augment gaps that were identified in the regulatory framework governing the exploration and production of petroleum resources, particularly in relation to hydraulic fracturing. In addition, the draft regulations were aimed at prescribing good international petroleum industry practices and standards that would enhance the safe exploration and production of petroleum. The draft regulations dealt with both the exploration as well as the production phases.

- [12] Within 30 days the Department of Mineral Resources received approximately 150 comments on the draft regulations. The

applicants were among those who commented on the draft regulations. The monitoring committee assessed the responses and prepared revised regulations for a more effective hydraulic fracturing regulatory framework. On 3 February 2014 the Minister published another moratorium on the granting of applications for exploration rights in a designated area. The moratorium did not apply to applications received and accepted before 1 February 2011, subject to the condition that such applications, if granted, shall not authorise the holder of such right to undertake hydraulic fracturing until such time as appropriate amendments had been made to the

Regulations under the MPRDA.

[13] At the invitation of the Department of Mineral Resources to Bundu, Falcon and Shell the first two companies published revised

environmental management programs to exclude hydraulic fracturing. Shell did not do so. On 3 June 2015 the Minister promulgated

the Petroleum Regulations, the making and contents of which form the subject matter of this application which was instituted on 20 November 2015. At the time of the hearing of this application the outcome of the applications for exploration rights by Bundu, Falcon and Shell (the companies) was still being awaited.

[14] Hydraulic fracturing is defined in the Petroleum Regulations as “injecting fracturing fluids into the target formation at a pressure exceeding the parting pressure of the rock to induce fractures through which petroleum can flow to the wellbore”. To illustrate the potential adverse environmental impacts associated with deep drilling and hydraulic fracturing the applicants referred to an extract from a study performed by the Director General for International Policies of the European Parliament dated June 2011. The actual process of hydraulic fracturing is preceded by a deep drilling process.

[15] The deponent of the main answering affidavit, David Msiza, the Acting Director General at the Department of Mineral Resources, alleged that he did not have knowledge firstly, of the applicants’ description of hydraulic fracturing and secondly, that it is preceded by deep drilling. The respondent adopted the stance that the views expressed by the deponent of the main answering affidavit, John Stern, about deep drilling, hydraulic fracturing and their adverse impacts on the environment were represented as being matters of fact, but in reality require expert evidence and a balanced and unbiased presentation of the factual background because they reflect Mr Stern’s opinions. In reply the applicants filed an affidavit by Stefan Cramer who has been employed since 2014 as a science adviser by the South African Faith Communities Environment Institute (SAFCEI). Dr Cramer studied geology with special emphasis on applied geology, sedimentology and geo-ecology. He also obtained certificates firstly, in human health and global environmental change and secondly, on medical geology. He has extensive experience as a geo-hydrologist as a mining geology and hydrology consultant in various parts of the world. As a science adviser to SAFCEI Dr Cramer has been involved in informing the public of the potential adverse impacts of hydraulic fracturing in the context of the intended shale gas development in the Karoo. He has also participated as a member of the Process Custodians Group in the strategic environmental assessment for shale gas development in South Africa initiated by the Department of Environmental Affairs. He confirmed having read Mr Stern’s founding and replying affidavits and stated that, in his view, the technical description of the deep drilling and hydraulic fracturing process and the potential impacts thereof were correctly recorded therein, save in respect of certain allegations in Mr Stern’s affidavits on which he commented and even corrected. The extent of such correction is, in my view, not material.

What is of importance is that Dr Cramer confirmed the allegations in Mr Stern's affidavit about the technical aspects of hydraulic fracturing and the potential adverse impact thereof.

[16] The respondent, on the other hand, filed an affidavit by Mohamed Kapdi, a practising attorney who described himself as "an oil and gas and energy expert, with more than 20 years' experience in the sector". He obtained a B.Proc. degree, has attended a shipping course, a course on drilling essentials for non-drilling professionals and core courses offered by the Association of International Petroleum Negotiators in oil and gas development since 2012. Between 1996 and 1999 he was part of the core team of directors responsible for the economic evaluation of the impact of the oil and gas industry and the establishment of the Cape Oil and Gas Supply Initiative, between 2009 and 2010 he was the Acting Deputy Chairperson of the South African Oil and Gas Alliance and since 2015 he has been a member of the Advisory Council to the Minister of Energy. Except for authoring and co-authoring publications regarding the oil and gas and energy sectors, he regularly provides training and hosts seminars regarding the energy and oil and gas sector in South Africa. Mr Kapdi stated that he

had read Mr Msiza's answering affidavit and confirmed what Mr Msiza said about him. In his affidavit Mr Msiza alleged that, to the extent that he dealt with matters in his answering affidavit which did not fall within his personal knowledge, he relied on inter alia Mr Kapdi's expert advice. It is however not clear from either Mr Msiza's or Mr Kapdi's affidavit on what aspects the former relied on the latter's expert advice.

