IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: 58/2023; 71/2023; 351/2023

ECHCM Case No: 3491 /2021

In the matter between:

MINISTER OF MINERAL RESOURCES AND ENERGY	First Appellant
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Appellant
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA BV	Third Appellant
IMPACT AFRICA LIMITED	Fourth Appellant
BG INTERNATIONAL LIMITED	Fifth Appellant
and	
SUSTAINING THE WILD COAST NPC	First Respondent
MASHONA WETU DLAMINI	Second Respondent
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Respondent
NTSINDISO NONGCAVU	Fourth Respondent
SAZISE MAXWELL PEKAYO	Fifth Respondent
CAMERON THORPE	Sixth Respondent
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Respondent
NATURAL JUSTICE	Eighth Respondent
GREENPEACE ENVIRONMENTAL ORGANISATION	Ninth Respondent

FIRST TO SEVENTH RESPONDENTS' HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. This appeal concerns an exploration right granted to the fourth appellant (**"Impact"**) to be exercised by the third and fifth appellants (**"Shell"**), to conduct seismic survey operations off the Wild Coast of South Africa ("**the seismic blasting**").

2. Despite the potentially devastating impact that the seismic blasting will have, Impact and Shell did not:

   2.1. obtain an environmental authorisation under the National Environmental Management Act 107 of 1998 ("**NEMA**") to commence the seismic blasting; or

   2.2. adequately consult (or consult at all) with affected communities when Impact obtained its exploration right over eight years ago.

3. When assessing and granting the exploration right to Impact, the Department of Mineral Resources and Energy ("**the Department**") failed to take into account a number of critical considerations - including the impact that the seismic blasting would have on the livelihoods of affected communities, on the spiritual and cultural practices of such communities, and the cumulative impact of all seismic blasting along the East Coast. These omissions rendered the grant of the Exploration Right and Shell's seismic blasting unlawful and invalid.

4. The High Court agreed. It reviewed and set aside the following decisions ("**the decisions**"):[1]

[1] In doing so, the High Court correctly concluded that: There was no delay in launching the review proceedings; Exceptional circumstances existed, warranting the condonation of the respondents' failure to exhaust internal remedies before initiating the review application; The decisions fell to be reviewed on the grounds (amongst others) that the appellants failed to adequately consult interested and affected parties before the Exploration Right was granted and that relevant considerations were not taken into account when granting the Right; The renewal decisions are wholly dependent on the grant and existence of the Exploration Right. Thus, if the Exploration Right

4.1. The decision to grant exploration right 12/3/252 ("**the Exploration Right**") to Impact, taken on 29 April 2014; and

4.2. The decisions to renew the Exploration Right, taken on 20 December 2017 and 30 July 2021, respectively.

5. The appellants now appeal against the High Court's orders reviewing and setting aside the Exploration Right and its renewals. The respondents have cross-appealed against the High Court's refusal to grant the declarator relief sought by them.

6. In these submissions, we show that:

6.1. There was no unreasonable delay in launching the review application;

6.2. Exceptional circumstances warrant the condonation of the respondents' failure to exhaust internal remedies;

6.3. Impact and the Department failed to adequately consult with interested and affected communities;

6.4. The Minister of Minerals and Energy (**"the Minister"**) failed to take relevant considerations into account and failed to apply his mind;

6.5. The High Court's order setting aside the decisions was just and equitable; and

6.6. The cross-appeal should be upheld.

---

is set aside, the renewals decisions must fall with it; Given that the review relief had been granted, there was no need to consider the declaratory relief sought by the applicants i.e. an order declaring that ("Shell") is not entitled to commence with any exploration activities without first seeking and obtaining an environmental authorisation in terms of the National Environmental Management Act 107 of 1998.

NO UNREASONABLE DELAY

7. The appellants incorrectly claim that the review should have been dismissed, upfront, on the ground that the respondents unreasonably delayed in launching their challenge (in breach of the 180-day time limit under section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**). In this regard:

   7.1. The respondents maintain that they became aware of the grant of the Exploration Right in late October and early November 2021. The review application was initiated (by amendment of the notice of motion in this matter) in January 2022. This was well within the 180-day limit.

   7.2. Shell claims that it does not matter when individual persons or communities became aware of the impugned decisions and their reasons. Shell contends that the decisions affected the public at large, and that (relying on the *OUTA* case)[2] that the clock started ticking when the public at large might reasonably have been expected to have become aware of the decisions and the reasons for them, regardless of when the particular individuals became aware. Shell maintains that this occurred on 20 May 2020, when an Environmental Compliance Notice was sent to interested and affected parties, and to the "general public", allegedly alerting them to the grant of the Exploration Right. We address this notice below.

   7.3. Impact adopts a similar approach to Shell, claiming that the applicable test is when the public at large could reasonably be expected to have become aware

[2] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 27.

of the decisions and their reasons. Impact maintains that this occurred in 2013, when it notified the public of its application for an exploration right.

7.4. The Minister adopts the same position as Impact, stating that the public at large would reasonably have been expected to have become aware of the grant of the Exploration Right around 29 April 2014, seven years before the institution of the review.

8. The positions adopted by the appellants are unsustainable for the following reasons:

8.1. There is no evidence that the Minister (or his delegate) gave the public notice of the decisions prior to October 2021. Under section 3 of PAJA, an administrator must afford all persons whose rights are materially affected by administrative action:

> "(i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5."[3]

8.2. There is no evidence that the Minister or his delegates gave the public notice that the Exploration Right had been granted and later renewed (i.e. there was no "clear statement of the administrative action"). The Minister does not point to any such notice or publication in his heads of argument. He simply asserts that the public would have become aware of the grant of the Exploration Right around April 2014, without explaining how.

[3] S 3(2)(b) of PAJA.

8.3. Nor does Impact specify how the public became aware of the decisions to grant and later renew the Exploration Right prior to October 2021. In its heads of argument, Impact contends that the general public would have "*become aware of the exploration right in 2013, when there was public notification of the exploration right application by means of: notices in four newspapers on 22 March 2013; emails to stakeholders on 22 March 2013…; emails to all IA&Ps on 17 and 24 May 2013 notifying of the draft EMPr's availability for review and comment; and three public meetings in Port Elizabeth, East London and Port St Johns on 3 , 4 and 5 June 2013*".[4] These processes notified various parties of Impact's application for an exploration right. They do not constitute notice of the grant of the Exploration Right or its renewals. The Minister decided to grant Impact's application for an Exploration Right on 29 April 2014, after the above notices were given and meetings held.

