

SOUTH AFRICA / JUDGMENT

Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk) (1 September 2022)

[2022] ZAECMKHC 55

COURT

Eastern Cape High Court, Makhanda

BEFORE

Mbenenge, Nhlangulela, Norman

CASE / FILE NUMBER

3491/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO: 3491/2021

Reportable

In

the matter between:

SUSTAINING
THE WILD COAST NPC
1st Applicant
MASHONA
WETU
DLAMINI
2nd Applicant
DWESA-CWEBE
COMMUNAL PROPERTY
3rd Applicant
ASSOCIATION
NTSINDISO
NONGCAVU
4th Applicant
SAZISE
MAXWELL
PEKAYO
5th Applicant

CAMERON
THORPE
6th Applicant
ALL
RISE ATTORNEYS FOR CLIMATE AND
7th Applicant
THE
ENVIRONMENT NPC
NATURAL
JUSTICE
8th Applicant
GREENPEACE
ENVIRONMENTAL ORGANIZATION
9th Applicant
and
MINISTER
OF MINERAL RESOURCES AND ENERGY
1st Respondent
MINISTER
OF ENVIRONMENT, FORESTRY AND
2nd Respondent
FISHERIES
SHELL
EXPLORATION AND PRODUCTION
3rd Respondent
SOUTH
AFRICA B V
IMPACT
AFRICA
LIMITED
4th Respondent
BG
INTERNATIONAL
LIMITED
5th Respondent

JUDGMENT

MBENENGE JP:

Introduction

- [1] Stripped of verbiage, the principal question dealt with in these proceedings is whether the grant of an exploration right for the exploration of oil and gas, which has culminated in the need to conduct a seismic survey along the Southeast coast of South Africa,[1] is lawful.

- [2] While some enjoy water sports on the beaches comprising the Eastern Cape coast, it is, to others, a home for communities that are steeped in customary rituals. These communities subsist on fishing and other marine resources to supplement their livelihood.
- [3] The Eastern Cape coast is not only a haven for marine and bird life, including endangered, threatened and protected species but also a centre of attraction to entities desirous of exploring mineral and petroleum resources from its seabed. To this end, one of these entities has sought and obtained an exploration right in terms of the applicable statutory framework. As a precursor to the exploration, it has become necessary to conduct a seismic survey[2] off the Eastern Cape coast. The quest to conduct the survey and possible resulting exploration does not find favour with communities

and entities who uphold nature conservation and protection of the coastal environment, the contention being, inter alia, that the survey will impact negatively upon the livelihood and the constitutionally and customarily held rights, including customary

fishing and religious rights, of the coastal communities.

- [4] The scramble for the utilisation of our coastal waters often brings to the fore the interplay, foreshadowed in section 24 of the Constitution,[3] between the right to a protected environment, on the one hand, and socio-economic development, on the other, once echoed by Ngcobo J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*

- [4] in the following terms:

‘ . . . [D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment.

Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment

and development are thus inexorably linked.’

The parties

- [5] In light of the nature of these proceedings and the issues raised by the parties, it is imperative to give a detailed description of the parties to this litigious matter and, as far as possible, to mention what cause they champion.
- [6] The first applicant is Sustaining the Wild Coast NPC,[5] a non-profit company whose objective is to promote sustainable livelihood that constructs, rehabilitates and protects the natural

environment on the Wild Coast.

- [7] The second applicant is Mashona Wetu Dlamini, a resident of Sigidi Village in the Umgungundlovu Community which forms part of Amadiba Traditional Community. Mr Dlamini is a traditional healer and a member of the council of inkosana of Umgungundlovu, Duduzile Baleni. He acts for himself, on behalf of traditional healers along the Wild Coast and on behalf of the Umgungundlovu Community.
- [8] The third applicant is the Dwesa-Cwebe Communal Property Association,[6] a duly established juristic entity in whose favour land of which the Dwesa-Cwebe community[7] had been dispossessed under colonialism and apartheid was restored under the Restitution of Land Rights Act 22 of 1994. Dwesa-Cwebe is a marine protected area[8] bordering the Cwebe Reserve located along the Wild Coast, in the district of Elliotdale.
- [9] The fourth applicant is Ntsindiso Nongcavu, a fisher from Port St Johns, who brings the application for himself and on behalf of fellow Wild Coast fishers.
- [10] Saziso Maxwell Pekayo and Cameron Thorpe are the fifth and sixth applicants, respectively. They form part of a local cooperative, Kei Mouth Fisheries, and launch the application on their own behalf, on behalf of their community and of Wild Coast fishers.
- [11] The seventh applicant is All Rise Attorneys for Climate and Environmental Justice NPC,[9] a law clinic and a duly incorporated non-profit company representing communities fighting against and affected by climate change.
- [12] Natural Justice and the Greenpeace Environmental Organisation NPC seek to join these proceedings as the eighth and ninth applicants, respectively. Natural Justice is a voluntary association whose objectives are to provide legal support to indigenous people and local communities and ensure that the interests of these communities are effectively represented in the development and implementation of domestic and international law and policy. Greenpeace Environmental Organization NPC[10] works towards the achievement of environmental rights and social and environmental justice in communities across South Africa.
- [13] The second, fourth, fifth, sixth and seventh applicants act in the public interest and in the interest of protecting the environment. In addition to acting in the public interest, the third applicant acts in the interest of its members.
- [14] The first respondent is the Minister of Mineral Resources and Energy, responsible for the administration of the Mineral and Petroleum Resources Development Act 28 of 2002.[11] The second respondent is the Minister of Environment, Forestry and Fisheries, cited in her capacity as the functionary who administers

the National Environmental Management Act 107 of 1998,[12] the Integrated Coastal Management Act 24 of 2008[13] and the National Environmental Management: Biodiversity Act 10 of 2004.[14] The legislation administered by these ministries has one thing in common: the recognition of everyone's constitutional right to have the environment, including the coastal environment, protected for the benefit of present and future generations.

[15] The third respondent is Shell Exploration and Production South Africa BV.[15] Shell is an integrated energy company. It holds itself out as 'one of the largest corporates in the world' and considers itself to be 'a pioneer in the development of new technologies and processes in an energy-hungry world.'

[16] The fourth respondent is Impact Africa Limited.[16] Impact undertakes '[to substantially and meaningfully expand opportunities for historically disadvantaged South Africans, including women, to enter the petroleum industry and to benefit from the exploitation of the nation's petroleum resources]'

and to '[promote and advance the social and economic welfare of all South Africans].'[17] It is not in dispute that Shell and Impact have each a 50% participating interest in the exploration right which authorised the

seismic survey and exploration sought to be conducted on the Wild Coast.

[17] The fifth respondent is BG International Limited, a duly incorporated external company conducting business in, inter alia, the Gauteng Province. It is also not in dispute that the fifth respondent is the Shell entity which co-owns the project affected by the relief sought in these proceedings, hence the third and fifth respondents are otherwise hereinafter collectively referred to as Shell.

Factual

background

[18] Even though the issues raised in this application are largely more legal rather than factual, a brief setting out of the relevant background facts is nevertheless necessary. On 14 July 2011, Impact applied for a technical co-operation permit. That permit was granted by the Deputy Director-General of the Department of Mineral Resources and Energy[18] on 27 July

2012. Thereafter, on 18 February 2013, Impact applied for an exploration right to, inter alia, use the seismic survey to seek out oil and gas reserves off the Eastern Cape coast[19] in the Transkei Algoa exploration area, in terms of section 79 of MPRDA.[20] The application was accepted on 01 March 2013. Impact was required to submit an environmental management program[21] on the proposed activities to the Petroleum Agency of South Africa[22] for consideration and approval by the Minister responsible for mineral resources. In this regard, regulation 52 of the Regulations promulgated under MPRDA makes provision for the details to be included in an EMPr.[23]

- [19] Pursuant to PASA's acceptance of the application, the consultation process engaged in by an independent environmental assessment practitioner, at the instance of Impact, then the operator for conducting the seismic survey, was as follows:
- (a) Potential interested and affected parties were identified through analysis of potential stakeholders and based on stakeholders engaged in previous similar studies in the area.
 - (b) A list setting out these parties was generated for use in the envisaged consultation. The list included various functionaries at local, regional and national levels, and representatives of NGOs, industry groups and communities.
 - (c) A background information document providing an overview of the proposed exploration activities and locations was compiled and distributed to the interested and affected parties. The document provided instructions for submitting comments and input for consideration in the EMPr.
 - (d) Adverts were placed in The Times, Die Burger (Eastern Cape), The Herald and The Daily Dispatch newspapers on Friday 22 March 2013 notifying members of the public of the proposed project. The public was also thereby provided with details of the consultation process, including information on how they could provide input into and comment on the EMPr process.
 - (e) 21 calendar days[24] were allowed for interested and affected parties to submit issues or express concerns for consideration in the compilation of the draft EMPr. This period also allowed for members of the public to register as interested and affected parties and/or submit issues or concerns.
 - (f)

Issues

or concerns were received and compiled into a report that formed part of the draft EMPr. The draft EMPr was made available to interested and affected parties for 30 calendar days[25] on the project website.

- (g) The interested and affected parties on the stakeholder database were notified of and invited to group meetings held in Port Elizabeth,[26] East London[27] and Port St Johns.[28] Two group meetings were held with officials from the Eastern Cape Parks and Tourism Agency and the Department of Development, Environmental Affairs and Tourism in East London on 04 June 2013.
- (h) Meetings involving the monarchs in the Transkei[29] through the monarchs' representative, Mr Richard Stephenson, and the Royal Monarch Council were held in Mthatha and comments

received therefrom for consideration by the relevant functionary.

(i) All comments received on the draft EMPr were compiled and documented in the comments and responses report. No substantive changes were made to the EMPr in preparing the final report for submission to PASA.

[20] Pursuant to this process, PASA recommended the approval of the EMPr on 09 September 2013. The Deputy Director-General gave such approval on 17 April 2014.

[21] The exploration right applied for by Impact was granted on 29 April 2014.[30] In terms of section 80(5) of MPRDA, an exploration right is subject to prescribed terms and conditions and is valid for a period not exceeding three years.