[17] The respondent alleged that the applicants have a bias in favour of the protection of existing socio-economic power structures in the Karoo region and of their privileged position within those structures. The applicants denied the allegations of bias.

They acknowledged their interest in the land which is utilised largely for agricultural purposes and upon which approximately 100,000 people are employed. It is that same land in respect whereof the applications for exploration rights for shale gas were made. If those applications are successful, deep drilling and hydraulic fracturing may be utilised which may potentially impact adversely on the environment, including the land in question and the farming operations on the land.

[18] The respondent's allegations of bias are, in my view, irrelevant if regard is had to the fact that he has not disputed the allegations made by Mr Stern, confirmed by Dr Cramer, about deep drilling and hydraulic fracturing and its potential adverse

environmental impacts. In any event, in parts of his affidavit Mr Msiza accepted that hydraulic fracturing of shale gas has

potential adverse impacts on the environment. He alleged, for instance, that where petroleum is produced by means of hydraulic

fracturing, the Petroleum Regulations seek to conserve the environment, mitigate environmental risk and combat pollution of air,

land, water and ground water. That allegation contains an acknowledgement that hydraulic fracturing has potential adverse

environmental impacts.

[19] The undisputed major possible impacts are air omissions of pollutants and contamination of surface and ground water due to uncontrolled gas or fluid flows arising from blow-outs or spills, interception of naturally occurring fractures and fissures, well failures, corrosion of casings, cementing failure, leaking fracturing fluid and uncontrolled waste water discharge. The European study refers to the possible mitigants for the above possible impacts. In my view the applicants' description of deep drilling and hydraulic fracturing as well as the potential adverse environmental impacts they have on the land in question, as set out by Mr Stern and Dr Cramer, must be accepted. In other words, it must be accepted that, on the available evidence in this application, deep drilling and hydraulic fracturing have potential adverse environmental impacts. It is against the above background that I now deal with the Petroleum Regulations.

[20] When the National Environmental Management Act, 1998 (Act No. 107 of

1998) (NEMA) commenced on 29 January 1999, mining operations were excluded from its scope. Environmental management provisions in relation to mining activities were contained in the MPRDA. In the case where an activity would disturb the environment there was a lack of integration between the processes contained in NEMA and the MPRDA. The Minister of Mineral Resources and the Minister of Environmental Affairs, later joined by the Minister of Water and Sanitation, concluded an agreement titled One Environmental System for the country with respect to mining (the Agreement). To give effect to the Agreement various pieces of legislation had to be amended.

[21] Pursuant to and in accordance with the Agreement, section 50A was inserted in NEMA by section 17 of the National Environmental

Management Laws Amendment Act of 2014[4] with effect from 2 September 2014. It deals with future amendments in respect of environmental matters insofar as they relate

to the Agreement. Section 50A (2) of NEMA reads as follows :

“Agreement for the purpose of subsection (1) means the Agreement reached between the Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources titled One Environmental System for the country with respect to mining, which entails—

(a) that all environment related aspects would be regulated through one environmental system which is the principal Act and that all

environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002;

- (b) that the Minister sets the regulatory framework and norms and standards, and that the Minister responsible for Mineral Resources will implement the provisions of the principal Act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;
- (c) that the Minister responsible for Mineral Resources will issue environmental authorisations in terms of the principal Act for prospecting, exploration, mining or operations, and that the Minister will be the appeal authority for these authorisations; and
- (d) that the Minister, the Minister responsible for Mineral Resources and the Minister responsible for Water Affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and agree to synchronise the time frames.”

[22] Section 163A was inserted in the National Water Act[5] by section 5 of the National Water Amendment Act,[6] also with effect from 2 September 2014. It is generally similar to section 50A of NEMA. Section 163A (2) of the National Water Act reads as follows :

“Agreement for the purpose of subsection (1) means the Agreement reached between the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs titled One Environmental System for the country with respect to mining, which entails:

- (a) that all environment related aspects would be regulated through one environmental system which is the National Environmental Management Act, 1998 (Act No. 107 of 1998) and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);
- (b) that the Minister responsible for environmental affairs sets the regulatory framework and norms and standards, and that the Minister responsible for mineral resources will implement the provisions of the National Environmental Management Act, 1998 (Act No. 107 of 1998) and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;
- (c) that the Minister responsible for mineral resources will issue environmental authorisations in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) for prospecting, exploration, mining or operations, and that the Minister responsible for environmental affairs will be the appeal authority for these authorisations; and
- (d) that the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and also agreed to align the time frames and processes.”

[23] It will be noticed that section 50A (2)(a) of NEMA refers to “the principal Act” whereas section 163A (2)(a) of the National Water Act identifies NEMA as the Act through which all environmental-related aspects would be regulated. In terms of those sections all environmental provisions would be repealed from the MPRDA. In terms of sections 50A (2) (b) of NEMA and section 163A (2)(b) of the National Water Act the Minister of Environmental Affairs sets the regulatory framework and norms and standards while the Minister of Mineral Resources implements the provisions of NEMA and the subordinate legislation as far as they relate to prospecting, exploration, mining or operations.