8.4. Both the Minister and Impact attempt to get around this problem of showing when the public might reasonably have become aware of the grant of the Exploration Right by focusing on the applicability of section 3 versus section 4 of PAJA in this matter. They claim that section 4 (which contains the same requirements as section 3) applies. This approach is flawed for two reasons:

8.4.1. First, it is confused in law. Sections 3 and 4 are not mutually exclusive provisions. They apply simultaneously. Section 3 sets out the general requirements for procedural fairness when administrative action materially and adversely affects the rights of any person. Section 4 sets out the procedures that can be followed by an administrator to give

[4] Impact HOA, para 10.

effect to procedural fairness (and the requirements for such fairness in section 3) when his or her administrative decision affects the rights of many persons (i.e. the public). Section 4(1) proposes procedures such as holding a public enquiry, or following a notice and comment procedure, or "*another appropriate procedure to give effect to section 3*"[5]. The remainder of section 4 gives details of how such procedures should be implemented. Thus, it is clear that section 4 applies in addition to section 3, not instead of it.

8.4.2. Second, this argument misses the point. The point is that the Minister should have given clear notice of his decision to grant the Exploration Right and its renewals, and informed all affected persons (being individuals and the public) of their right to appeal the decisions or request reasons. The Minister failed to do so. In the absence of a clear announcement of the decisions, the public could not reasonably have known of their existence. It was only after 29 October 2021,[6] when SLR Consulting (at the instance of Shell) gave notice of Shell's intention to commence with the seismic survey and the issue was picked up in the media, that the public at large might reasonably have become aware of the decisions.

8.5. Shell claims that the public was made aware of the decisions before October 2021. According to Shell, this occurred when a document titled "*Notification to Stakeholders: Environmental Compliance Audit related to Exploration Right 12/3/25"* was sent to interested and affected persons on 20 May 2020. This

[5] Section 4(1)(e) of PAJA.
[6] HC Judgment, Record, vol 19, p 3858, para 22.

notice was not put up in evidence before the High Court and is not in the Record of Appeal. Shell relies on a reference to the notice in the *BDSA*[7] judgment.[8] The judgment states that the Notification constituted an audit to confirm whether the contents of the EMPr were still sufficient and valid for the project. It states that the notice was provided to interested and affected parties and the general public for comment within 30 days. Shell's reliance on this notice is misplaced for the following reasons:

8.5.1. First, the notice does not constitute a clear statement of the administrative action or decision taken. Its purpose was to call for public comment on the EMPr. Its subject line does not state that it relates to Impact's application for an exploration right. It simply refers to the right by its official number (Exploration Right 12/3/252). There is nothing in the heading of the notification that would lead interested and affected parties, or the public at large, to understand that Impact's application for an exploration right had been granted. Neither the parties nor the Court has seen the contents of the Notification, and thus

[7] *Border Deep Sea Angling Association & Others v Minister of Mineral Resources & Energy & Others* (3865/2021) [2022] ZAECMKHC 38 (07 June 2022) ("***BDSA***"). This was a prior unsuccessful interdict application in relation to the same seismic survey.

[8] Shell HOA, para 18. The judgment states at Record, vol 7, p 1283:

> "[22]…[Shell] relies on the EMPr compliance audit circulation for public comment on 20 May 2020. This audit was significant, its purpose being to confirm whether the EMPr requirements were still sufficient and valid for the project. It was provided to Interested and Affected Parties, including the first applicant, and to the general public for comment within 30 days."

And at record, vol 7, p 1287:

> "[29]. 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 database included a few hundred people, including Stone and Mr JC Rance, the environmental office for the first applicant and now chair of the second applicant. 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 GNR 326 of April 2017'. It references the Exploration Right and that there was an approved EMPr, and afforded interested and affected parties a 30-day period for comment. No comments were received."

it cannot be relied upon to demonstrate a clear statement that the decision had been taken to grant an exploration right to Impact.

8.5.2. Second, the BDSA judgment does not explain the manner in which the Notification was made available to the public at large. There is no evidence that it came to the attention of the public. Nor is there evidence that the interested and affected persons who received the notice read it and deciphered its meaning.

9. In light of the above, there is no basis for the appellants to claim that the public might reasonably have been expected to become aware of the decisions prior to late October 2021. As such, the 180-day time period only began running in October 2021 and there was no delay in launching the review proceedings.

EXHAUSTION OF INTERNAL REMEDIES

10. The first to seventh respondents sought condonation from the Full Court for their failure to exhaust internal remedies prior to bringing their review application. The internal remedy in question is an internal appeal against the award and/or renewals of the Exploration Right in terms of section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 (**"MPRDA"**).

11. The condonation application arose in an unusual context, in which the review relief was introduced into the first to seventh respondents' case[9] only after the launching of the application and the grant of an interim interdict by the Honourable Justice Bloem.[10]

[9] Notice of amendment in terms of Rule 28, vol 8, pp 1470 – 1473.
[10] Volume 19, pp 3807 – 3849.

12. The first to seventh respondents did not pursue an internal appeal process for four reasons:[11]

    12.1. First, they found out about the grant and renewals of the Exploration Right in November 2021, almost seven years after the Exploration Right was granted;

    12.2. Second, their initial approach to the Court was for urgent interdictory relief pending the finalisation of part B of the application. The commencement of the seismic survey was imminent at that stage, and would most likely have been concluded prior to the resolution of any internal appeal. To follow the internal appeal process would therefore negate the purpose of approaching the Court for effective relief;

    12.3. Third, because there existed a reasonable apprehension of bias against them on the part of the Minister. This apprehension was based on the Minister's opposition to part A of their application despite no relief being sought against him, as well as his application for leave to appeal the judgment and order granted in part A. The reasonable apprehension is fortified by several public statements made by the Minister, criticising public interest groups for challenging seismic surveys[12] and maintaining his refusal to review the Exploration Right.[13]

13. The Minister addressed these assertions in his affidavits in the Full Court by baldly denying the allegations of bias. He did not engage with the first to seventh respondents' reasons for not pursuing an internal appeal, despite being the authority to which the internal appeal would lie, and thus the party with the interest in their

[11] Supplementary affidavit of Reinford Sinegugu Zukulu, vol 8, pp 1534 - 1536, para 110.
[12] Annexure "RSZ5" to the supplementary affidavit of Reinford Sinegugu Zukulu, vol 8, pp 1551 – 1552.
[13] Annexure "RSZ6" to the supplementary affidavit of Reinford Sinegugu Zukulu, vol 8, p 1553.

failure to exhaust their internal remedies.[14] The heads of argument filed on the Minister's behalf, in this Court, do not address this issue at all.