No meaningful seismic and exploration activities were immediately conducted along the eastern coastline, but the following developments

unfolded:

(a) On 17 May 2017, Impact, together with EXXONMOBIL Exploration Product SA Ltd (EMEPSAL),[31] applied for the first renewal of the exploration right. The application was granted on 20 December 2017.

(b) In 2018,[32] PGS Geophysical conducted a 2D[33] multi-client seismic survey in the area in question as a precursor to the 3D[34] survey which is the subject of this application.

(c) On 13 March 2020, Impact applied for the second renewal of the exploration right.[35]

(d) On 04 June 2021, the Director-General of the Department consented to the assignment and transfer of a 50% participating interest, in the exploration right in the Transkei Algoa exploration area, to the fifth respondent.

(e) The second renewal was granted on 30 July 2021.

[22] On 29 October 2021, SLR Consulting (South Africa) Ltd,[36] at the instance of Shell, as operator of the exploration right, gave notice of Shell's intention to commence with a 3D seismic

survey along the Wild Coast, pursuant to the exploration right and the EMPr approved in 2014.

[23] The survey is conducted by a seismic vessel sailing off the coastline, towing a 6- kilometres-long array of airguns behind it. During the survey, the seismic vessel[37] discharges pressurised air from its airgun[38] arrays[39] to generate sound waves that are directed downwards towards the seabed. The waves are reflected from geological layers below the seafloor and recorded by multiple receivers or hydrophones which are towed behind the seismic vessel by multiple streamers that are 6 kilometres long. Analyses of the returned signals allow for interpretation of sub-geological formations and structures. During the survey, the vessel sails off the coastline between 20 and 80 kilometres from the shore.

[24] It is common cause that Impact and Shell have secured no environmental authorisation to undertake the impugned survey and exploration.

- [25] Mr Reinford Sinegugu Zukulu, the deponent to the affidavit filed in support of the first to seventh applicants, registered as an interested and affected party on 07 November 2021, lending support to petitions that were, at the time, in circulation as part of a mass campaign mobilized to ask the relevant Minister to hold in abeyance the proposed activities. The campaign yielded nought.
- [26] In the wake of these events, urgent proceedings were launched by Border Deep Sea Angling, Kei Mouth Ski Boat Club and the eighth and ninth applicants against the present respondents on 30 November 2021. An order was sought to restrain Shell and Impact from undertaking seismic survey operations pursuant to Impact's exploration rights from 01 December 2021 onwards, pending separate proceedings to be launched to review the exploration right and its renewals. The first to seventh applicants in the current proceedings had been desirous to join those proceedings but ended up not doing so due to having been overtaken by events. The court[40] dismissed the application on the ground that the applicants had not established a well-grounded apprehension of irreparable harm if interim relief was not granted and the ultimate relief eventually granted, or that the balance of convenience favoured them.[41] Because nothing hinges on this judgment, nothing more about it, for present purposes, will be said. It suffices only to state that the judgment subsequently became the subject of an application for leave to appeal on the merits and costs. Only leave to appeal the costs order was pursued. That application was dismissed.[42]

This application

- [27] As a result of the notice to conduct the impugned survey, the first to seventh applicants, claiming to have learned of SLR's notice upon its publication, resorted to court by way of urgency seeking an order interdicting the third, fourth and fifth respondents from undertaking the survey,[43] pending the determination of part B of that application.[44] The urgent application was premised on the contention that the survey would not only be harmful but would be unlawful, given that Shell does not have an environmental authorisation to conduct the exploration right in terms of NEMA. They furthermore contended that they had not been consulted prior to the decision granting the exploration right being taken and that the survey would cause harm to the environment and their livelihoods, culture and heritage.
- [28] Amidst opposition by the first and fifth respondents, the court,[45] having been satisfied that the requisites for the grant of an interim interdict had been fulfilled, granted the interdict pending the finalisation of Part B, and directed the first and fifth respondents to pay the costs of the application incurred thus far.[46]
- [29] In the course of time, the relief sought in Part B was augmented to, inter alia, seek orders reviewing the decision granting the exploration right, including the renewals thereof, and declaratory and interdictory

relief, including relief consequential thereto. Part B, in amplified form, now serves before this court. To the extent that there might have been a delay in launching the proceedings and failure to exhaust internal remedies before launching the application, condonation therefor is also being sought.[47]

[30] This case is significant for all the parties involved. Some of the issues raised are novel. In light of this, a full court sitting as the court of first instance was constituted, in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013.[48] Also, even though the case is justiciable before the High Court in Makhanda,[49] for the sake of convenience, it was, with the consent of all the parties, heard in the High Court, Gqeberha.

The parties' contentions

[31] The first to seventh applicants' assertion is, first, that environmental authorisation in terms of NEMA is necessary for exploration activities regulated by the MPRDA and that the seismic survey is a listed activity under NEMA which may not commence without such authorisation having been secured. Second, the process of consulting with potential interested and affected parties is materially flawed and inadequate as it did not take into account the nature and structure of the applicants' communities and the manner in which decisions are taken by the communities; in addition to the customary law rights and duties held by all the applicant communities, the Dwesa-Cwebe community holds recognised customary fishing rights and ought, therefore, to have been specifically consulted. Third, because the first to seventh applicants were not aware of the application for the exploration right and the renewals thereof, the impugned decisions were taken without paying heed to the fundamental considerations, including the anticipated harm to marine and bird life along the Wild Coast and the communities' spiritual and cultural rights; on a proper application of the precautionary principle, the court should find that the threat of harm to marine and bird life justifies a cautious approach, which was not given heed to when the exploration right was granted. As a result, the mitigation measures contained in the EMPr are woefully insufficient to address the threat of harm arising from the proposed seismic survey.

[32] The eighth and ninth applicants seek leave to intervene in these proceedings on the basis that they have a direct and substantial interest in the outcome thereof. They otherwise align themselves with the relief sought by the first to seventh applicants. Their point of emphasis is that the area in which the impugned survey is to be conducted enjoys a special legal status that affords the environment a particularly high level of protection, given the ecological value of the area and the presence of many critically endangered, threatened and protected species. They, therefore, assert that the impugned decisions ought to be set aside on the basis that the decision-makers failed to consider the National Environmental Management: Integrated Coastal Management Act 24 of 2008 and made no proper consideration of the climate change impacts of the impugned decision.

[33] The second to fifth respondents have taken the preliminary points that the applicants are barred from seeking to review the impugned decisions because more than 180 days elapsed since the decisions were taken and the applicants failed to exhaust internal remedies available to them. On the merits, Shell and Impact contend that there was no need to secure environmental authorisation under NEMA in addition to the EMPr in terms of the MPRDA. In further support of the impugned decisions and actions, they allege that seismic surveys are routine and have been performed in the past, which is evidence that they are not harmful to marine and bird life in the area concerned. They also contend that there are no climate change impacts to access

a seismic vessel any more than there would be a fishing or commercial vessel. Reliance for these contentions is placed on evidence tendered by experts who deny that harm will result from the seismic surveys; it is contended that there is no research globally showing that serious injury, death or stranding of marine mammals has occurred from exposure to sound from seismic surveys when the appropriate mitigating and monitoring measures are implemented.[50] Regard being had to the social and economic development that will ensue from the survey, argue Shell and Impact, the survey ought to be allowed. Shell and Impact maintain that the consultation process followed was adequate, having been in accordance with the applicable regulatory framework and that they had no obligation to consult the applicants specifically, in circumstances where the applicants concerned took no steps to register as interested and affected parties.

[34] For his part, the first respondent resists the review and setting aside of the impugned decision on the basis that due process was followed in taking the decisions based on the prescribed material before him to which he applied his mind. The first respondent associates himself with Impact and Shell in (a) contending that the applicants should be non-suited for having delayed before launching this application; (b) defending the consultation process as having been adequate; and (c) asserting that no separate environmental authorisation in terms of NEMA is required for exploration activities. At the hearing, the first respondent also persisted in contending, together with the other respondents, that the applicants should be non-suited for having delayed before launching this application.

[35] In rebuttal of the preliminary points, the applicants dispute that the review application was brought out of time; they only became aware of the impugned decision in November 2021. They further contend that, given the first respondent's approach to the litigation[51] and public statements he made,[52] no purpose would have been served in lodging an internal appeal. Based on expert evidence, the applicants dispute that they will benefit from the results of the seismic survey and the ensuing projected exploration.

[36] In his supplementary affidavit attested and filed of record on 7 December 2021, Mr Zukulu sought an indulgence to tender expert evidence setting out the risks of harm associated with seismic surveys in general, and on the Wild Coast, in particular. In the affidavit, he makes the point that the founding papers had been prepared in extreme urgency and haste, the information embodied therein not having been to hand five days prior thereto, on 2

December. The delivery of the supplementary affidavit and the relevant reports were at no stage made the subject of controversy. Indeed, doing so would, in my view, have been tantamount to creating a storm in a teacup. This is especially so if one has regard to the fact that leave to file the affidavit was applied for and the respondents averse to such filing were invited to oppose the same.^[53] The notice attracted no such opposition. The interests of justice dictate that the affidavit be admitted. This case will be adjudicated with all the facts having been placed before court. No prejudice will be suffered by the admission of the affidavit. None was pointed to, either.