[24] Other sections of the MPRDA which are relevant to this application and which were repealed by sections 31 and 33 respectively of the Mineral and Petroleum Resources Development Amendment Act of 2008 pursuant to and in accordance with the Agreement, were sections 38 and 39 of the MPRDA. Prior to their deletion sections 38 read as follows :

“The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit-

- (a) must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act, 1998 (Act 107 of 1998);
- (b) must consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment as contemplated in section 24 (7) of the National Environmental Management Act, 1998 (Act 107 of 1998);
- (c) must manage all environmental impacts-
 - (i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate; and
 - (ii) as an integral part of the reconnaissance, prospecting or mining operation, unless the Minister directs otherwise;
- (d) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and
- (e) is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.”

and section 39 (2) reads as follows:

“Any person who applies for a reconnaissance permission, prospecting right or mining permit must submit an environmental management plan as prescribed.”

[25] Also pursuant to and in accordance with the Agreement paragraph (a) of section 107 (1) of the MPRDA was deleted by section 77 of the Mineral and Petroleum Resources Development Amendment Act[7] with effect from 7 June 2013. The Petroleum Regulations state that the Minister made them under section 107 of the MPRDA as read with the provisions of section 14 of the Interpretation Act.[8] When the MPRDA commenced on 1 May 2004, section 107 (1) (a) read as follows :

“The Minister may, by notice in the Gazette, make regulations regarding –

- (a) (i) the conservation of the environment at or in the vicinity of any mine or works;
- (ii) the management of the impact of any mining operations on the environment at or in the vicinity of any mine or works;
- (iii) the rehabilitation of disturbances of the surface of land where such disturbances are connected to prospecting or mining operations;
- (iv) the prevention, control and combating of pollution of the air, land, sea or other water, including ground water, where such pollution is connected to prospecting or mining operations;
- (v) pecuniary provision by the holder of any right, permit or permission for the carrying out of an environmental management programme;
- (vi) the establishment of accounts in connection with the carrying out of an environmental management programme and the control of such accounts by the Department;
- (vii) the assumption by the State of responsibility or co-responsibility for obligations originating from regulations made under subparagraphs (i), (ii), (iii) and (iv) of this paragraph; and
- (viii) the monitoring and auditing of environmental management programmes...”.

[26] Section 107 (1)(a) provided for the making of regulations regarding environmental matters concerning prospecting and mining minerals and exploring for and producing petroleum. It is irrelevant that section 107 does not refer to petroleum because in terms of section 69 (2)(a) and (b)(i) of the MPRDA any reference in section 107 (which falls under Chapter 7 of that Act) to minerals must be construed as a reference to petroleum.

[27] The applicants’ case is that, in line with the provisions of the Agreement and after paragraph (a) had been deleted from section 107 (1) of the MPRDA with effect from 7 June 2013, the respondent did not have the power to make regulations regarding the matters which were listed in paragraph (a) of section 107 (1), specifically those matters which were listed in section 107 (1)(a)(i), (ii), (iii) and (iv). They are:

27.1. Regulation 86 which provides for the environmental impact assessment before the commencement of exploration and production

activities related to petroleum;

27.2. Regulation 87 which deals with assessment of the affected areas before well design and the submission of a geological report to the designated agency for approval;

27.3. Regulation 88 which deals with the monitoring of water resources relevant to the drilling site;

27.4. Regulation 89 which deals with the assessment of the risk of potential hydraulic fracturing related seismicity;

27.5. Regulation 95 which deals with design of a well;

27.6. Regulation 96 which deals with construction of a well;

27.7. Regulations 97, 98, 99 and 100 which set out the requirements for conductor casing, surface casing, intermediate casing and

production casing;

27.8. Regulation 101 which deals with the centralisation of casing;

27.9. Regulation 102 which deals with the cement requirements of casing operations and compression strength tests;

27.10. Regulation 103 which deals with testing of casing string after the setting and cementing thereof;

27.11. Regulation 105 which deals with the installation of blowout prevention equipment;

27.12. Regulation 106 which deals with the pressure testing of blowout prevention equipment;

27.13. Regulation 107 which deals with the examination of a well before commencement of drilling or hydraulic fracturing;

27.14. Regulation 109 which deals with the permitted drilling fluids;

27.15. Regulation 110 which deals with the management of drilling operations and hydraulic fracturing;

27.16. Regulation 111 which deals with the equipment used in hydraulic fracturing;

27.17. Regulation 112 which deals with mechanical integrity tests before the commencement and during hydraulic fracturing;

27.18. Regulation 113 refers to the list of substances in schedule 1 which are prohibited from use in the fracturing process;