14. Impact's critique of the applicants' assertions boils down to an insistence that it complied with its consultation obligations, and that the applicants must therefore have been aware of the Exploration Right prior to November 2021.[15] As we address below, however, the evidence demonstrates that Impact did not comply with its consultation obligations and the first to seventh respondents were not aware of the Minister's decisions prior to November 2021. In any event, Impact, too, has not pursued this matter in the heads of argument filed on its behalf.

15. Impact also contends that the first to seventh respondents cannot rely on the conduct of and public statements made by the Minister after the litigation commenced in justifying the failure to exhaust internal remedies prior to applying for the review and setting aside of the Minister's decisions. [16] Shell raises a similar argument.[17]

16. What Impact and Shell both fail to take into account is that the grounds giving rise to the perception of bias all arose before the first to seventh respondents amended their notice of motion to include the review of the Minister's decisions. The obligation to exhaust internal remedies, and the realisation that this would be fruitless, was not an issue at the time of the launch of the application and the hearing of part A. This perception of bias only arose at the time of the amendment, after part A of the application had been finalised, and when the review relief was introduced into the notice of motion.

[14] Minister's answering affidavit, vol 11, p 2219, paras 169 – 170.
[15] Impact's answering affidavit, vol 12, pp 2341 - 2342, para 273.
[16] Impact's answering affidavit, vol 12, p 2342, paras 274 – 275.
[17] Shell's answering affidavit, vol 16, p 3222, para 84.

17. In the circumstances, we submit with respect that the Full Court was quite correct in its finding that *"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."*[18] To have expected the first to seventh respondents to have lodged an appeal prior to pursuing their application, in circumstances where their appeal would inevitably be dismissed, would amount to a denial of justice between the parties.

18. We submit that the Full Court correctly found that the reasons advanced by the first to seventh respondents for their failure to exhaust their internal remedies do indeed constitute exceptional circumstances.

INADEQUATE PUBLIC CONSULTATION

19. Impact was required to meaningfully consult with communities and individuals that would be affected by the seismic blasting. Impact's duty to do so derives from the following:

    19.1. First, the obligations that were imposed upon Impact, as an applicant for an exploration right, by the MPRDA;[19] and

[18] Judgment of the Full Court, vol 19, p 3873, para 82.

[19] These are derive from s 79(4) of the MPRDA, which deals with applications for exploration rights. At the time that the exploration right was granted, this section provided that:

> "(4) If the designated agency accepts the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing-
>
> (a) to notify and consult with any affected party; and
>
> (b) to submit an environmental management programme in terms of section 39 within a period of 120 days from the date of the notice."

19.2. Second, the self-standing duty under PAJA to consult with the applicant communities, as holders of existing customary rights (particularly customary fishing rights) that would be adversely affected by the seismic blasting.[20]

20. Impact failed to comply with the regulations and principles applicable to public consultation under PAJA and the MPRDA.[21] As a consequence, the decision to grant the Exploration Right was procedurally unfair and fell to be reviewed under section 6(2)(c) of PAJA.

i) Applicable law

21. The right to procedurally fair administrative action is entrenched in section 33 of the Bill of Rights. The grant of an exploration right constitutes administrative action.[22]

22. When administrative action materially and adversely affects the rights of any person, their right to procedural fairness is triggered. Section 3 of PAJA (dealt with above) sets out the requirements for procedural fairness. These include that the person whose rights are impacted must be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.[23]

[20] This derives from section 3 of PAJA, which is addressed below.
[21] Impact's duty to consult with communities and individuals impacted by the seismic blasting derives from the following:
First, the obligations that were imposed upon Impact, as an applicant for an exploration right, by the MPRDA
Second, the self-standing duty to consult with the applicant communities, as holders of existing customary rights (particularly customary fishing rights) that would be adversely affected by the seismic blasting.[21]
[22] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC ("*Bengwenyama*").
[23] S3(2)(b)(i) and (ii) of PAJA.

23. In the context of exploration and mining, PAJA must be read together with the MPRDA. When an application for an exploration right is made, the MPRDA imposes obligations on the an applicant to consult with any affected party.[24]

24. The courts have set out general principles that are applicable to consultation of communities in relation to applications under the MPRDA. Two principles from the *Bengwenyama*[25] case bear emphasis:

    24.1. First, interested and affected persons must be informed in sufficient detail of what the proposed mining activities will entail so that they can properly assess the impact of the mining operations. The provision of the necessary information will allow such persons to make an informed decision in relation to the representations that they will submit to the decision-maker.[26]

    24.2. Second, a meaningful consultation process is integral to ensuring procedural fairness. In *Bengwenyama*, the Court held that the award of a prospecting right constitutes administrative action. The Court stated that, in terms of section 6 of the Act, "*any administrative process conducted or decision taken in terms of the Act must be taken in accordance with the principles of lawfulness, reasonableness and procedural fairness. The prescripts of the Act in this regard are subject to the provisions of PAJA.*"[27] In other words, in order to protect interested and affected persons' rights to just administrative action, the consultation process must be comprehensive and meaningful.

[24] MPRDA, section 79(4) (*supra*).
[25] *Bengwenyama (supra).*
[26] *Bengwenyama* at para 66 – 67.
[27] *Bengwenyama* at para 61.

24.3. Although the *Bengwenyama* case dealt with consultation in relation to prospecting right applications, the reasoning applies with equal force to exploration right applications.

25. The specific requirements for consultation under the MPRDA are set out in Regulation 3 of the MPRDA. This regulation must be interpreted in light of the above principles.

26. At the relevant time (i.e. during 2013), Regulation 3 provided as follows:

> "3(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 in the area 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)."[28]

ii) Consultation process carried out by the Department and Impact

27. The EMPR details the consultation process that was carried out. It includes the following steps:

28. The first step is that a stakeholder database was developed through "stakeholder analysis" and using previous studies in the area. Thereafter, a Background Information Document was compiled and distributed to all identified I&APs.[29] It was distributed by email.[30] Project information was also made available on the project information website at http://www.erm.com/TranskeiAlgoa-EMPR.[31]

29. The second step was that adverts were placed on Friday 22 March 2013 in the following newspapers: *The Times*, *Die Burger* (Eastern Cape), *the Herald* and the *Daily Dispatch.*[32] These adverts notified the public about the proposed project, and provided details of the consultation process and information on how members of the public could provide input on the forthcoming survey.[33]

30. The third step was that a period of 21 calendar days (22 March 2013 to 12 April 2013) was allowed for I&APs to submit issues or concerns for consideration in the compilation of the EMPr.[34] This period also allowed for members of the public to register as I&APs and to submit issues or concerns. All issues raised in this process

[28] Emphasis added.
[29] EMPr, Record, vol 4, p 621.
[30] , Record, vol 4, p 739.
[31] EMPr, Record, vol 4, p 739.
[32] EMPr, Record, vol 4, p 621.
[33] Advertisements, , Record, vol 5, p 865 – 868.
[34] EMPr, Record, vol 4, p 621.

were compiled into a short Comments and Responses Report that formed part of the draft EMPr.