- [37] The late delivery of the supplementary affidavit of Mr Zukulu, together with annexures thereto, is accordingly condoned.
- [38] A further preliminary issue that was the subject of a skirmish at the hearing of this application was whether the belatedly delivered affidavit of Dr Jammie, Impact's expert witness, should be admitted. The affidavit deals with the macro and regional economic and social consequences of the relief being granted in the terms sought by the applicants and the intervening parties. Dr Jammie's commitments and unforeseen logistical challenges are said to have rendered it well nigh impossible for Impact to deliver the affidavit timeously.
- [39] Only the intervening parties opposed the interlocutory application, contending, in the main, that, due to paucity of time, they would be prejudiced as they had not been able to procure an expert witness to answer Dr Jammie's affidavit. The affidavit, so it was contended, related to an issue that should have been raised at the outset and that, therefore, the application for the admission of the affidavit did not meet the threshold.
- [40] Amidst such opposition, the court provisionally accepted the affidavit, with the parties acknowledging that this was a pragmatic solution in the circumstances of this case. It bears mentioning that, whilst the intervening parties could have asked for more time by even seeking a postponement at the cost of the errant party, they did not do so. Instead, as a fall-back position, they accepted that the applicants' expert, Professor Bond, does participate in the debate on the topic at hand.
- [41] No reason has been found for rejecting the affidavit. Impact's application for the admission of the affidavit is, therefore, granted, leaving the court to consider issues that are germane to the merits of these proceedings.
- [42] The entitlement or otherwise of the applicants and the intervening parties to the grant of the relief they are seeking hinges on answers to the following questions, namely:
- (a) have the eighth and ninth applicants made out a case for intervention;
 - (b) do the applicants fall to be non-suited due to -
 - (i) the alleged delay in launching these proceedings; and
 - (ii) not having exhausted internal remedies prior to the launch of this application;

- (c) do the grounds for the review of the impugned decisions pass muster;
- (d) should the declaratory and interdictory relief sought be granted; and
- (e) what costs order should be made?

Each one of these questions will be dealt with in the order in which they have been posed.

The intervention

- [43] It is trite law that an applicant for leave to intervene must show that it has a direct and substantial interest in the subject matter of the litigation, in the form of a legal interest that may be prejudicially affected by the judgment of the court.[54] It is incumbent on the applicant for intervention to demonstrate that it has a right adversely affected or likely to be affected by the order sought. However, the party seeking to intervene is not required to satisfy the court at the stage of intervention that it will succeed; it need only make allegations which, if proved, would entitle it to relief.[55]
- [44] Where a party has shown a direct and substantial interest in the subject matter of a case, the court has no discretion to exercise. It must grant the intervention.[56]
- [45] The generous approach to standing adopted under section 38 of the Constitution is the overriding factor. That section grants locus standi to any party alleging the infringement of a right in the Bill of Rights acting in its own interest,[57] on behalf of another person who cannot act in their own interest,[58] in the interest of a group or class of persons,[59] in the interest of the public[60] or as an association acting in the interest of its members.[61]
- [46] Section 32(1) of NEMA makes provision for an even broader legal standing to enforce environmental laws in respect of any breach or threatened breach of NEMA. It accords standing to any person or group of persons referred to in section 38 of the Constitution, but, most importantly, adds ‘in the interests of protecting the environment’[62] as another relevant factor.
- [47] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[63] O’Regan J advocated for a more generous approach regarding standing in the constitutional dispensation than at common law. All courts required to adjudicate constitutional claims are required to invoke the generous approach.[64]
- [48] In this matter, regard should be had to the fact that the litigation is of a public or constitutional character; it involves an infringement of the Bill of Rights and a breach or threatened breach of NEMA. Therefore, the range of interests upon which an intervening party might rely in contending for a direct and substantial interest ought to be broadly construed.

- [49] In the view of this court, the objectives of the intervening parties and the entities or persons in whose interests the litigation is brought, establish the entitlement to seek the substantive relief prayed for in the intervening parties' notice of motion in their own right, independently of the first to seventh applicants.
- [50] The Minister and Shell have consented to the joinder sought. Only Impact opposes the intervention application. But, Impact does not deny that the intervening parties have the standing to seek the substantive relief sought in the notice of motion in their own right. It merely contends that the intervening parties' participation is redundant because the first to seventh applicants already represent the public interest and there is overlap in the factual allegations, review grounds, statutory provisions and relief sought between the intervening parties and the first to seventh applicants. Impact's stance is predicated on the contention that the intervention would not be of "assistance to the court." That is, however, hardly the test for intervention.[65]
- [51] There is yet another relevant factor; it was available to the intervening parties to pursue Part B of the BDSA case regardless of the fact that Part A was not successful. They did not do so but elected to intervene in these proceedings. Had they pursued Part B, their application and the instant application would, in all probability, have had to be consolidated. The intervening parties deserve of being commended for the prudent step they took which has had the effect of avoiding a multiplicity of applications. In any event, the interests of justice dictate that they be allowed to intervene in these proceedings. It is also of importance that, in this instance, the intervening parties seek to join these proceedings acting in the public interests and under the broader standing provisions set out in NEMA.
- [52] In these circumstances, Natural Justice and Greenpeace Africa have made out a case for the intervention they are seeking. Henceforth, these entities are applicants in these proceedings and will be referred to as such interchangeably with the appellation "intervening parties."

Has there been an unreasonable delay?

- [53] Three administrative decisions are at the heart of the review part of the applicants' prayers namely, the decision to grant the exploration right made on 29 April 2014; the decision taken on 20 December 2017 to renew the exploration right; and the decision of 26 August 2021 further renewing the exploration right.
- [54] The respondents seek to bar the challenge to the impugned decisions on the ground that the applicants launched these proceedings on 02 December 2021, outside of the 180 days period referred to in section 7 of the Promotion of Administrative Justice Act 3 of 2000.[66] The applicants dispute this and, in the alternative, seek an order extending the 180 days in accordance with section 9 of PAJA.[67]

[55] In terms of section 7(1)(b) of PAJA, any proceedings for judicial review in terms of section 6 must be instituted without unreasonable delay and no later than 180 days after the date on which the person concerned 'was informed of the administrative action,' became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[56] The enquiry whether there was an unreasonable delay in launching review proceedings is factual, involving a value judgment in the light of all the relevant circumstances including any explanation that is offered for the delay.[68]

[57] In *NAPTOSA and Others v Minister of Education, Western Cape and Others*[69] Conradie J held:

'It is well established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings. The declaratory order, being as flexible as it is, can be used to obtain much the same

relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should, accordingly, in an appropriate case, weigh the same considerations of 'justice or convenience' as it might do in case of an interdict or review.'

[58] In the current dispensation where the review of administrative action is regulated by PAJA and not the common law,[70] these remarks may best be understood within the context of what Plasket AJA said in *Beweging vir Christelik-Volkseie v Minister of Education and Others*, [71] namely:

'In respect of the prayers for declarators, no decision is taken on review, whether directly or indirectly, no exercise of public power is sought to be set aside and the PAJA has no bearing on the relief claimed because no administrative action is implicated. That being so, section 7 (1) and section 9 of the PAJA have no application. The relief claimed being discretionary, however, the appellants were obliged to have launched their application within a reasonable time. In other words, the common law delay rule . . . applies to determine whether the application in respect of this relief was brought timeously and, if not, whether any unreasonable delay should be condoned.'

[59] The undue delay objection has no bearing on the prayer that seeks to interdict Shell and Impact from conducting the seismic survey under the exploration right without environmental authorisation in terms of the applicable dispensation. None of the respondents has suggested that this relief is affected by the alleged undue delay. Assuming the applicants' contention that authorisation in terms of NEMA is required, conducting the survey would constitute a criminal offence, the challenge of which would not be barred by the delay rule.

- [60] Mr Zukulu says he only learned about the proposed seismic survey after the publication of the SLR from media reports in early November 2021 and that the applicants whose cause he is championing became aware of the publication subsequent thereto, on diverse occasions, they not having been consulted prior to the exploration right and the renewals thereof being granted.
- [61] The respondents do not deny that the applicants concerned only became aware of the proposed seismic survey in November 2021. They have contented themselves with merely contending that the applicants and their communities were neither denied nor precluded from registering as interested parties pursuant to the newspaper advert of 2013 and from attending any one of the group meetings held as part of the public consultation process.
- [62] For their part, the intervening parties, too, allege that they discovered that the exploration right had been awarded on 29 October 2021; even though the deponent to their affidavits[72] registered as an interested and affected party in his personal capacity during the consultation process in 2013, he was not notified

of either the grant of the exploration right or the first and second renewals of the right or the EMPr compliance audit.

- [63] All that is said to counter the intervening parties' version is that it is "improbable" that the interested and affected parties would not have come to know that a decision had been taken earlier than 2021. No facts are put up to controvert the allegations made in the founding papers that, due to the failure on the part of the relevant Department to inform the interested and affected parties and the public at large that the exploration right had been granted, they did not learn of the decision until October 2021, in the case of the intervening parties, and November 2021 in the case of the applicants.

- [64] In *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another*[73] the court held:

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

- [65] A dispute of fact also does not arise with a party seeking to controvert the version of another by casting aspersions on or making speculative remarks in relation to those being controverted.[74] Only concrete allegations or facts placing in issue the allegations made in the founding papers would have created a dispute of fact warranting the invocation of the Plascon Evans rule.[75]
- [66] In these circumstances, there is no dispute of fact in relation to when the applicants got to know of the award of the impugned exploration right and the renewals thereof. The ineluctable conclusion is, therefore, that the Department did not inform the interested and affected parties and the public at large of the decision granting the exploration right. The intervening parties became aware of the decision in October 2021 and the applicants in November 2021.
- [67] It is important to note that PAJA requires of the applicant to bring review proceedings within 180 days, not only from the date when the applicant ‘was informed of the administrative action or became aware of the action and the reasons,’ but from the date when the applicant ‘might reasonably have been expected to have become aware of the action and the reasons.’[76]
- [68] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*[77] the SCA, with reference to *Gqwetha v Transkei Development Corporation*[78] on the importance of the delay rule, drew a distinction between administrative acts which affect and are then challenged by an

individual and those which affect the public at large and said:

‘In its terms, sections 7(1) envisages asking when “the person concerned” was informed or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation, it would be anomalous-if not absurd- even if the administrative act were to be reviewable at the instance of one member of the public, and not at the instance of one another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had the knowledge of the action, not dictated by knowledge or lack of it, of the particular member or members of the public who have chosen to challenge the acts.’[79] (Emphasis supplied)

[69] There is, however, a dimension to these proceedings which distinguishes it from OUTA.