27.19. Regulation 114 which deals with the containment of fracture and fracturing fluids;

27.20. Regulation 115 which deals with the management of fracturing fluids;

- 27.21. Regulation 116 which deals with the management of flowback and produced fluids;
- 27.22. Regulation 117 which deals with the development of a fluid transportation management plan;
- 27.23. Regulation 118 which deals with an area where hydraulic fracturing additives, chemicals, oils and fuels are to be stored;
- 27.24. Regulation 119 which deals with hydraulic fracturing operations;
- 27.25. Regulation 120 which deals with the compilation and submission of a post hydraulic fracturing report;
- 27.26. Regulation 122 which deals with the protection of water resources prior to and during all the phases of drilling and hydraulic fracturing;
- 27.27. Regulation 124 (5) which deals prohibits the discharge of hydraulic fracturing fluids and hydraulic fracturing flowback;
- 27.28. Regulation 126 which deals with the management of spillage used or generated during or after hydraulic operations;
- 27.29. Regulation 127 which deals with fugitive emissions;
- 27.30. Regulation 128 which deals with the management and control of fugitive dust;
- 27.31. Regulation 129 which deals with the control of noise pollution associated with hydraulic fracturing operations;
- 27.32. Regulation 130 which deals with the suspension of a well;
- 27.33. Regulation 131 which deals with the management and monitoring of wells that are in suspension phase following drilling and hydraulic fracturing operations; and
- 27.34. Regulation 132 which deals with the decommissioning or closure of a well;

[28] In my view the above regulations seek to (a) conserve the environment at or in the vicinity of the wells (petroleum production area) used for hydraulic fracturing; (b) manage the impact of the production operations on the environment at or in the vicinity of the wells; (c) rehabilitate disturbances of the surface of land where such disturbances are connected to exploration or hydraulic fracturing; and (d) prevent, control and combat pollution of the air, land, sea or other water, including ground water, where such pollution is connected to exploration or hydraulic fracturing. I agree with the applicants' contention that the above regulations would have been covered by section 107 (1)(a)(i) to (iv) had paragraph (a) not been deleted from section 107 (1).

- [29] The date of the deletion of paragraph (a) from section 107 (1) of the MPRDA is significant if regard is had to the fact that the Petroleum Regulations were made almost two years thereafter on 3 June 2015. In my view the respondent did not have authority to make the Petroleum Regulations which deal with the matters contained in the deleted paragraph (a) of section 107 (1) of the MPRDA, more particularly (a)(i), (ii), (iii) and (iv), because paragraph (a) of section 107 (1) had been repealed by 3 June 2015 when the Petroleum Regulations were made.
- [30] In *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*[9] Maya JA (as she then was), with reference to paragraphs 128 and 135 of *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)*[10] agreed with the submission made by one of the parties that the making of regulations by a Minister constitutes administrative action within the meaning of the Promotion of Administrative Justice Act[11](PAJA). I am bound to the interpretation given to the New Clicks case by the Supreme Court of Appeal.[12]
- [31] Mr Breitenbach, who appeared on behalf of the applicants with Mr Schreuder, submitted that the respondent's decision to make the Petroleum Regulations must be judicially reviewed because firstly, the respondent was not authorised by section 107 of the MPRDA to make them;[13] secondly, the making of the Petroleum Regulations contravened sections 44 (1C) and 50A of NEMA and section 163A of the National Water Act or was not authorised by those sections;[14] and thirdly, the making of the Petroleum Regulations was procedurally unfair.[15]
- [32] At the hearing reliance was placed on section 107 (1)(g) and (l) for the submission that the repeal of paragraph (a) of section 107 (1) did not mean that the respondent did not have the power to make the Petroleum Regulations or the regulations previously authorised by section 107 (1)(a)(i) to (iv). Section 107 (1)(g) and (l) provide that the Minister of Mineral Resources may make regulations regarding –
- “(g) the form, conditions, issuing, renewal, abandonment, suspension or cancellation of any environmental management programme, permit, licence, certificate, permission, receipt or other document which may or have to be issued, granted, approved, required or renewed in terms of this Act;*
- (l) any other matter the regulation of which may be necessary or expedient in order to achieve the objects of [the MPRDA].”
- [33] Mr Maenetje, who appeared with Ms Muvangua on behalf of the respondent, submitted that section 107 (1)(g) of the MPRDA, as read with sections 24C (2A)[16] and 50A (2)(c) of NEMA, empowers the respondent to make regulations to fulfil the function of issuing environmental authorisations, for hydraulic fracturing in this case. He submitted that the provisions of section 107 (1)(g) are broad enough for the respondent

to prescribe what information must be submitted or the process that must be followed in applying for any environmental authorisation that is required in respect of hydraulic fracturing. It was submitted that, to the extent that the impugned Petroleum Regulations

set such process, information or steps to be followed for applying for or obtaining an environmental authorisation, it is authorised.