31. The fourth step was that the EMPr draft was made available to I&APs for a period of 30 calendar days (24 May - 24 June 2013) on the project website.[35] Notification was sent directly to all I&APs.

32. The fifth step was that Impact conducted a series of face-to-face engagements including group meetings (in an open house format) and focused group meetings (in a standard format) as part of its stakeholder engagement process.[36] All I&APs on the stakeholder database were notified of and invited to the group meetings. Three group meetings were held in Port Elizabeth, East London and Port St Johns. In addition, two focused group meetings were held. One of the focused meetings was with the Provincial Environment Authorities. The other focused meeting was with "*two traditional monarchs and their senior advisors [who] were met in Mthatha, as well as Richard Stephenson, who is mandated to represent the 4 of the Transkei Kingdoms regarding this Project [fn1]*". Footnote 1 states that "*the Royal Monarchs Council has subsequently been formed which represents the following Kingdoms: Thembuland - King Zwelibanzi Dalindyebo; West Pondoland - King Mangaliso Ndamase; and Xhosaland - King Zwelonke Sigcau*.".

iii) Consultation was inadequate

33. The consultation carried out by Impact (and its consultants) and the Department was manifestly inadequate. Impact failed to comply with the specific prescripts of Regulation 3, as well as the broader requirements of meaningful consultation.

[35] EMPr, Record, vol 4, p 622.
[36] EMPr, Record, vol 4, p 622.

34. The Department and Impact failed to comply with Regulation 3 in the following respects:

34.1. First, there is no evidence (or allegation in the papers) that a notice announcing the acceptance of Impact's application for an exploration right was put up on the notice board of the Regional Manager or designated agency (as is required by Regulation 3(2));

34.2. Second, Regulation 3(1) requires that the Department "make known" that the application has been accepted. Regulation 3(3) also requires that the Department must "make known the application". Properly interpreted, the Department did not comply with this obligation. Impact published a notice in four newspapers ("the Published Notice").[37] The Published Notice failed to "make known" the acceptance of Impact's application in the following respects:

34.2.1. The notice is in English. A notice cannot "make known" information if the notice is in a different language to the language that large sections of the public in the affected area speak.

34.2.2. The language used is technical and inaccessible. For example, the work programme is described as including the following steps: "*Phase 1: Airborne geophysics acquisition (gravity and magnetics) to define existing structural trends, identify additional features and to address depth to basement/magnetic source. Phase 2: 2D and 3D seismic surveys followed by processing and interpretation…."*

[37] Record, vol 11, p 2231.

34.2.3. The notice refers to a large geographic location that will be affected. It described the location in vague terms as the "*Transkei/Algoa area off the Eastern Cape Coast of South Africa*" and stated that "*the proposed Exploration area (45 838km^2) extends from the coast out to a maximum water depth of approximately 4000m*". This area is so large and vaguely defined that it was impossible for communities to know if the notice was applicable to them.

34.3. Third, Regulation 3(3) requires that the application be made known by "at least" one of three methods. Properly interpreted (in order to best give effect to the right to procedurally fair just administration)[38] this provision requires the Regional Manager to use whatever method (and however many methods) is necessary to effectively make Impact's application known. There is no evidence that the Regional Manager published the notice in the Provincial Gazette or in the Magisterial Court in the magisterial district applicable to the land in question. The EMPr does not mention such publication, nor does the Minister. The only method used was publication in newspapers.

34.4. In respect of publication in newspapers, Regulation 3(3)(c) requires the publication of an advertisement in a local or national newspaper "circulating in the area where the land or offshore area to which the application relates, is situated." The newspapers in which the adverts were placed did not circulate

[38] It is trite law that statutes and regulations must be interpreted in a manner that best gives effect to rights in the Bill of Rights. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 22-23; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107.

locally “in the area” on the seashore affected by the seismic blasting.[39] No advert was published in a local newspaper.

34.5. Regulation 3(4)(a) requires that the publication referred to in regulation 3(3) must include an invitation to members of the public to submit comments in writing on or before a date specified in the publication. It must also contain the street address of the person to whom any comments must be sent or delivered. The Published Notice does not contain this information. It omits to call members of the public to put in written comments. Rather, it contains an invitation to register as an I&AP.

35. As such, there was no compliance with Regulation 3, as the appellants claim.

36. Not only was there no compliance with Regulation 3, there was not compliance with the broader obligation to ensure meaningful consultation with interested parties. The Department and Impact failed to ensure meaningful consultation in the following respects:

36.1. First, the process to identify IA&Ps was under inclusive. In this respect:[40]

36.1.1. To identify I&APS, the EMPr states that a “stakeholder analysis” was conducted. The EMPr provides no detail of what the “*stakeholder analysis*” entailed. Nor does it explain what the “*previous studies in the area*” consisted of. The respondent communities were not involved in any previous studies. Nor is there any evidence that Shell or Impact attempted to investigate and discover the identity of

[39] First to Seventh Applicants’ Supplementary Affidavit, Record, vol 8, p 1487-8, para 25.2.
[40] First to Seventh Applicants’ Supplementary Affidavit, Record, vol 8, p 1486-7, para 25.1.

affected communities, despite Impact being aware that there were numerous fishing communities in the affected area.[41]

36.1.2. As a consequence of Impact and Shell's failure to seek out and identify these communities, the communities were not included on the stakeholder database and identified as I&APs. After the publication of the notices in the newspapers, the consultation process focused on I&APs.[42] The respondent communities were excluded from this process.[43]

36.2. Second, the notices that were published in the four newspapers were inaccessible to many members of the public.

36.2.1. Three of these newspapers are English and one is Afrikaans. Few people in the respondent communities (particularly the Amadiba community) read English, and virtually nobody speaks Afrikaans. The majority of residents along the Wild Coast speak isiXhosa or isiMpondo. If Impact wanted to engage with them, it should have prepared notices in their languages.