- (a) In terms of section 3(2)(b)(iii) of PAJA, in order to give effect to the right to procedurally fair administrative action, an administrator must give persons materially and adversely affected by the decision a clear statement of the administrative action. The affected person should at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual bases. Without this information, notice of any right of appeal or review would be pointless.[80]

- (b) Section 3(2)(b)(iv) requires that the persons concerned also be notified of any right of review or internal appeal where applicable. This requirement is repeated in regulation 23(b) of the Regulations on Fair Administrative Procedures, 2002[81] which requires adversely affected persons to be informed of administrative action that has been taken. In terms of regulation 25, a notice contemplated in regulation 23(b) must also, where applicable, stipulate the period, if any, in which the review or appeal proceedings must be instituted; state the name and address of the person with whom proceedings for review or appeal must be instituted; and set out any other formal requirements in respect of the proceedings for review or appeal.
- (c) Provision is made in MPRDA[82] for the lodging of an appeal by any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of MPRDA within 30 days of becoming aware of such decision.
- (d) Section 3(2)(b)(v) provides for the giving of adequate notice to the person concerned of the right to request reasons.

[70] PAJA is incorporated by reference in section 6 of the MPRDA, which reads:

‘(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

(2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision.’

[71] Section 6 of the MPRDA is subservient to section 3(2)(b) of PAJA. Therefore, it is incumbent on the Minister or his delegate to give notice of the award of an exploration right and its renewals in writing to interested and affected parties, to inform them of their right to lodge a review or an appeal against the decision and of their right to request reasons for the decision. Neither section 6 of MPRDA nor section 3(2)(b) of PAJA was complied with by the ministry.

[72] Shell argued, with reference to BDSA,[83] that the public including the applicants, must, objectively, be deemed to have known about the granting of the exploration right and the renewals by no later than 2020. This contention is unavailing. According to BDSA, the notification merely afforded the interested and affected parties a 30-day period for comment. In this case, there is not a shred of evidence that the intended recipients of the notice were informed of their right to review or appeal the decision, or the right to request reasons for the decision. The notice relied on by the respondents falls foul of the requirements of section 3(2)(b).

[73] The failure by the Minister or his delegate to comply with section 3(2)(b) of PAJA is fatal to the respondents' preliminary point that the applicants delayed in bringing the review proceedings. Such failure negates the suggestion that the applicants are reasonably expected to have become aware of the action and the reasons therefor.

[74] Accordingly, the 180 days period in question did not start running before November 2021. There was, therefore, no delay in bringing this application, let alone an unreasonable delay.

Exhaustion of internal remedies

[75] Section 7(2)(a) of PAJA requires a court to review an administrative action in terms of PAJA where an internal remedy provided for in any other law has first been exhausted.

[76] Section 96(3) of MPRDA provides that no person may apply to the court for the review of an administrative decision made in terms of MPRDA until that person has lodged an appeal against the administrative decision and the appeal process has been exhausted.

[77] However, a court may, in exceptional circumstances, and on application by the person concerned, exempt such person from the obligation to exhaust such remedy before instituting proceedings in a court for judicial review in terms of PAJA.[84] What constitutes exceptional circumstances depends on the facts and the circumstances of the case and the nature of the administrative

action in issue.[85]

[78] The applicants did not lodge an appeal. Four reasons are advanced: First, they became aware of the grant and renewals of the exploration right in November 2021, some 7 years after the exploration right was initially granted. Second, when they launched an application for the grant of urgent interdictory relief the commencement of the impugned seismic survey was imminent and following the internal process would have defeated the purpose of approaching the court for effective relief. Third, because of the agreement reached by the parties to expedite timeframes for the resolution of part B, it became incumbent

on the applicants to pursue the main application and avoid any delay that would have arisen from pursuing an internal appeal. Fourth, the applicants harboured an apprehension that the Minister is biased against them- an apprehension fortified by the statements he made criticising public interest groups for challenging seismic surveys and maintaining his refusal to review Shell's exploration rights. Also, in circumstances where the Minister could simply have abided the decision of the court in relation to the grant of part A of the application, which he was initially minded to do, he ended up being partisan and opposing the interdictory relief.

- [79] The respondents have not pertinently engaged with the applicants regarding their reasons for not pursuing an internal appeal. The overwhelming evidence is that the applicants were not aware of the Minister's decision to grant the exploration right prior to November 2021. It should be borne in mind that there had been a failed attempt to interdict the seismic survey on 30 November 2021. The imminence of the survey when the current proceedings were launched should be viewed against that background.
- [80] The Minister has tendered a bald denial to the allegations of bias. He offered no explanation for his change of mind, and sudden opposition to Part A of the application, for having publicly criticised interest groups who challenged the survey and maintaining his refusal to review Shell's exploration rights.
- [81] The rule against bias is entrenched in the Constitution, which places a high premium on the substantive enjoyment of rights. Any existing administrative remedy has to be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law.[86] The reasons proffered by the applicants in their request to be exempted from exhausting internal remedies are good for the intervening

parties as well. The public statements made by the Minister do give rise to a reasonable apprehension of bias against the applicants and relieve the applicants and the intervening parties of the duty to exhaust their internal remedies as such appeal would have been an exercise in futility.

- [82] This is a classic case of an internal remedy that would not have been objectively implemented and which would have rendered nugatory the values of administrative justice enshrined in the Constitution and upheld by PAJA. Not even the belated reliance by Impact on Ncumcara Community Forest Management Association v The Environmental Commissioner[87] detracts from this conclusion. The case is distinguishable on the facts and the law; whilst upholding the principle on exhaustion of domestic remedies, the court accepted that in very exceptional circumstances a case in which domestic remedies have not been

exhausted may be entertained if doing so will achieve justice between the parties. In any event, the instant case is, for the reasons

already advanced, "very exceptional."

- [83] The applicants have, therefore, made out a proper case for being exempted from the obligation to exhaust internal remedies.

Do the grounds for the review of the impugned decisions pass muster?

- [84] The applicants assail the three administrative decisions[88] in terms of PAJA under the following sub-headings:

- (a) procedural unfairness;
- (b) failure to take into account relevant considerations; and
- (c) failure to comply with applicable legal prescripts,

all of which are dealt with seriatim.

Procedural unfairness

[85] According to the applicants, the decision to grant the exploration right is procedurally unfair because Impact failed to adequately consult (or consult at all) with interested and affected communities, including the applicants. Impact and Shell's contention, on the other hand, is that the obligation imposed upon Impact by MPRDA[89] and the Regulations made thereunder was fulfilled.

[86] The applicants' contention is premised on the right to procedurally fair administrative action enshrined in the Constitution, the provisions of MPRDA and the Regulations made thereunder.

[87] Law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled.[90] It is also settled law that the award of a prospecting right constitutes administrative action.[91] The right to procedurally fair administrative action is enshrined in section 33(1), and PAJA is the law contemplated in section 33(3) of the Constitution. MPRDA makes provision for consultations to be made with interested and affected parties, and so do the Regulations.

[88] In light of its centrality to the issue at hand, regulation 3 of the Mineral and Petroleum Resources Development Regulations[92] deserves of being quoted copiously. It reads:

'3. Consultation with interested and affected persons

(1) The Regional Manager or designated agency, as the case may be, must make known by way of a notice, that an application contemplated in regulation 2, has been accepted in respect of the land or offshore area, as the case may be.

(2) The notice referred to in sub-regulation

(1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.

(3) In addition to the notice referred to in sub-regulation (1) the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods –

(a) Publication in the applicable Provincial Gazette;

(b) Notice in the Magistrate's Court in the magisterial district applicable to the land in question;
or

- (c) Advertisement in a local or national newspaper circulating . . . where the land or offshore area to which the application relates is situated.
- (4) A publication, notice or advertisement referred to in sub-regulation (3) must include -
 - (a) An invitation to members of the public to submit comments in writing on or before a date specified in the publication, notice or advertisement, which date may not be earlier than 30 days from the date of such publication, notice or advertisement;
 - (b) The name and official title of the person to whom any comments must be sent or delivered; and
 - (c) The –
 - (i) Work, postal and street address and if available, an electronic mail address;
 - (ii) Work telephone number; and
 - (iii) Facsimile number, if any, of the person contemplated in paragraph (b).’

[89] The procedure that was followed by Impact in this instance is adumbrated in paragraph [19]. Repeating the same would unnecessarily overburden this judgment. What remains to consider is whether the procedure stands the requirements of the Constitution and the law.

[90] As already stated, the consultants identified the interested and affected parties, not through a public process, but through an analysis of potential stakeholders engaged in previous similar studies in the area. The EMPr does not explain what “stakeholder analysis” denotes. There is a dearth of information as to what “previous studies in the area” means. There is no evidence that the applicant communities were involved in such studies. Despite Impact having been aware of numerous communities in the area concerned, there is nothing from a reading of the papers pointing to Shell or Impact or the consultants as having conducted investigations to unleash the identity of the communities. Consequently, the communities did not form part of the stakeholder database. This disadvantaged the communities as they ended up not receiving the relevant background information, and, eventually, not being consulted.

[91] The first time the consultants endeavoured to reach out to the public was when an advert was publicised in newspapers on 22 March 2013 informing the broader public about the proposed exploration activities. It is also not in dispute that the newspapers are out of reach of the Dwesa-Cwebe, Xolobeni and the Pondoland area communities. When the newspapers finally came to hand, they turned out to have been in the English and Afrikaans languages, which members of the affected communities barely understood as they are Xhosa speaking.

[92] It is very telling that the Transkei monarchs or communities thereof were not invited and did not attend any of the consultation meetings. It would seem Impact and Shell were content to consult with only the monarchs or the communities, adopting the ill-begotten stance that such consultations sufficed. That view was clearly incorrect. From a reading of the application papers, it is evident that the traditional leaders concerned urged the consultants to deal directly with members

of the affected communities, to no avail. In any event, the top-down approach whereby kings or monarchs were consulted on the basis that they spoke for all their subjects is a thing of the past which finds no space in a constitutional democracy. There is no law, and none was pointed to, authorising traditional authorities to represent their communities in consultations. In any event, the applicant communities do not fall within the kingdoms listed in the EMPr.