[34] Although the answering affidavit made specific reference to sections 107 (1)(k) and (l) nowhere did the respondent place reliance on section 107 (1)(g). But the more fundamental problem with the respondent's reliance on section 107 (1)(g) is the meaning to be given to that subsection. It refers to the form, conditions, etc of any environmental management program, permit, or other document which may or have to be issued in terms of the MPRDA, not NEMA. In my view it is not the meaning of section 107 (1)(g) that the Minister of Mineral Resources should have or has the power to make regulations as to how a person should go about applying for environmental authorisations for hydraulic fracturing under the MPRDA. That interpretation of section 107 (1)(g) would be inconsistent with the provisions of section 44 (1)(a) and 50A (2)(b) of NEMA. Section 44 (1)(a) provides that the Minister of Environmental Affairs may make regulations dealing with any matter which under NEMA must be dealt with by regulation.[17] In the circumstances, section 107 (1)(g) of the MPRDA is no answer to the applicants' contention that the respondent was authorised to make the Petroleum Regulations.

[35] It was furthermore submitted on behalf of the respondent that if section 107 (1)(l) is read with the objects of the MPRDA, as set out in section 2 (h) thereof, the respondent may make regulations concerning the exploration and extraction of shale gas by means of hydraulic fracturing aimed at advancing the right to an environment that is not harmful. The object of the MPRDA which is set out in section 2 (h) of the MPRDA is to :

"give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development ...".

[36] Firstly, it goes without saying that prior to the deletion of paragraph (a) of section 107 (1), section 107 (1)(l) did not

authorise the making of regulations about the aspects covered in section 107 (1)(a). Secondly, the deletion of paragraph (a) means that the scope of the respondent's power to make regulations has been changed. The effect of the deletion of paragraph (a) of section 107 (1) was not to expand the range of matters falling under section 107 (1)(l) so as to include matters

which had, until the deletion, been covered by section 107 (1)(a). Thirdly, the repeal of paragraph (a) of section 107 (1) was part of an overall statutory scheme aimed at shifting the regulation of environmental matters concerning prospecting and mining for minerals and exploring for and producing petroleum from the MPRDA to NEMA. Lastly, the insertion of sections 44 (1C) and 50A in NEMA and section 163A in the National Water Act stripped the respondent of the power to

make regulations dealing with environmental matters insofar as they relate to prospecting, exploration, mining or operations, the regulatory framework and norms of standards which, in terms of section 50A (2) of NEMA and section 163A (2) of the National Water Act, must be set by the Minister of Environmental Affairs. For the above reasons I do not agree with the submission made on behalf of the respondent that section 107 (1)(l) authorised the respondent to make the Petroleum Regulations. Because the applicants have established that the respondent was not authorised by section 107 of the MPRDA to make them, they are entitled under section 6 (2)(a)(i) of PAJA to the judicial review of his decision to make them.

[37] It was also submitted on behalf of the applicants that the making of the Petroleum Regulations contravened the provisions of sections 44 (1C) and 50A of NEMA and 163A of the National Water Act or that their making was not authorised by those sections. Sub-section 1C was inserted in section 44 of NEMA by section 15 (b) of the National Environmental Management Laws Amendment Act of 2014 with effect from 2 September 2014. Section 44 (1C) provides that regulations made in terms of NEMA or any other Act that may have the effect of amending the provisions of the Agreement referred to in section 50A of NEMA must be made by the Minister of Environmental Affairs in concurrence with the Minister of Mineral Resources and the Minister of Water Affairs.

[38] I am of the view that the Petroleum Regulations have the effect of amending the Agreement because the respondent set the regulatory

framework and norms and standards governing the environmental-related aspects of mining when he made the Petroleum Regulations. In terms of the Agreement, as contained in section 50A (2)(b) of NEMA and section 163A (2)(b) of the National Water Act, it is the Minister of Environmental Affairs who should set the regulatory framework and norms and standards and the Minister of Mineral Resources implements the provisions of NEMA and the subordinate legislation as far as they relate to prospecting, exploration, mining and operations. The making of the Petroleum Regulations by the Minister of Mineral Resources, as opposed to the Minister of Environmental Affairs, contravened the provisions of sections 44 (1C) and 50A (2)(b) of NEMA and section 163A (2)(b) of the National Water Act or was not authorised by those sections. The applicants are accordingly entitled under section 6 (2)(f)(i) of PAJA to the judicial review of the making of the Petroleum Regulations.

[39] It was also submitted on behalf of the applicants that the making of the Petroleum Regulations was procedurally unfair. Regulation 113 (1) provides that the substances listed in Schedule 1 are prohibited from use in the fracturing process. Schedule 1 to the Petroleum Regulations lists the substances that will not be allowed as additives to fracturing fluids in the fracturing process. That schedule is an important part of the system of regulation created by the Petroleum Regulations. The schedule was not included in the proposed technical regulations for petroleum exploration and exploitation published for comment by members of the public and interested and affected parties.