36.2.2. In addition, there is no newspaper circulation in Amadiba or in the communities of Dwesa-Cwebe. Newspapers are not delivered to

[41] This is evident from the EMPr (Record, vol 4, p 716 - 718.) Under the heading "*Subsistence fishers*", the EMPr states, inter alia, that *"the East Coast is home to a large poor rural population many of whom are directly reliant on the coast for their livelihoods (Clark et al., 2002). These subsistence fisher communities include predominantly low income Xhosa or Pondo people who live in the eastern part of the country…"*.

[42] For example, I&APs were given direct notice and asked to raise concerns for consideration in the EMPr. The EMPr was then made available to I&APs on the project website for comment. I&APs were invited to participate in face-to-face group meetings.

[43] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1488-8, para 25.3.

these communities. Newspaper advertisements simply do not reach them, even if they are in a language the community understands.

36.2.3. As is the case with many communities along the Wild Coast, the people of Amadiba mostly get their news from the radio. They mainly listen to Ukhozi FM and Umhlobo Wenene. If there had been any notice or discussion of the Shell's proposed seismic blasting on the radio, they would certainly have commented.[44]

36.3. Third, Impact impermissibly consulted traditional "monarchs" rather than traditional communities.

36.3.1. Impact approached its consultation with traditional communities like the colonial and Apartheid powers of the past, by consulting only with Kings and assuming that they speak for all of their "subjects".[45] This approach is outdated and invalid.

36.3.2. The consultation with monarchs goes directly against the rules regarding consultation and decision-making in the respondent communities. Those rules require that decision-making is done by the community as a whole, rather than by a single monarch or chief.[46]

---

[44] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1487-8, para 25.2.

[45] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 27-28, para 54.

[46] In *Maledu*, para 97 the Court underscored the importance of majority decision making when it concerned the rights of communities under customary law:

> "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 interest in or rights to the land concerned, and who are present at such a meeting." (emphasis added)

See Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 23-24, para 38. First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1495-6, para 38 – 42, and p 1476, para 25.5.2.

36.3.3. In any event, the respondent communities do not fall within the Kingdoms listed in the EMPr and were not represented by the named monarchs or a Mr Richard Stephenson.[47] In particular, these individuals did not have jurisdiction over amaMpondo aseQaukeni (Eastern Pondoland). None of them were empowered to speak on behalf of customary fishers anywhere along the Wild Coast.[48]

37. In light of the above, the appellants cannot claim that there was compliance with the prescripts of Regulation 3 or substantial compliance therewith. The steps taken by the Department and Impact did not fulfil Regulation 3's purposes of procedural fairness or meaningful consultation with affected persons.

RELEVANT CONSIDERATIONS NOT TAKEN INTO ACCOUNT

38. When assessing (and ultimately granting) Impact's application for an exploration right, the Department failed to take into account a number of relevant considerations. These include, but are not limited to, the following:

39. First, the Department failed to take into account the detrimental impact that the surveying activities would have on the spiritual and cultural practices of affected communities.

39.1. The sea plays a central role in the spiritual and cultural life of the Amadiba community. It is sacred to them. Traditional healers rely on the sea for their treatments. Such healers go to the sea to commune with ancestors who reside in the ocean. It is considered important not to disturb these ancestors

[47] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 22, para 33.
[48] Replying Affidavit of Sustaining the Wild Coast NPC and Others to the Answering Affidavits relating to Part A, vol 7, p 1404, para 48.2.

through pollution and other disturbances. The respondent communities held concerns that the seismic blasting would upset the ancestors.[49]

39.2. This cultural and spiritual relationship with the sea is not unique to the Amadiba community. The Port St Johns community (represented by the fourth respondent) also believes that the sea is a site where ancestors reside.[50] The Kei Mouth communities (represented by the fifth and sixth respondents) rely on the sea for cultural and spiritual practices.[51] This relationship with the sea is common to the Mpondo communities living along the Wild Coast.[52]

39.3. It is not surprising that the Department failed to take the above impacts into account. The EMPr makes no mention of the impact that the seismic blasting will have on the spiritual and cultural practices of communities. The only cultural or heritage concern raised by the EMPR relates to shipwrecks.[53]

39.4. The Rule 53 record shows that the Minister did not consider any information relating to the applicant community's spiritual and cultural rights outside of that contained in the EMPr.[54]

40. Second, the Department failed to take into account the impact of the seismic survey on the livelihoods of the communities along the Wild Coast. The sea is the primary - and in many cases the only - source of nutrition and income for the respondent

[49] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 26, para 48 - 49.
[50] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 31, para 67.
[51] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 31, para 71.
[52] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 26, para 50.
[53] Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part A, Record, vol 1, p 22, para 33.
[54] Supplementary Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part B, vol 8, p 1612 para 46.

communities. If they are not able to catch fish, they will not be able to feed their families. They will also not be able to pay for items such as food, electricity and school fees from the small income they earn from selling fish.[55]

41. Small scale fishing communities receive permits to fish a basket i.e. a collection of fish species that they may catch. Some communities fish beyond "nearshore" for species that occur offshore in deeper water. These would be affected by the seismic blasting.[56]

42. Third, the Department failed to take into account the cumulative impact of exploration, prospecting and reconnaissance activities.

    42.1. In order to determine the potential impact of the proposed seismic blasting, these activities should not have been considered in isolation. Shell is one of many entities seeking to establish the presence of oil and gas deposits off the coast of South Africa, with a view to exploiting those deposits if found. It was necessary for the decision-maker to consider the impact of the proposed activities in context i.e. taking into account other seismic survey activity that would likely occur at the same time and the cumulative impact of all such activities.[57]

    42.2. It is clear that other seismic survey activities were planned and/or possible – the Rule 53 record contains information on pending applications for exploration activities along the East coast (at the time of Impact's application)

[55] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1502-5, para 58 – 64.
[56] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1505-7, para 65 - 70.
[57] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1509, para 75.

and all rights and permits for exploration that existed at the time over the same area.

42.3. It would not be appropriate to determine applications for licences for exploration activities and other human activities on an ad hoc basis and without considering the cumulative impact of a growing number of activities in the area in question. In other words, the Minister was not only required to consider Shell's proposed activities and their impact, but he was also required to consider the manner in which these activities would compound and be compounded by other exploration activities in the same area.[58]

42.4. There is no evidence in the record that the Minister or other decision-makers applied his mind to any past, present or reasonably foreseeable future seismic activities and the cumulative impacts that may ensue.[59]

43. Fourth, the decision-maker failed to take into account the unacceptable environmental harm that would result from the seismic blasting.[60] This harm is detailed in the affidavits. The Minister was obliged to take these threats into account in considering the application for an exploration right, and to do so through the lens of the precautionary principle. The proper application of this principle would oblige Impact to establish that there are no substantial risks of environmental harm arising from the seismic survey activities.