[93] For purposes of MPRDA, a community means ‘a group of historically disadvantaged persons with interests or rights in the particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this Act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community.’ Therefore, the community is a separate entity from the Chief and “Chief” does not denote the community. In this regard, the following remarks on the nature of communal participation made by Petse AJ in *Maledu and Others v Itereleng Bagatla Mineral Resources (Pty) Ltd and Another*[93] are illuminating:

‘However, in instances where land is held on a communal basis, affected parties must be given sufficient notice of and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken. And this decision can competently be taken only with the support of the majority of the affected persons having an interest in or rights to the land concerned, and who are present at such a meeting.’

[94] The respondents criticise the applicants for adopting a pedantic approach. They contend that MPRDA and the Regulations were given effect to; the Regulations require that the public be notified in two languages, which was done. The requirements of regulation 3, so argue the respondents, were fulfilled. Had the applicants been of the view that regulation 3 was invalid because it does not meet the requirements of the Constitution and the law, they should have assailed it accordingly, which they never did. I disagree.

[95] In the first place, meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof. Moreover and in any event, the Constitution, PAJA, MPRDA and the Regulations apply contemporaneously to the impugned consultation process. The prescripts of MPRDA and regulation 3 are subject to the Constitution and PAJA. Therefore, it is within the prism of

the Constitution and PAJA that regulation 3 should be interpreted.

[96] In *Zondi v MEC for Traditional and Local Government Affairs*[94] the Constitutional Court explained the applicable position as follows:

‘PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.’

[97] The importance of meaningful consultations where, as in the present matter, communal rights are at stake, was clarified as follows in *Bengwenyama*: [95]

‘Another more general purpose of the consultation is to provide land owners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is the integral part of the fairness process. . .

The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must:

- (a) inform the land owner in writing that his application for prospecting rights on the owner’s land has been accepted for consideration by the Regional Manager concerned;
- (b) inform the land owner in sufficient detail of what the prospecting operation will entail on the land, in order for the land owner to assess what impact the prospecting will have on the land owner’s use of the land;
- (c) consult with the land owner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and
- (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult.’

[98] Admittedly, *Bengwenyama* dealt with consultation in the context of a prospecting right application. However, there is no reason in logic why the principle enunciated in the case and its rationale should not apply to an exploration right application.

[99] For all we know, contrary to the provisions of regulation 3, the consultants did not “make known” by way of a notice that there was an exploration application underway; no notice accessible to the public was placed on a notice board at a place determined to be accessible to the public; the consultants purportedly “[made] known” to the public by way of provincial and national newspapers (not a local newspaper). *The Times*, [96] *Die Burger* (Eastern Cape)

and the Herald have little coverage in Transkei. In any event, Die Burger is in Afrikaans, a language that is hardly spoken in Transkei. There is no gainsaying that over the years, especially since 1976,[97] Afrikaans fell into disuse in Transkei where the majority of inhabitants are Xhosa speaking.[98] To the extent that the Daily Dispatch circulates widely in the Transkei and Algoa areas, it did not reach the applicant communities at Xolobeni and Dwesa-Cwebe. In any event, they would not have understood the advert because they are not conversant with English. Had the consultants and those who mandated them been serious about reaching out to the applicant communities, they would have seen their way clear to utilising a newspaper that is in a language spoken by the majority of people in the area concerned. I'solezwe lesiXhosa or broadcast in Umhlobo Wenene radio station would have yielded better results.

- [100] In these circumstances, the object of regulation 3, in so far as it provides that the notice must let the affected and interested parties know and that the notice must be accessible to all affected communities, was thwarted. This is a clear case where little regard (or no regard at all) was paid to the significance of language as a tool of communication.
- [101] The consultation process was woefully lacking in yet another respect; after the initial project information had been compiled and availed "online," a website was provided for interested and affected persons to have access to more information. Much as in this age and era computers and other similar devices are more ubiquitous than flies on a summer day, this court does not hesitate in taking judicial notice of the fact that a great number of the population, especially in rural communities, still lacks access to these devices. The applicant communities are part of those who are still disadvantaged. The majority of members of aMadiba community are on record as not having access to email or internet facilities. In these circumstances, the distribution of the relevant information document by email and on the website would be neither accessible nor effective as a consultation tool within aMadiba community.
- [102] What this all translates to is that Impact did not give the applicant communities proper notice of the nature and purpose of the proposed seismic survey, the information required to make meaningful representation, or the opportunity to make representations. At the hearing, some time was spent debating what the affected and interested communities would have said had they been consulted. The fact that the communities might have had little or nothing to say regarding whether or not the exploration right should be granted is not germane to the enquiry whether the communities were entitled to meaningful consultation.[99]
- [103] In sum, therefore, the consultation carried out by Impact was procedurally unfair. The decision to grant the exploration right falls to be reviewed on this ground alone, in terms of section 6(2)(c) of PAJA.[100] The renewals depend upon the grant of the exploration right whose process has been proven to have been fatally defective.[101] By the same token, the decisions to renew the exploration right also fall to be reviewed.

[104] The corollary of the inadequate consultation process is that factors that the applicants and the intervening parties would have placed before the Minister to inform the decision-making process were not considered.

[105] Because it takes a single bad reason to render the entire decision reviewable,[102] the applicants need only prove one ground of the review to succeed in assailing the grant of the exploration right.[103] However, for the sake of completeness and in view of the importance of this matter, it behoves this court to deal, albeit in a truncated fashion, with other review grounds, as well, which is what is considered next.

Failure to take into account relevant considerations.

[106] Section 6(2)(e)(iii) of PAJA provides for judicial review where action was taken without taking into account relevant considerations.

[107] The fundamental considerations that are said to be absent from the EMPr and the record filed in terms of rule 53 of the Uniform Rules of Court in these proceedings are –

- (a) the anticipated harm to the marine and bird life along the Eastern Cape coast;
- (b) the communities' spiritual and cultural rights and their rights to livelihood; and
- (c) the climate change considerations and requirements advocated by the intervening parties.

These considerations are, in turn, dealt with one after the other.

[108] For their contention that the anticipated harm to marine and bird life is a fundamental consideration, the applicants rely on the evidence of experts. The experts are in agreement that there is a reasonable apprehension of harm to marine and bird life and that the mitigation measures proposed by Shell and Impact do not adequately manage the threat of harm. The applicants' experts emphasise the need for evidence ruling out a significant risk of harm before the seismic survey may be conducted. The respondents, likewise, rely on experts to refute the suggestion of possible harm to marine and bird life. They suggest that the detrimental effect of seismic surveys are not known and that, in so far as there is a possibility of death or stranding of marine animals from exposure to sound from seismic surveys, there are appropriate mitigating and monitoring measures in place.

[109] Because of the apparent dispute between the experts as to the adequacy of the mitigation measures minimising the known effects of seismic surveys, it would have been incumbent on the decision-maker to invoke the precautionary principle. In *Fuel Retailers*, [104] the duty imposed on environmental authorities was examined. The court emphasised that the approach adopted in our environmental legislation is one of risk-aversion and caution, which entails 'taking into account the limitation on present knowledge about the consequences of an environmental decision.' [105] It was further held that the precautionary principle is applicable 'where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.' [106]

[110] The onus rests on the party refuting the applicability of the precautionary principle to establish that the principle is of no application.[107]

[111] The institutional competence of judges to make decisions relating to which considerations are relevant and which are not is a perilous course that has the potential to turn judges into administrators.[108] Notwithstanding this, the courts' power to review decisions on the basis of relevant and irrelevant considerations was affirmed in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd.*[109] The advent of PAJA has fortified the position, so much so that post-1994 law reports abound with instances in which relevant considerations were not taken into account at all, resulting in the review court setting aside the action.[110]

[112] Apropos the complaint that the Minister failed to consider the relevant communities' spiritual and cultural rights and their rights to livelihood, an apt starting point are the instructive remarks by O' Regan J in *MEC for Education, KwaZulu-Natal and Others v Pillay*. [111] She said:

'My understanding of how our Constitution requires us to approach the rights to culture, therefore, emphasising four things: cultural

rights are associative practices which are protected because of the meaning that shared practices give to individuals and to succeed in a claim relating to a cultural practice a litigant will need to establish its associative quality; an approach to cultural right in our Constitution must be based on the value of human dignity which means that we value cultural practices because they afford

individuals the possibility and choice to live a meaningful life; cultural rights are protected in our Constitution in the light of a clear constitutional purpose to establish unity and solidarity amongst all who live in our diverse society; and solidarity is not best achieved through simple toleration arising from a subjectively asserted practice. It needs to be built through institutional enabled dialogue.'

[113] This judgment, especially on the aspect under discussion, would be incomplete without reference being made to the following remarks by Bloem J in *Sustaining the Wild Coast NPC*: [112]

'I accept that customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How ancestors can reside in the sea and how they can be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the Constitution those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.'

[114] The remarks, though made in the context of a temporary interdict, are timeless in their force and application. The issue is whether it was incumbent on the relevant authorities to consider the spiritual and cultural rights at the particular point when the decision-making process was under way. It will be for the administrative functionary concerned (and not this court) to give due weight to this consideration in light of all other factors serving before it. Approaching it differently would usurp the functions of the administrative tribunal.

[115] The applicant communities contend that they bear duties and obligations relating to the sea and other common resources like our land and forests; it is incumbent on them to protect natural resources, including the ocean, for present and future generations;

the ocean is the sacred site where their ancestors live and so have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content. If there is a potential for disturbance, they contend, they must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance.

[116] In his affidavit, Mr Zukulu states that the sea plays an important role in his community's way of life; it is a key part of their livelihood. They collect mussels, limpets, oysters and crayfish. They also fish for a range of species, including king fish as well as garrick, kob and shad. Sea food, to this community, forms a vital part of their diet and contributes to the fact that their community has some of the lowest rates of hunger in South Africa. Sea food provides them with income as they are able to sell their catches to tourists and neighbours on a cash basis. They are concerned that the proposed seismic survey will have an impact on their ability to sustain themselves from the sea.