[40] Mr Msiza alleged that the purpose of the schedule of prohibited substances is to mitigate the risk of the potential harmful effects caused by the use of hazardous substances. The applicants contended that Mr Msiza's allegation contains an

acknowledgement that hazardous substances are used in fracturing fluids. The respondent did not deny Mr Stern's allegation

that those hazardous substances which are used in hydraulic fracturing fluids are or may be toxic and harmful to the environment

and to persons who farm or live in the Karoo, including many of the applicants.

[41] In terms of section 4 (1)(a), (b) and (c) of PAJA, where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether

(a) to hold a public enquiry; (b) to follow a notice and comment procedure; and (c) to hold a public enquiry and to follow a notice and comment procedure.

[42] In this case the notice and comment procedure was followed. However, because the schedule did not form part of the proposed technical regulations which were published for comment by members of the public and interested parties, it cannot be said that the respondent took "appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them", as required by section 4 (3)(a) of PAJA. Interested and affected parties were accordingly denied the opportunity to comment on the prohibited substances now listed in Schedule 1. The procedure followed did not provide an opportunity for all South Africans to be heard on the important issue of the substances that may not be used in hydraulic fracturing fluids. In the circumstances I am satisfied that the making of the Petroleum Regulations, inclusive of Schedule 1, was procedurally unfair. The applicants are accordingly entitled under section 6 (2)(c) as read with section 4 of PAJA to the judicial review of the making of the Petroleum Regulations.

[43] For the reasons set out above, the respondent's decision to make the Petroleum Regulations is declared unlawful. In view of the declaration of invalidity of the Petroleum Regulations, it is unnecessary to deal with the aim or purpose of the Petroleum Regulations.

[44] In terms of section 8 (1) of PAJA where a party has successfully judicially reviewed an administrative action, a Court may grant any order that is just and equitable, including setting aside administrative action and remitting the matter for reconsideration by the administrator, with or without directions. Counsel for the respondent submitted that if the Petroleum Regulations were found to be invalid, this Court should either suspend the declaration of invalidity for a period of approximately 12 months to allow the respondent to make appropriate regulations. That submission was based on the fact that the applicants have not attacked hydraulic fracturing itself. It was submitted that the setting aside the Petroleum Regulations with immediate effect would amount to setting aside the

government's policy decision to permit hydraulic fracturing, alternatively, that this Court should limit the retrospective effect of a declaration of invalidity so that steps already taken are not automatically reversed.

[45] Counsel for the applicants submitted that if the applicants succeed in establishing that the making of the Petroleum Regulations was unlawful and unfair and therefore invalid, they are entitled to effective relief which may be denied only if there are compelling

reasons for withholding the relief sought.[18] He submitted that the fact that the applicants did not attack hydraulic fracturing or the government's policy decision to

permit hydraulic fracturing does not constitute a compelling reason for withholding the relief sought. I agree with that

submission. The government policy was not and could not have been that deep drilling and hydraulic fracturing should be permitted

even if not lawfully regulated. The respondent adduced no evidence to show that any application for exploration rights, on the basis that the Petroleum Regulations were valid, has been granted. In the circumstances it is unlikely that the retrospective effect of a declaration of invalidity would reverse any steps already taken. Although the general rule favours prospectivity, in this case it has not been shown that an unlimited retrospective order of invalidity would pose any prejudice to the Minister or the Department of Mineral Resources or third parties. In the circumstances of this case it would be just and equitable to set aside the making of the Petroleum Regulations retrospectively.

[46] Most of the Petroleum Regulations deal with the protection of the environment against the risk posed by hydraulic fracturing for shale gas and its associated deep drilling. Because the task of separating the good from the bad is, by virtue of the fact that the Petroleum Regulations comprise a composite set of rules of deep drilling and hydraulic fracturing, so complicated as to be impractical, the Petroleum Regulations as a whole are liable to be set aside.[19]

[47] Ideally the issue of non-joinder should be dealt with first because if the submission has merit the application should be postponed to allow joinder to take place before the merits are dealt with. In this case however one has to understand the statutory framework and background facts first to appreciate the joinder point.

[48] The submission on behalf of the respondent was that every person who has an interest in hydraulic fracturing should be joined. The respondent contended specifically that the Minister and Department of Environmental Affairs, the Minister and Department of Water and Sanitation, PASA and the companies should have been joined.