44. Fifth, the decision-maker failed to consider the requirements of the National Environmental Management: Integrated Coastal Management Act 24 of 2008

[58] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1509, para 75.
[59] Supplementary Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part B, vol 8, p 1617, para 69.
[60] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1520-1, para 87.

(**"ICMA"**), which creates specific measures for the protection of the coastal zone. It operates as a supplementary framework that provides supplementary protections against the overuse, degradation and inappropriate management of the coastline.

45. The eighth and ninth respondent address the ICMA at length. To avoid repetition, we align ourselves with their submissions and do not belabour the point here. We simply note that, since Shell did not obtain environmental authorisation as required by NEMA and the MPRDA, it circumvented the specific protections in the ICMA in respect of the coastal zones in which its seismic blasting was to take place. There is accordingly a host of peremptory considerations that were not taken into account.[61]

46. In light of the above, it is clear that the decision-maker failed to take relevant considerations into account. As such, the decision is reviewable under s 6(2)(e)(iii) of PAJA and the principle of legality.

MINISTER'S FAILURE TO APPLY HIS MIND

47. The Minister failed to apply his mind to the information and matter before him. He relied wholly on the Petroleum Agency of South Africa's ("**PASA**") recommendation in respect of the issue of harm.[62]

    47.1. In assessing the EMPr, the Minister should have had regard to independent, peer-reviewed scientific literature regarding the potential harm of the seismic survey and the effectiveness of the mitigation measures.

[61] First to Seventh Applicants' Supplementary Affidavit, Record, vol 8, p 1523 – 7, para 90 - 94.

[62] Cora Hoexter contends that this form of fettering or acting under dictation falls under the grounds of review of administrative actions that is "otherwise unlawful or unconstitutional" (s 6(2)(i) of PAJA) or that is taken "because of the unauthorize or unwarranted dictates of another person or body" (s 6(2)(e)(iv) of PAJA). Hoexter, C and Penfold, G 'Administrative Law in South Africa' (3rd ed) 2021 (Juta) at p 378 and 441.

47.2. It is clear that the Minister did not do so. The Rule 53 Record contains no evidence that the Minister applied his mind independently to the EMPr. On the contrary, the documents included in the Rule 53 record (particularly PASA's recommendation to the Minister that the Exploration Right be granted) contain only summaries of the contents of the EMPr.[63]

JUST AND EQUITABLE RELIEF

48. The appellants contend that the High Court failed to consider the question of just and equitable relief (under section 172 of the Constitution) in the circumstances of this case. In essence, the appellants contend that the court *a quo* should have declined to set aside the decisions after declaring them invalid.

49. The appellant's primary reason for adopting this approach is that Shell and Impact have spent significant sums of money towards implementing the Exploration Right, in reliance on the validity of the decisions. Given the passage of time between the grant of the right and the initiation of the review, they argue that it would be disproportionate and prejudicial to set the Exploration Right aside and require Impact and Shell to begin the process afresh.

50. This argument is unsustainable for the following reasons:

50.1. First, the defects in the decision to grant the Exploration Right are egregious. The failure to consult with the respondents rendered the process unfair and tainted the decision as a whole. The decision was taken without reference to critical information, much of which would have emerged had proper consultation taken place. It is not possible to uphold the Exploration Right and

[63] Supplementary Founding Affidavit of Sustaining the Wild Coast NPC and Others relating to Part B, vol 8, p 1611, para 40.

conduct some form of make-up consultation process. Such a process would be a farce, conducted only to tick a box.

50.2. Second, Impact is not an innocent bystander in this matter. It was responsible for consulting with interested and affected parties. It is clear from the EMPr that Impact was aware of fishing communities living along the coast that may be affected, but failed to take meaningful steps to engage with those communities. Impact made only superficial efforts to consult with monarchs, on the basis that these persons represented all impacted traditional communities. The lack of proper consultation is the primary cause for the long lag between the grant of the Exploration Right and the respondents becoming aware of the decision. Impact is, in this respect, the author of its own misfortune. Against this background, the rights of the respondent communities should not be sacrificed in the name of saving Impact and Shell wasted expenses.

51. Therefore, the relief proposed by the appellants (i.e. an order declining to set aside the Exploration right and its renewals) is not just and equitable or in the interested of justice.

THE CROSS-APPEAL

52. The Full Court held that, in the light of its decision to review and set aside the Exploration Right and the renewals thereof, it was unnecessary to determine the respondents' entitlement to declaratory relief.[64]

[64] Judgment of the Full Court, vol 19, p 3886, para 137.

53. The respondents were granted leave to cross-appeal this aspect of the Full Court's judgment.[65] The cross-appeal is based, *inter alia*, on the important role played by declaratory relief in the advancement and protection of constitutional rights, including those enshrined in section 24 of the Constitution.

54. In *Rail Commuters*, O'Regan J described declaratory relief as *"a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution and its values."*[66] Declaratory relief facilitates a delineation of constitutional rights and obligations, enabling the holders of thereof to conduct themselves accordingly.

55. The Full Court recognised the centrality in this case of section 24 of the Constitution,[67] and the interplay between the right to a protected environment on the one hand and socio-economic development on the other.[68] The Constitutional Court recognised this interplay in *Fuel Retailers*, with the promotion of development and the protection of the environment being described as "inexorably linked".[69]

56. The question as to whether those seeking to conduct seismic surveys must first obtain environmental authorisation in terms of NEMA strikes at the core of the balance sought to be achieved between these often-competing rights and interests.

---

[65] Updated copy of the notice of cross-appeal, vol 19, p 4036.2.

[66] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 107.

[67] Section 24 of the Constitution provides as follows:

> *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 economic and social development.*

[68] Judgment of the Full Court, vol 19, p 3852, para 4.

[69] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (6) SA 4 (CC) para 44.

It involves the determination of the scope and nature of the obligations arising from NEMA and the MPRDA, in order to give full effect to section 24 of the Constitution.

57. The effect of the Full Court's failure to address the declaratory relief sought by the respondents is that, if the appeal against the decision of the Full Court is successful, there would be no clarity as to whether the seismic survey could commence in the absence of separate environmental authorisation under NEMA. This question would no doubt form the subject of additional litigation between the parties.