[117] Mr Zukulu has also averred that, even as lay persons, they are already seeing signs of climate change in his area: their agriculture is becoming more challenging as they experience much more unpredictable weather patterns and more extreme weather events such as more droughts and heavier downpours of rain. Their livestock is sick more often. As a coastal community, they are very concerned about the prospect of rising sea levels.

[118] According to Shell and Impact, no harm will ensue from the seismic survey because it will be conducted approximately 20 km into the sea, away from the shore. They also contend that measures have been put in place to mitigate and monitor possible death or stranding of marine mammals from exposure to sound from seismic surveys.

[119] There is no evidence that when the impugned decisions were taken the possibility of harm was considered. None of the measures contended for by the respondents addresses the potential harm to the applicants and their religious or ancestral beliefs and practices. In any event, there is no evidence of the decision-maker having taken into account the alleged remedial measures.

[120] The intervening parties' contention that the decision-maker gave no proper consideration to the climate change impacts of the decision to grant the exploration right is an important factor to be considered in the process of granting an exploration right.

[121] Reliance for this contention, by the intervening parties, is placed on expert testimony[113] showing that most of the discovered reserves of oil and gas cannot be burnt if we are to stay on the pathway to keep global average

temperature increases below 1.5 degrees Celsius. Authorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.

[122] According to the respondents, climate change considerations and the right to access food and livelihood are irrelevant when considering an application for an exploration right; these considerations are premature because they fall to be considered at a much later stage.

[123] On the authority of *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*[114] the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food.

[124] The respondents' thesis does not find support from *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*,[115] either, where Murphy J said:

'The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. Allowing for the respondents' argument that no empowering vision in NEMA or the regulations explicitly prescribes a mandatory procedure or condition to conduct a formal climate change assessment, the climate change impacts are undoubtedly a relevant consideration as contemplated by section 240 of NEMA for the reasons already discussed. A formal expert report on climate change impacts will be the best evidentiary means of establishing that this relevant factor in its multifaceted dimensions was indeed considered, while the absence of one will be symptomatic of the fact that it was not.[116]'

[125] It seems clear from the foregoing, even taking into account the contentions raised by the respondents, that, had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate change and the right to food perspective, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable.

[126] The intervening parties have added another fundamental factor which they claim was not considered namely, failure by the decision-maker to take the factors mentioned in ICMA into account when making the relevant decision. Section 12 of ICMA makes the State the public trustee of coastal public property and casts a duty on the State to ensure that coastal public property is used, managed, protected, conserved and enhanced in the interest of the whole community. Section 21 confers the power upon an organ of state that is legally

responsible for controlling and managing any activity on or in coastal waters to control and manage the activity in the interest of the whole community.

- [127] There is no doubt that the Minister and his delegate constitute an organ of State responsible for managing activities on or in coastal waters when they consider applications for an exploration right, even one that entails seismic surveys.
- [128] The Minister has not disputed that the provisions of ICMA were not considered. He was merely content to argue that the provisions of ICMA are only triggered if and when an environmental authorisation under NEMA is required. This is a legal argument. The deponent to the Minister's affidavit is a functionary who did not take any of the impugned decisions. Her affidavit offers no basis upon which she could give evidence concerning what was in the mind of the decision-maker at the time they took the impugned decision.
- [129] The obligations imposed upon organs of state in terms of section 12 and 21 of ICMA are not triggered only in the event that an environmental authorisation is required. It is only section 63 which is conditional on the requirements of an environmental authorisation in terms of NEMA.
- [130] The area to which the exploration right applies enjoys a special legal status that affords the environment and within this area a particularly high level of protection and necessitates that decisions affecting it be taken in a manner that complies with the requirements of ICMA. One of the objectives of ICMA is to introduce an integrated approach to management and in this instance, the decision-maker did quite the opposite and dealt with the application as an energy sector-specific issue.
- [131] The Minister was duty bound to take into account the considerations referred to in ICMA. As a matter of fact, he did not do so. This, in and by itself, renders the impugned decision reviewable.
- [132] By way of summation, the failure on the part of the Minister to take into account the considerations dealt with above is fatal to the decision to grant the exploration right and the renewals thereof, rendering these reviewable in terms of section 6(2)(e)(iii) of PAJA.

Failure to comply with applicable legal prescripts.

- [133] In terms of section (6)(2)(b) of PAJA, a court has the power to review an administrative action in the event that legal prescripts were not complied with. The applicants seek to assail the decision granting the exploration right on this front, as well.
- [134] There was non-compliance, they argue, with section 80(1)(g) of MPRDA in that the objects referred to in section 2(d) and (f) of MPRDA were not satisfied. These are substantial and meaningful expansion of the opportunities for historically disadvantaged persons to enter into and actively participate in the mineral and petroleum industries, benefit from the exploitation of the nation's

mineral and petroleum resources, promote employment and advance the social and economic welfare of all South Africans.

[135] Much as there were statements made in the EMPr that the seismic survey would create jobs and increase government revenues etc, no detail to substantiate these claims is made; no explanation as to how the jobs will be created, and how the economy will be stimulated, or how the seismic survey will improve the socio-economic circumstances in which most South Africans live are provided.

[136] On this additional ground, too, the impugned decisions are liable to be set aside.

Should the declaratory and interdictory relief be granted?

[137] Additional to the review, the applicants seek an order which in effect declares that the fifth respondent is not entitled to commence any exploration activities, including conducting a seismic survey, without seeking and obtaining an environmental authorisation in terms of NEMA. The setting aside of the decision granting the exploration right and its renewals renders it unnecessary for the court to determine the applicants' entitlement to the declaratory relief. There is no longer any dispute between the parties in need of resolution by way of a declaratory order.

[138] The prayer to interdict the fourth and fifth respondents from undertaking seismic survey operations under the exploration right unless and until they obtain an environmental authorisation in terms of NEMA is sought in the alternative to the declaratory and review relief. The success of the review will render this prayer redundant. The review and setting aside of the decision granting the exploration right will have the effect of removing the right (including the renewals thereof) in its entirety resulting in Shell being prohibited from conducting the seismic survey.

Conclusion

[139] The court is satisfied that the review grounds meet the threshold. It is demonstrably clear that the decisions were not preceded by a fair procedure; the decision-maker failed to take relevant considerations into account and to comply with the relevant legal prescripts. Therefore, the decision granting the exploration right falls to be reviewed under section 6(2) of PAJA and the principle of legality. Logically, the renewals arose from the exploration right and have no independent and separate existence from the right. It follows that if the exploration right is wrong in law, the renewals are legally untenable. The decisions are liable to be set aside in terms of section 8 of PAJA.

Costs

[140] The applicants have attained substantial success and are thus entitled to their costs. In view of the complexity of the case and its importance to the parties, the involvement of more than one counsel in each of the legal teams was warranted. Such involvement redounded to a smooth and structured hearing and culminated in the determination of this matter.

Order

[141] The following order is, therefore, made:

1. The decision taken by the first respondent on 29 April 2014 granting exploration right 12/3/252 to the fourth respondent for the exploration of oil and gas in the Transkei and Algoa exploration areas is reviewed and set aside.
2. The decision taken by the first respondent on 20 December 2021 to grant a renewal of the exploration right is reviewed and set aside.
3. The decision taken by the first respondent on 26 August 2021 to grant a further renewal of the exploration right is reviewed and set aside.
4. The first, fourth and fifth respondents shall pay costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include, in the case of the first to seventh applicants, the costs of three counsel and, in the case of the eighth and ninth applicants, the costs of two counsel.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

NHLANGULELA DJP:

I agree.

Z M NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORMAN J:

T V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the 1st to 7th applicants : T Ngcukaitobi SC

(with him, E Webber and N Stein)

Instructed by

: Legal Resources Centre

Cape Town

C/o Huxtable Attorneys

Makhanda

Counsel for the 8th and 9th applicants : N Ferreira (with him C Tabata)

Instructed by

: Cullinan & Associates

Kenilworth, Cape Town

Counsel for the 1st respondent : A Beyleveld SC (with him, A Barnett)

Instructed by

: The State Attorney

Gqeberha

C/o Whitesides Attorneys

Counsel for the 4th respondent : J J Gauntlett SC QC

(with him, F B Pelser, A Nacerodien and N M Nyathi)

Instructed by

: Cliffe Dekker Hofmeyer Inc

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Counsel for the 5th respondents : A Friedman

(with him, S Pudfin-Jones)

Instructed by

: Shepstone & Wylie Attorneys

UMhlanga Rocks, Durban

C/o Nettletons Attorneys

Heard on

: 30 & 31 May 2022

Delivered on

: 01 September 2022

- [1] Otherwise referred to as the Eastern Cape coast. Part of this coast is a 250 km strip commonly known as the “Wild Coast” straggling the Mthamvuma River in the North and the Great Kei River to the South.
- [2] A seismic survey is the study in which seismic waves generated through compressed air are used to image layers of rock below the seafloor in search of geological structures to determine the potential presence of naturally occurring hydrocarbons (i.e. oil and gas).
- [3] The section reads: ‘Everyone has a 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 economy and social development.’
- [3] The section reads:
- ‘Everyone has a 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 economy and social development.’
- [4] (CCT 67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); [2007] (6) SA 4 (CC); (07 June 2007), para 44.
- [5] SWC.
- [6] The Dwesa-Cwebe Community.
- [7] Made up of the Mendwane, Hobeni, Cwebe, Ngoma, Ntlangano, Mpume and Ntubeni villages.
- [8] By virtue of being a marine protected area, some of the concerns raised in this application would otherwise have no bearing on this area. The view taken of this matter and the orders to be eventually granted render this aspect of the case unnecessary to deal with.
- [9] All Rise.
- [10] GPAF.
- [11] MPRDA.