[49] In *Economic Freedom Fighters and others v Speaker of the National Assembly and others*[20] Binns-Ward J considered the applicants' (EFF and its members who were parliamentarians at the time) application for an order

declaring provisions of the Parliamentary and Provincial Medical Aid Scheme Act[21] inconsistent with the Constitution because those provisions make membership of the Parmed Medical Aid Scheme compulsory for certain

office bearers, including parliamentarians and judges of the Constitutional Court, Supreme Court of Appeal and High Court, for as long as they hold that office or post. The EFF attacked those provisions on the basis that, amongst others, they infringe the right of their members to freedom of association. It was submitted by the Speaker of the National Assembly that the application should be stayed pending the joinder of certain necessary parties, like for instance, the Chief Justice as representative of all sitting judges who would be adversely affected by the order sought, if granted. The Court found that there was nothing in the provisions of the Parliamentary and Provincial Medical Aid Scheme Act that would justify holding that the Chief Justice had the power or responsibility to represent the personal interests of the judges in their membership of a medical aid scheme. The mere fact that a party may have an interest in the outcome of the litigation does not mean that that party is required to be joined in those proceedings. The right of a party to validly raise the objection that another party should have been joined in the proceedings has been held to be a limited one.[22].

[50] Binns-Ward J stayed proceedings pending the joinder of persons who are compulsory members of Parmed because an order setting aside the impugned provisions may imperil the financial viability of the scheme and consequently members' rights to benefits from the scheme. The Court furthermore found that the persons who have a direct and substantial interest were all identifiable and that a range of means of effective notice to each of them was readily conceivable. In this case the group of parties to be joined is undeterminable.

[51] Regarding the joinder of the Ministers and Departments, firstly, it is unnecessary to join a Minister of a national department and the department of which he or she is the political head because a litigant brings a national department before Court by citing the political head of the department in a representative capacity.[23] In the case of the Department of Environmental Affairs it would be the Minister of Environmental Affairs and in the case of the Department of Water and Sanitation it would be the Minister of Water and Sanitation. Secondly, it was also unnecessary to join the Minister of Environmental Affairs although she might have been involved throughout the making of the Petroleum Regulations.

The fact of the matter is that she did not make the Petroleum Regulations. They were made by the respondent.

[52] As set out above, one of the applicants' grounds of challenge is that the Petroleum Regulations have the effect of amending the Agreement referred to in section 50A (2) of NEMA and that, in terms of section 44 (1C) of NEMA, the Petroleum Regulations should have been made by the Minister of Environmental Affairs in concurrence with the Minister of Mineral Resources and the Minister of Water and Sanitation. It was submitted on behalf of the respondent that in the light thereof the Minister of Environmental Affairs has a direct and substantial legal interest in the matter and that such legal interest could be prejudicially

affected by the order sought, if granted. In my view the respondent has failed to show how the right of the Minister of Environmental Affairs, as the executive authority responsible for the administration of NEMA and the regulations made under it, will be prejudicially affected if the order sought is granted. There might have been substance in the respondent's submission that the Minister of Environmental Affairs ought to have been joined had the latter concurred in the making of the Petroleum Regulations, on the basis that she acted inconsistently with section 44 (1C) of NEMA.

- [53] In the circumstances, the rights of neither the Minister or Department of Environmental Affairs nor the Minister or Department of Water and Sanitation will in my view be prejudicially affected if the Petroleum Regulations are set aside. That those Ministers' rights might be affected is irrelevant. What is relevant is that those Ministers or Departments have no legal interest in the order sought. The respondent's submission in that regard can accordingly not be sustained.
- [54] Regarding PASA, in terms of section 70 of the MPRDA it is a wholly owned and controlled agency designated by the respondent to perform the functions referred to in Chapter 6 of that Act, which chapter deals with petroleum exploration and production. The MPRDA does not establish PASA as a juristic entity. PASA is the respondent's agent to perform the functions as set out in section 71 of the MPRDA. Those functions include receiving applications for exploration rights, evaluating such applications and making recommendations to the respondent in respect thereof. The setting aside of the Petroleum Regulations cannot adversely affect PASA's rights, assuming that it has such rights. In my view it was not necessary for the applicants to join PASA as a party in these proceedings.
- [55] Regarding the abovementioned companies, the respondent did not pertinently raise the point of their non-joinder in the answering

affidavits. That point was pertinently raised in respect of the Minister of Environmental Affairs. It was submitted however on behalf of the respondent that the companies had a legitimate expectation that their applications for exploration rights would be processed ever since the Petroleum Regulations were made and that an order setting aside the Petroleum Regulations would adversely affect their applications. The applicants complained that, had the point been taken in the answering affidavits, they would have investigated and responded thereto in their replying affidavits. In my view there is merit in that complaint. These being motion proceedings where affidavits serve the role of pleadings and evidence, the respondent should have set out facts in the answering affidavits for his reliance on legitimate expectation and non-joinder of the companies. It was unfair to the applicants to deny them the opportunity of dealing with those aspects in their replying affidavits.

[56] Furthermore, the respondent cannot rely on the doctrine of legitimate expectation because he did not allege, let alone prove, that the Department of Mineral Resources made a competent and lawful representation to the companies.[24] If any representation was made to the companies it would have been that their applications for exploration rights would be processed once the Petroleum Regulations were duly made. In the circumstances the companies could not have a legitimate expectation

that their applications would be processed pursuant to the promulgation of regulations unlawfully and unfairly made.