58. It is for this reason that courts bear a duty, where faced with multiple grounds of attack, to determine all of the grounds raised, to avoid an unnecessary remission to the Court a quo in the event of the appeal court not confirming the Court a quo's order. [70]

59. We submit that in declining to make a determination on the declaratory relief sought, the Full Court erred: it ought to have decided whether the respondents were entitled to the declaratory relief despite having reviewed and set aside the Exploration Right and its renewals.

The seismic survey may not proceed without environmental authorisation in terms of NEMA

60. Section 24F(1)(a) of NEMA provides that "*Notwithstanding any other Act, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case*

[70] *S v Jordan and others (Sex Workers Education and Advocacy Task Force and others as amici curiae)* 2002 (6) SA 642 (CC) para 21.

may be, has granted an environmental authorisation for the activity." (emphasis added)

61. Section 5A of the MPRDA provides as follows:

> ***Prohibition relating to illegal act***
>
> *No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –*
>
> *(a) an environmental authorisation;*
>
> *(b) . . .*
>
> *(c) . . .* (emphasis added)

62. The term 'environmental authorisation', in terms of section 1 of the MPRDA, *"has the meaning assigned to it in section 1 of the [NEMA]."*

63. It is common cause that Impact and Shell have not secured environmental authorisation under NEMA. They rely on an EMPr that was submitted and approved as part of an application for an exploration right to use seismic surveys to seek out oil and gas reserves in terms of section 79 of the MPRDA. That EMPr was approved by PASA on 9 September 2013 and by the Director-General of Mineral Resources and Energy on 17 April 2014.[71]

64. All of the appellants assert that the EMPr is sufficient to enable Shell to commence its seismic survey more than seven years after the grant of the Exploration Right, and despite a clear prohibition on commencement without environmental authorisation.

65. The question as to whether Shell may commence its seismic survey without separate environmental authorisation under NEMA requires a determination of the following:

[71] Founding affidavit, vol 1, pp 25 – 26, paras 85 – 88.

65.1. First, whether NEMA applies to activities that are regulated by the MPRDA; and;

65.2. Second, whether the seismic survey constitutes a listed activity under NEMA.

The application of the MPRDA does not exclude the application of the NEMA

66. The MPRDA and the NEMA were both enacted to give effect to section 24 of the Constitution.

67. In *Maccsand*, the Constitutional Court emphasised the role of NEMA in environmental management and enforcement, confirming that it operates as a framework for the regulation of all decisions taken by organs of state in respect of activities that may affect the environment.[72]

68. NEMA's provisions make clear that it applies to all aspects of environmental management and enforcement plans, without qualification or exception. In particular, section 2 of NEMA provides that its guiding principles, *inter alia* –

68.1. apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

68.2. serve as the general framework within which environmental management and implementation plans must be formulated;

[72] *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC) para 9.

68.3. serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the NEMA or any statutory provision concerning the protection of the environment; and

68.4. guide the interpretation, administration and implementation of the NEMA, and any other law concerned with protection or management of the environment.

69. There can be no question that the MPRDA falls within the scope of *"any other law concerned with protection or management of the environment".*[73] The interpretation of its provisions must therefore be informed by the environmental management principles as set out in section 2 of NEMA.[74]

70. Among the principles enumerated in section 2 of NEMA is that *"environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option."*[75]

71. As such, NEMA recognises that activities that affect the environment do not operate in silos, and that an approach that takes account of every aspect of their possible impact is required by section 24 of the Constitution.

72. An example of this is the ICMA, which does not provide for its own environmental authorisation process but rather lists, in section 63, eleven additional factors that

[73] The Preamble to the MPRDA affirms *"the State's obligation to protect the environment for the benefit of present and future generation, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development."* Section 2(h) of the MPRDA further lists, as one of the objects of the MPRDA, to *"give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development."*

[74] *MEC for Agriculture, Conservation¸ Environment and Land Affairs v Sasol Oil (Pty) Ltd and another* 2006 (5) SA 483 (SCA) para 15.

[75] Section 2(4)(b) of NEMA.

must be taken into account for environmental authorisations required under ICMA. This is, we submit, an explicit recognition that NEMA operates as the base statute for all matters affecting the environment, and that it is supplemented where necessary by statutory provisions enacted to deal with specific environmental considerations, including exploration.

73. Section 4(1) of the MPRDA provides that *"When interpreting a provision of this Act, any reasonable interpretation which is consistent with the object of this Act must be preferred over any other interpretation which is inconsistent with such objects."* This includes the shared object between NEMA and the MPRDA, namely to give effect to section 24 of the Constitution.

74. This is in line with the Constitutional Court's instruction that when interpreting legislation, and as part of the duty to promote the spirit, purport and objects of the Bill of Rights, our courts are enjoined to *"prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees"*[76]

75. We submit that an interpretation of the MPRDA that excludes the requirement to obtain environmental authorisation in terms of NEMA for any listed activity in terms of section 24 thereof would fall foul of the manner in which the management principles in section 2 of NEMA ought to be applied, as well as the obligation to give the fullest possible effect to section 24 of the Constitution.

76. The broad application of NEMA is also supported by the specific provisions applicable to environmental authorisations, in particular:

[76] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53, cited in *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another* 2019 (1) SA 1 (CC) para 45.

76.1. section 24(2), which empowers the Minister of Forestry, Fisheries and the Environment to identify activities which may not commence without environmental authorisation. This provision is couched in unqualified terms.

76.2. section 24(8)(a), which provides that *"authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L."*[77]

76.3. sections 24K (dealing with consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction) and 24L (dealing with alignment of environmental authorisations) of the NEMA, which clearly contemplate that certain activities may require authorisation under both the NEMA and other legislation, and empower the relevant authorities to co-ordinate the requirements of both. These provisions do not, however, empower those authorities to dispose of either set of requirements.[78]

77. Also relevant is the express recognition in NEMA of the distinction between an EMPr and environmental authorisation:

77.1. NEMA defines the terms "EMPr" and "environmental authorisation" separately and with no reference to one another, suggesting that these are entirely independent – albeit related – processes; and

[77] Section 24L of the NEMA provides for integrated environmental authorisation. Shell does not contend that this provision is applicable.
[78] *City of Cape Town v Maccsand (Pty) Ltd and others* 2010 (6) SA 63 (WCC) at 77.

77.2. The same conclusion may be drawn from the power conferred on the Minister by section 24N(1) of NEMA to require the submission of an EMPr prior to considering an application for environmental authorisation.