- [12] NEMA.
- [13] ICMA.
- [14] NEMBA.
- [15] Shell.
- [16] Impact.
- [17] These objectives are set out in an annexure to Impact's answering affidavit, being a letter addressed to PASA, dated 08 May 2017.
- [18] The Deputy Director-General.
- [19] The Transkei Algoa Exploration area is located between Port Elizabeth in the Eastern Cape Province (33° 54'S, 23° 36') and Ramsgate in the KwaZulu-Natal Province (30° 40'S, 30° 20'E). The Transkei part of the area extends along a narrow strip of the continental shelf to a maximum distance of approximately 135 km of the Eastern Cape coastline. The Algoa part is located further offshore immediately South of the continental shelf, approximately 100 km from the Port Elizabeth shoreline. The proposed exploration areas cover an area of approximately 45,838 km².
- [20] In relevant part, the section provides: ' (1) Any person who wishes to apply to the Minister for an exploration right must lodge the application- (a) at the office of the designated agency; (b) in the prescribed manner; and (c) together with the prescribed non-refundable application fee.' (2) The designated agency must, within 14 days of the receipt of the application, accept an application for an exploration right if- (a) the requirements contemplated in subsection (1) are met; (b) no other person holds a technical co-operation permit, exploration right or production right for petroleum over the same land and area applied for; and (c) no prior application for a technical co-operation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.'
- [20] In relevant part, the section provides:
- ' (1) Any person who wishes to apply to the Minister for an exploration right must lodge the application-
- (a) at the office of the designated agency;
- (b) in the prescribed manner; and
- (c) together with the prescribed non-refundable application fee.'
- (2) The designated agency must, within 14 days of the receipt of the application, accept an application for an exploration right if-

- (a) the requirements contemplated in subsection (1) are met;
- (b) no other person holds a technical co-operation permit, exploration right or production right for

petroleum over the same land and area applied for; and

- (c) no prior application for a technical co-operation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.'

[21] EMPr.

[22] PASA.

[23] These are - '(a) a description of the environment likely to be affected by the proposed prospecting or mining operation;

- (b) an assessment of the potential impacts of the proposed prospecting or mining operation on the environment, socio-economic conditions and cultural heritage, if any;

- (c) a summary of the assessment of the significance of the potential impacts, and the proposed mitigation and management measures to minimise adverse impacts and benefits; (d) financial provision which must include – (i) the determination of the quantum of the financial provision contemplated in regulation 54; and (ii) details of the method providing for the financial provision contemplated in regulation 53; (e) planned monitoring and performance assessment of the environment management plan; (f) closure and environmental objectives;

- (g) a record of the public participation undertaken and the results thereof; and

- (h) an undertaking by the applicant regarding the execution of the environmental management plan.'

[23] These are -

'(a) a description of the environment likely to be affected by the proposed prospecting or mining operation;

- (b) an assessment of the potential impacts of the proposed prospecting or mining operation on the environment, socio-economic conditions and cultural heritage, if any;

- (c) a summary of the assessment of the significance of the potential impacts, and the proposed mitigation and management measures to minimise adverse impacts and benefits;

- (d) financial provision which must include –

- (i) the determination of the quantum of the financial provision contemplated in regulation 54; and

- (ii) details of the method providing for the financial provision contemplated in regulation 53;

- (e) planned monitoring and performance assessment of the environment management plan;
- (f) closure and environmental objectives;
- (g) a record of the public participation undertaken and the results thereof; and
- (h) an undertaking by the applicant regarding the execution of the environmental management plan.’

[24] 22 March 2013 to 12 April 2013.

[25] 24 May to 24 June.

[26] On 03 June 2013. Port Elizabeth is now known as “Gqeberha.”

[27] On 04 June.

[28] On 05 June.

[29] AbaThembu, amaMpondo of the East and of the West and amaXhosa monarchs. The “Transkei” territory is a former black homeland which gained self-governing status in 1963 and was granted “independence” in 1976. Transkei did not receive international recognition as an independent State, having been considered to be a product of apartheid. Following a multiracial election that took place in 1994, apartheid came to an end and Transkei, together with other homelands, was reabsorbed into South Africa. The appellation “Transkei” is nevertheless used in this judgment for the sake of convenience.

[30] Exploration Right 12/3/252 (otherwise hereinafter referred to as the exploration right).

[31] Impact assigned 75% participating interest in the exploration right to EMEPSAL and became 25% participating interest holder. By notarial deed dated August 2017 EMEPSAL assigned the interest to and in favour of STATOIL South Africa BV (Incorporated in Netherlands)

(STATOIL). In terms of the deed, the participating interest of the parties in the exploration right were: EMEPSAL, 40%; STATOIL, 35%; and Impact, 25%.

[32] The same exercise appears to have been conducted in 2013, as well.

[33] Seismic surveys are undertaken to collect either 2-dimensional (2D) or 3-dimensional (3D) data. The 2D survey provide a vertical slice though the earth’s crust along the survey trackline. The vertical scales on displays of such profiles are generally in 2-way sonic time, which can be converted to depth displays by using sound velocity data. 2D surveys are typically applied to obtain regional data from widely spaced survey grids (10s of kilometres) (para 2.3.2, EMPr).

[34] A 3D survey comprises a toed airgun array; up to 12 or more lines of hydrophones spaced 5 to 10m apart and between 3m and 25m below the water surface (the array can be upwards of 12 000m long and 1200 m wide); and a control and recording system co-ordinating the firing of shots, the recording of returned signals and accurate position fixing (Id).

- [35] At this point in time, EMEPSAL had a 40% interest; Equinor (formally STATOIL), 35%; and Impact, 25%. EMEPSAL further recorded that it had withdrawn from the exploration right and that it had no objection to Impact making the renewal application in its sole name. Likewise, and by virtue of a joint operating agreement, Equinor (together with EMEPSAL) consented to the transfer of its entire participating interest in the exploration right to Impact.
- [36] SLR, otherwise referred to as “the consultants.”
- [37] In this instance, the Amazon Warrior.
- [38] An airgun is an underwater pneumatic device from which high pressure air is released suddenly into the surrounding water. On release of pressure, the resulting bubble pulsates rapidly producing an acoustic signal that is proportional to the rate of change of the volume of the bubble. The acoustic signal propagates through the water and subsurface and reflections are transmitted back to the surface. The sound source must be submerged in the water, typically at a depth of 5 to 25 metres (para 2.3.4 of the EMPr).
- [39] Airguns are used on an individual basis (usually for shallow water surveys). Arrays of airguns are made of towed parallel strings of airguns (usually comprised of between 12 and 70 airguns) and are normally towed between 50 meters and 100 meters behind the seismic vessel. The airgun would be fired at approximately 10 to 20 second intervals at an opening pressure of between 2000 to 2500 bsi and a volume of 3000 to 5000 cubic inches (para 2.3.4 EMPr).
- [40] Per Govindjee AJ.
- [41] *Border Deep Sea Association v Minister of Mineral Resources & Energy* (3865/2021) [2021] ZAECGHC 111 (03 December 2021); 2021 JDR 3208 (ECG).
- [42] *Border Deep Sea Angling Association & Others v Minister of Mineral Resources & Energy & Others* (3865/2021) [2022] ZAECMKHC 38 (07 June 2022) (BDSA).
- [43] Part A.
- [44] At that point, Part B comprised a prayer interdicting the third, fourth and fifth respondents from undertaking seismic survey operations under the exploration right unless and until they have obtained an environmental authorisation under NEMA.
- [45] Per Bloem J.
- [46] *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2021] ZAECGHC 118; [2022] All SA 796 (ECG); 2022 (2) SA 585 (ECG) (28 December 2021).

[47] The first to seventh applicants seek an order that – ‘1. The fifth respondent may not undertake any seismic survey if it has not been granted an environmental authorisation in terms of [NEMA]. 2. The decision taken by the first respondent, on 29 April 2014, to grant an exploration right to the fourth respondent to explore for oil and gas in the Transkei and Algoa exploration areas . . . is reviewed and set aside. 3. The decision taken by the first respondent, on 20 December 2017, to grant a renewal of exploration right 12/3/252 is reviewed and set aside. 4. The decision taken by the first respondent, on 26 August 2021, to grant a further renewal of exploration right 12/3/252 is reviewed and set aside. 5. The decision to allow the fifth respondent to commence the seismic survey without the environmental authorisation in terms of NEMA is declared to be invalid and is set aside. 6. The applicants’ failure to exhausts internal remedies in respect of the decisions in 2, 3, 4, and 5 is condoned. 7. The time period of 180 days in section 7 (1) of PAJA is extended, in accordance with section 9 of PAJA, to the date that the review relief in Part B was instituted. 8. In the alternative to 2 - 7, the fourth and fifth respondents are interdicted from undertaking seismic survey operations under exploration right 12/3/252 unless and until they obtain an environmental authorisation in terms of NEMA. 9. The applicants are granted leave to file the supplementary affidavit of Reinford Sinegugu Zukulu, together with all supporting affidavit annexed thereto.

10. The first, fourth and fifth respondents are ordered to pay the applicants’ costs.’

[47] The first to seventh applicants seek an order that –

‘1. The fifth respondent may not undertake any seismic survey if it has not been granted an environmental authorisation in terms of [NEMA].

2. The decision taken by the first respondent, on 29 April 2014, to grant an exploration right to the fourth respondent to explore for oil and gas in the Transkei and Algoa exploration areas . . . is reviewed and set aside.
3. The decision taken by the first respondent, on 20 December 2017, to grant a renewal of exploration right 12/3/252 is reviewed and set aside.
4. The decision taken by the first respondent, on 26 August 2021, to grant a further renewal of exploration right 12/3/252 is reviewed and set aside.
5. The decision to allow the fifth respondent to commence the seismic survey without the environmental authorisation in terms of NEMA is declared to be invalid and is set aside.
6. The applicants’ failure to exhausts internal remedies in respect of the decisions in 2, 3, 4, and 5 is condoned.
7. The time period of 180 days in section 7 (1) of PAJA is extended, in accordance with section 9 of PAJA, to the date that the review relief in Part B was instituted.