[57] Lastly, in terms of Rule 10A of the Uniform Rules of Court in proceedings where the validity of a law is challenged, the party

challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings. The national executive authority responsible for the administration of the MPRDA is the Minister of Mineral Resources, the respondent herein. That is the party who must be given the benefit of being heard on the purpose pursued by the Petroleum Regulations, its legitimacy, the factual context and the impact of their application.[25] In all the circumstances the respondent's claim of non-joinder is not sustained.

[58] The applicants have successfully challenged the validity of the making of the Petroleum Regulations. They are accordingly

entitled to the costs of the application. The applicants as well as the respondent employed two counsel. The costs shall therefore include the costs attendant upon the employment of two counsel.

[59] In the result, it is ordered that :

59.1. that the decision of the Minister of Mineral Resources (the respondent) to make the Regulations for Petroleum Exploration and Production, 2015 (published in Government Notice R 466 in Government Gazette 38855 dated 3 June 2015) is reviewed and set aside;

59.2. that the matter is remitted to the respondent for reconsideration; and

59.3. the respondent pay the applicants' costs of the application, such costs to include the costs of two counsel.

G H BLOEM

Judge of the High Court

For the applicants:

Advs A M Breitenbach SC and M Schreuder, instructed by Derek Light Attorneys, Graaff Reinet and Dold and Stone Inc, Grahamstown.

For the respondent:

Advs N H Maenetje and Muvangua, instructed by the State Attorney, Port Elizabeth and Whitesides Attorneys, Grahamstown.

Date of hearing:

18 May 2017

Date of delivery of the judgment:

17 October 2017

- [1] Government Notice R 466 published in Government Gazette 38855 dated 3 June 2015.
- [2] Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).
- [3] In Government Notice 1032 in Government Gazette 36938 dated 15 October 2013.
- [4] National Environmental Management Laws Amendment Act, 2014 (Act No. 25 of 2014).
- [5] National Water Act, 1998 (Act No. 36 of 1998).
- [6] National Water Amendment Act, 2014 (Act No. 27 of 2014).
- [7] Mineral and Petroleum Resources Development Amendment Act, 2008 (Act No. 49 of 2008).
- [8] Interpretation Act, 1957 (Act No. 33 of 1957).
- [9] City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA) at 594E.
- [10] Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae) 2006 (2) SA 311 (CC).
- [11] Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
- [12] Security Industry Alliance v Private Security Industry Regulatory Authority and others 2015 (1) SA 169 (SCA) at 175H-I and South African Dental Association NPC v Minister of Health and others
- [2016] 1 All SA 73 (SCA) at 89i – 90d. It is to be noted that only Chaskalson CJ found that PAJA, in general, applies to the power of a Minister to make regulations. Sachs J did not accept that PAJA was applicable to the facts in the New Clicks case. Five Judges (Moseneke, Madala, Mokgoro, Skweyiya and Yacoob JJ) found that it was unnecessary to decide whether the making of regulations by a Minister constitutes administrative action within the meaning of PAJA. Ngcobo J, with whom Langa, O'Reagan and van der Westhuizen JJ concurred, preferred the narrow question, namely that PAJA applies to the specific power to make regulations conferred by section 22G (2) of the Medicines and Related Substances Act, 1965 (Act No. 101 of 1965).

[13] Section 6 (2)(a)(i) of PAJA.

[14] Section 6 (2)(f)(i) of PAJA.

[15] Section 6 (2)(c) of PAJA.

[16] Section 24 (2A) of NEMA reads as follows: “The Minister responsible for mineral resources must be identified as the

competent authority in terms of subsection

(1) where the listed or specified activity is directly related to (a) prospecting or exploration of a mineral or petroleum resource; or (b) extraction and primary processing of a mineral or petroleum resource.”

[17] Such matters include those described in section 24 (1A) and (5) of NEMA.

[18] *Mvumvu and others v Minister of Transport and Another* 2011 (2) SA 473 (CC) at 487 D.

[19] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D – E.

[20] *Economic Freedom Fighters and others v Speaker of the National Assembly and others*

[2016] 1 All SA 520 (WCC).

[21] *Parliamentary and Provincial Medical Aid Scheme Act, 1975* (Act No. 28 of 1975).

[22] *Judicial Services Commission and another v Cape Bar Council and another* 2013 (1) SA 170 (SCA) at 176H – J.

[23] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and another* 2004 (2) SA 611 (SCA) at 617A.

[24] *South African Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA) at 49H.

[25] *van der Merwe v Road Accident Fund and another* (Women’s Legal Centre Trust as amicus curiae)

[2006] ZACC 4; 2006 (4) SA 230 (CC) at 241F.

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