78. We submit that an approach that conflates an EMPr and environmental authorisation would accordingly be inconsistent with the text of NEMA.

79. The case law supports the conclusion that NEMA imposes a self-standing obligation on potential prospectors to obtain environmental authorisation under NEMA, in addition to the approval of an EMPr under the MPRDA:

79.1. In *Mining and Environmental Justice Community Network of South Africa*[79] the Court was faced with an application to review and set aside a decision to permit coal mining activities in a protected wetlands area. The Court held that the party seeking to conduct such mining activities would be required to obtain five different authorisations, including the approval of its EMPr in terms of section 39 of the MPRDA and environmental authorisation for listed activities in terms of section 24 of NEMA.[80] Although the necessary authorisations applicable to mining activities had been obtained, the land on which those activities would be provided was a protected environment as contemplated in the National Environmental Management: Protected Areas Act 57 of 2003 (**"NEMPAA"**), and thus the Court held that the authorisations as contemplated in the NEMPAA ought to have been secured as well.[81]

[79] *Mining and Environmental Justice Community of South Africa and others v Minister of Environmental Affairs and others* [2019] 1 All SA 491 (GP).
[80] Id para 4.11.
[81] Id para 10.7.

79.2. The Court in *Mineral Sands Resources* adopted the same view, albeit obiter, in finding that an EMPr constitutes authorisation for mining activities, but not necessarily for listed activities in terms of section 24 of NEMA. Accordingly –

> *"Prior to 8 December 2014,[82] therefore, the Mining Minister's decision to approve an applicant's Mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. At the same time, the applicant would typically have needed to obtain from the MEC or Environment Minister a NEMA environmental authorisation preceded by the approval of a NEMA EMP."*[83]

79.3. In *Global Environmental Trust*,[84] this Court was called upon to consider whether the respondent was conducting mining activities without the necessary authorisations and approvals. One of the issues raised was whether the approval of the respondent's EMPr was sufficient or whether the respondent required environmental authorisation in terms of the NEMA as well. Although the majority of the Court declined to address this issue on the basis that it did not arise on the papers, Schippers JA recorded his views in a minority judgment that there is a clear distinction between an EMPr under the MPRDA and environmental authorisation under NEMA, and that a separate environmental authorisation under NEMA was required.[85]

80. Based on the above, we submit that Shell's approved EMPr under the MPRDA does not absolve it of the duty to obtain environmental authorisation for any listed activities in terms of the NEMA.

---

[82] Being the date of commencement of the NEMA Amendment Act 62 of 2008, which brought about the rollout of the "One Environmental System" to streamline licensing processes. Prior to the introduction of One Environmental System, an applicant would be required to obtain the approval of its EMPr and then to secure separate environmental authorisation.

[83] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC) para 17. Reference added; our emphasis.

[84] *Global Environmental Trust and others v Tendele Coal Mining (Pty) Lt and others* [2021] 2 All SA 1 (SCA).

[85] Id para 39.

81. This conclusion is fortified by the anticipated introduction of section 38B of the MPRDA by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008. When it comes into operation, section 38B(1) will provide that *"An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of [NEMA], shall be deemed to have been approved and an environmental authorisation been issued in terms of [NEMA]."*

82. In line with the presumption against redundancy in statutory interpretation,[86] this must mean that, in order to avoid a superfluous amendment to the MPRDA, the amendment when brought into effect will alter the current position that an EMPr under the MPRDA is distinct from environmental authorisation under NEMA.

83. What remains to be determined is whether the seismic survey falls within the listed activities requiring environmental authorisation under the NEMA.

The seismic survey is a listed activity in terms of NEMA

84. There is a critical distinction to be drawn between two points in time:

    84.1. The first is the point at which an exploration right is granted. At this stage, an assessment is conducted as to whether the applicant satisfies the requirements an exploration right in terms of section 80 of the MPRDA.

    84.2. The second is the point at which the seismic survey is due to commence. This is a distinct point in time that carries distinct requirements imposed by the legislative framework: section 24F of NEMA prohibits the commencement of a listed activity without environmental authorisation. Similarly, section 5A of the

[86] See *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A).

MPRDA prohibits the exploration for minerals or petroleum, or the commencement of any incidental work, without environmental authorisation.

85. The appellants' contention that the EMPr that was approved at the time that the Exploration Right was granted constitutes the required environmental authorisation erroneously conflates these two distinct stages.

86. The deliberate manner in which these provisions have been framed supports the conclusion that, apart from the requirements that apply at the time of the grant of the exploration right, there is a discrete requirement at the stage of commencement of the seismic survey that environmental authorisation has been granted.

87. In other words, it is not only the development and production phase that attracts the obligation to secure environmental authorisation; the exploration phase does so independently of what activities may or may not follow.

88. It is also clear from a reading of section 5A of the MPRDA that the obligation to obtain environmental authorisation for exploration exists independently of the obligation to obtain an exploration right, and that the relevant time for assessment as to whether these requirements have been met is immediately prior to the commencement of the exploration activities, which activities commenced long after section 5A was introduced. There is nothing in section 5A to suggest that a holder of an exploration right is absolved from the obligation to obtain environmental authorisation as a result of the right being granted prior to the introduction of section 5A: these two requirements are self-standing and must both be satisfied prior to the commencement of the exploration activities.

89. Moreover, the Environmental Impact Assessment Listing Regulations Listing Notice 2 of 2014[87] lists as activity number 18 *"Any activity including the operation of that activity which requires an exploration right as contemplated in section 79 of the [MPRDA], including associated infrastructure structures and earthworks."*

90. There can therefore be no doubt that Shell was prohibited from commencing its exploration activities until it had obtained environmental authorisation.

91. In the light of the above, we are in respectful disagreement with the arguments raised on behalf of the Minister and Impact that the requirement of environmental authorisation under NEMA would amount to a retrospective application of a statutory obligation. Whether or not there existed an obligation to secure environmental authorisation at the time of applying for an exploration right, there is a clear duty to secure such authorisation prior to the commencement of the listed activities.

CONCLUSION

92. In light of the above, the first to seventh respondents seek an order dismissing the appeal and upholding the cross appeal, in accordance with the proposed order set out in their notice of cross-appeal.[88]

TEMBEKA NGCUKAITOBI SC

EMMA WEBBER

NIKKI STEIN

Counsel for the respondents

17 August 2023

[87] Published under GN R984 in *GG 38282* of 4 December 2014.
[88] First to Seventh Respondents' Notice of Cross Appeal, Record, vol 19, p 4036.1 – 4036.6.