8. In the alternative to 2 - 7, the fourth and fifth respondents are interdicted from undertaking seismic survey operations under exploration right 12/3/252 unless and until they obtain an environmental authorisation in terms of NEMA.
9. The applicants are granted leave to file the supplementary affidavit of Reinford Sinegugu Zukulu, together with all supporting affidavit annexed thereto.
10. The first, fourth and fifth respondents are ordered to pay the applicants' costs.'

[48] The Act.

[49] By reason of the Makhanda High Court, as the main seat (in terms of section 6 (1) (a) of the Act), having concurrent jurisdiction with the various local seats (Mthatha, Bhisho and Gqeberha) in which the cause of action arose.

[50] These measures are the invocation of international standards, including additional mitigation measures specific for the area concerned; the reduction of the sound source output to its lowest practically possible level; the engagement of qualified independent marine

mammal observers (MMO) and passive acoustic monitoring (PAM) operators who will be on-board the vessel to observe and record

responses of marine fauna to the seismic survey; the implementation of a dedicated MMO and PAM pre-shoot watch of at least 60 minutes to ensure that there are no diving seabirds, turtles, seals or cetaceans within 800 metres of the seismic source; the carrying out of airgun firing as soft-starts of at least 20 minutes duration; the suspension of the survey if cetaceans enter the 800 metre mitigation zone or if there are mortality or injuries as a direct result of the survey; and steering clear of declared marine protected areas with a 5 kilometre buffer zone being maintained around MPAs exceeding the current standard in South Africa of a 2 kilometre buffer zone around MPAs.

[51] Initially, the first respondent had evinced a determination to abide the decision of the court, but suddenly changed stance and filed answering papers shortly before the delivery of the applicants' replying affidavit.

[52] Public statements made by the Minister criticizing the applicants and aligning himself with Shell in its desire to conduct the seismic survey on the basis that the EMPr "constitutes an environmental authorisation as envisaged by the NEMA."

[53] Compare MEC for Health, Eastern Cape v Khumbulela Melane (2017/2015) [2022] ZAECMHC 4 (15 March 2022), where the court upheld the salutary approach of seeking condonation for the delivery of supplementary papers.

[54] SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others (CCT172/16) [2017] ZACC4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017), para 9.

- [55] SA Riding case, *supra*.
- [56] Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE) at 89B - C.
- [57] Section 38(a).
- [58] Section 38(b).
- [59] Section 38(c).
- [60] Section 38(d).
- [61] Section 38(e).
- [62] Section 32(1) (e) of NEMA.
- [63] 1996(1) SA 984 (CC); 1996 (1) BCLR 1 (06 December 1995), para 229.
- [64] Beukes v Krugersdorp Transitional Local Council and Another 1996 (3) SA 467 (W) at 474 E – H.
- [65] Minister of Social Development and Others v Net1 Applied Technologies South Africa (Pty) Ltd and Others
- [2018] ZASCA 129 (27 September 2018).
- [66] PAJA.
- [67] In relevant part, the section provides that the period of 180 days referred to in section 7 may be extended by a court on application
- by the person concerned where the interests of justice so require.
- [68] Wolgroeiers Afslalers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A); Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie 1986 (2) SA 57 (A); Gqwetha v Transkei Development Corporation Ltd and Others 2006
- (2) SA 603 (SCA).
- [69] (4842/99)
- [2000] ZAWCHC 9; 2001 (2) SA 112 (C) (20 October 2000), at 126E - G.
- [70] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004); Pharmaceutical Manufacturers Association of SA and Others: In re: Ex parte application of President of the RSA and Others
- [2000] ZACC 1; 2000 (2) SA 674 (CC) paras 45 and 51; 2000 (3) BCLR 241 (CC).
- [71] (308/2011)[2012] ZASCA 45; [2012] 2 All SA 462 (SCA), para 34.
- [72] Mr Poovalingum Moodley.

[73] [2008] ZASCA 6; 2008 (3) SA 371 (SCA), para 13.

[74] *Malawu v MEC for Co-operative Governance and Traditional Affairs, Eastern Cape and Another* (CA & R 118/2021) [2022] ZAECMKHC 27 (31 May 2022), paras 53 - 5.

[75] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[76] Section 7 (1) (b) of PAJA.

[77] *OUTA v SANRAL* (90/2013)

[2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (09 October 2013).

[78] 2006

(2) SA 603 (SCA), paras 22 – 3.

[79] *OUTA*, supra, para 27.

[80] *Hoexter and Penfold, Administrative Law in South Africa* (3rd Ed), p 521; also see *Police and Prisons Civil Rights Union and Other v Minister of Correctional Services and Others* (No 1) (603/05) [2006] ZAECHC 4; 2008 (3) SA 91 (E); [2006] 2 All SA 175 (E); 2006 (8) BCLR 971 (E); [2006] 4 BLLR (E) 12 January 2006), where Plasket J held that administrative decisions taken in violation of the rules of procedural fairness are invalid, irrespective of the merits.

[81] Made in terms of PAJA and published in GN R1022, G. 23674 dated 31 July 2002.

[82] Section 96 of MPRDA.

[83] Supra, para 29, which reads: ‘It must be noted that ERM sent a notification of its environmental audit report to the entire interested and affected parties’

database from the 2013 process. This data base included a few hundred people including Stone and Mr JC Rance, the environmental

office for the first applicant and now Chair of the second applicants. That notification, sent on 20 May 2020, is headed “Notification to Stakeholders: Environmental Compliance Audit related to exploration right 12/3/252, in substantial compliance with Regulation 34 (6) of the EIA Regulations GNR326 of April 2017. “it references the exploration right and that there was an approved EMPr, and afforded interested and affected parties a 30-day for comment. No comments were received.’

[83] Supra, para 29, which reads:

‘It must be noted that ERM sent a notification of its environmental audit report to the entire interested and affected parties’

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[84] Section 7(2)(c).

[85] *Koyabe and others v Minister of Home Affairs and others* (Lawyers for human rights as amicus curiae) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC), para 39.

[86] *Koyabe*, supra, para 44.

[87] (HC-MD-CIV-MOT-GEN-2022/00289

[2022] NAHCMD 380 (29 July 2022), submitted in terms of paragraph 61.11 of the Code of Conduct of all Practitioners, Candidate Legal Practitioners and Juristic Entities.

[88] The original decision granting Impact the right to explore for oil and gas in the Transkei and Algoa areas and the two renewals thereof.

[89] Section 79 of MPRDA (fn 20 above).

[90] Section 2 of the Constitution.

[91] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(4) SA 113 (CC).

[92] Published in GNR 420 of 27 March 2020.

[93] 2019

(2) SA 1 (CC), para 97.

[94] 2005

(3) SA 589 (CC), para 101.

[95] Supra, paras 66 - 7.

[96] Also known as the “Sunday Times”, circulating on Sundays.

[97] In pursuit of the separate development policy, the Constitution of the “Republic of Transkei” scrapped off Afrikaans as an official language, in favour of isiXhosa, in Transkei. Much as Afrikaans was reinstated as one of the nine official languages, the country over in 1994, the usage of Afrikaans has not regained foothold in Transkei. The 2016 community survey conducted by statistics South Africa reveals that 10.29% of the Eastern Cape population speaks Afrikaans. OR Tambo and Alfred Nzo district municipalities (making up the greater part of Transkei) records 0,18% and 0.21%, respectively, Afrikaans speakers.

[98] According to South Africa gateway tabulating languages that are spoken in South Africa's nine provinces in the Eastern Cape 78.8% of the population speak isiXhosa and 10.6% Afrikaans.

[99] Compare *Administrator of the Transvaal and Others v Zenzile and Others* (444/88) [1990] ZASCA 108; 1991 (1) SA 21 (AD); [1991] 1 All SA 240 (A) (27 September 1990) wherein Hoexter JA made reference to the following statement (in Wade, *Administrative Law* (6th ed) pp 533-4): 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudiced unfairly.'

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[100] The section provides that 'a court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair.'

[101] See *Magnificent Miletrading 30 (Pty) Ltd v Charmaine Celliers NO and Others* (CCT157/18) [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC)[2017] ZACC 36, where it was held: 'The proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive

validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as initial act is not set aside by a competent court.'

[101] See *Magnificent Miletrading 30 (Pty) Ltd v Charmaine Celliers NO and Others* (CCT157/18) [2019] ZACC 36; 2020 (1) BCLR 41 (CC); 2020 (4) SA 375 (CC)[2017] ZACC 36, where it was held:

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[102] *Patel v Witbank Town Council* 1931 TPD 284; compare *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* (476/2015) [2015] ZASCA 208; [2016] 1 All SA 483 (SCA); 2016 (3) SA 1 (SCA) (9 December 2015), paras 44-5 where it was held: ‘It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated. . . . Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) . . .’

[102] *Patel v Witbank Town Council* 1931 TPD 284; compare *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* (476/2015) [2015] ZASCA 208; [2016] 1 All SA 483 (SCA); 2016 (3) SA 1 (SCA) (9 December 2015), paras 44-5 where it was held:

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[103] Also see *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* 2007 (1) SA 576 (SCA) (2006) 27 ILJ 2076; [2006] 11 BLLR 1021; [2007] 1 All SA 164) para 24 where Cameron JA said that ‘(t)his dimension of rationality in decision-making predates its constitutional formulation.’

[104] *Supra*.

[105] *Supra*, para 81.

[106] *Supra*, para 98.

[107] *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and Others* [2012] 4 All SA 624 (GSJ).

[108] *Hoexter and Penfold*, *ibid*, p 439.

[109] 1988 3 SA 32 (A) at 541-2.

[110] See for example *SA Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 (W), paras 29-30; *Pieterse NO v The Master* 2004 (3) SA 593 (C), para 13 and *NSPCA v Minister of Environmental Affairs and Others* 2020 (1) SA 249 (GP), para 75.

[111]

[2007] ZACC 21; 2008

(1) SA 474 (CC), para 157 (minority judgment).

[112] Supra, para 32.

[113] Professor New.

[114] (133/98)

[1999] ZASCA 9 (12 March 1999).

[115] (2017) JOL 37526 (GNP); [2017] ZAGPPHC (GP); [2017] 2 All SA 519 (GP).

[116] Para 88.

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