IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case No.: CCT 194/2024

In the matter between:

SUSTAINING THE WILD COAST NPC	First Applicant
MASHONA WETU DLAMINI	Second Applicant
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
NTSINDISO NONGCAVU	Fourth Applicant
SAZISE MAXWELL PEKAYO	Fifth Applicant
CAMERON THORPE	Sixth Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B.V	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent
NATURAL JUSTICE	Sixth Respondent

GREENPEACE ENVIRONMENTAL ORGANISATION NPC	Seventh Respondent

Case No.: CCT196/2024

In the matter between:

NATURAL JUSTICE	First Applicant
GREENPEACE ENVIRONMENTAL ORGANISATION NPC	Second Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B.V	Second Respondent
IMPACT AFRICA LIMITED	Third Respondent
BG INTERNATIONAL LIMITED	Fourth Respondent
SUSTAINING THE WILD COAST NPC	Fifth Respondent
MASHONA WETU DLAMINI	Sixth Respondent
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Seventh Respondent
NTSINDISO NONGCAVU	Eighth Respondent
SAZISE MAXWELL PEKAYO	Ninth Respondent
CAMERON THORPE	Tenth Respondent
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Eleventh Respondent

APPLICANTS' HEADS OF ARGUMENT
(CASE NO 194/2024)

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INTRODUCTION

1. At its core, this case invokes the duty of the courts to grant just, equitable and effective remedies for breaches of the right to just administrative action. This duty was articulated by this Court in *Steenkamp* as follows:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. . . . The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."[1]

2. This application focuses on the question of remedy. The applicants[2] seek leave to appeal against the suspension order granted by the Supreme Court of Appeal (**"SCA"**) on the basis that it is neither legally competent nor just and equitable.[3]

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[1] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA121 (CC) para 29 ("***Steenkamp***").

[2] In these submissions we refer to the first to seventh applicants in CCT 194/2024 as "**the applicants**" and the applicants in CCT 196/2034 as "**Natural Justice**".

[3] In directions issued by the Acting Registrar of this Court on 27 August 2024 (vol 27, p 2289.632 – 2289.233, at para 4, 5 and 7) the applicants in CCT 194/2024 and CCT 196/2024 were informed that the applications for leave to appeal would be set down in due course for a consolidated hearing. The applicants were instructed to submit written argument, including on the merits of the appeal. These written submissions are filed pursuant to those directions.

3. This matter relates to a decision by the Minister of Mineral Resources and Energy (**"Minister"**) in 2014 to grant exploration right 12/3/252 (**"the exploration right"**) to Impact Africa Limited (**"Impact"**). This permitted Impact and Shell to explore for oil and gas along the Wild Coast of South Africa.[4] The grant of the exploration right was subsequently renewed in December 2017 and August 2021.

4. On the strength of the exploration right, Impact and Shell sought to conduct a seismic survey off the Wild Coast. A seismic survey is carried out by towing an array of airguns and receivers over the surface of the ocean. The airguns are blasted at regular intervals towards the seabed ("**seismic blasting**"). This generates soundwaves, which are used to image the subsurface to detect the potential presence of oil and gas deposits below the sea floor.[5]

5. A Full Court of the Eastern Cape High Court (**"High Court"**) held that the decisions to grant and renew the exploration right were unlawful and procedurally unfair. [6] It set the decisions aside.

6. The SCA dismissed the appeal brought against the High Court's judgment and order.[7] It confirmed that the decision to grant the exploration right was unlawful because it:

[4] The exploration right was granted to Impact. Impact subsequently transferred a 50% participating interest to BG International Limited (the fifth respondents in case number CCT 194/2024, hereafter referred to as **"Shell"**).

[5] Founding Affidavit of the Applicants (in case number CCT 194/2024) in Part A in the High Court ("**Sustaining the Wild Coast HC Part A FA**"), vol 1, p 32, para 94 – 95. Shell Answering Affidavit in Part A in the High Court ("**Shell HC Part A AA**"), vol 1, p 139, para 21 – 22.

[6] Judgment and order of the Full Court of the Eastern Cape Division of the High Court, Makhanda (**"High Court judgment"**), vol 22, pp 2289.60 – 2289.99.

[7] Judgment and order of the Supreme Court of Appeal (**"SCA judgment"**), vol 22, pp 2289.44 – 2289.59.

6.1 violated the right of interested and affected communities to be consulted meaningfully on the anticipated impact of the proposed seismic survey;[8] and

6.2 failed to take account of relevant considerations, including:[9]

6.2.1 the detrimental impact of the seismic survey on the spiritual and cultural rights of affected communities;

6.2.2 the detrimental impact on the livelihood of members of the communities along the Wild Coast (given that "*the sea is the primary – and in many cases the only – source of nutrition and income for them*"); and

6.2.3 the requirements of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("**ICMA**"), which creates specific measures for the protection of the coastal zone.

7. As a consequence, the SCA upheld the High Court order. It confirmed that the grant of exploration right (along with the renewals of that grant) should be set aside.

8. However, the SCA amended the High Court's order by adding the following paragraph:

> "Paragraphs 1, 2 and 3 hereof are suspended pending determination of the application submitted on 21 July 2023 pursuant to s 81 of the Mineral and

[8] SCA judgment, vol 22, pp 2289.54, para 24.

[9] SCA judgment, vol 22, pp 2289.54 – 2289.55, para 25.

Petroleum Resources Development Act 28 of 2002 for the renewal of [the exploration right]."[10] ("**the suspension order**")

9. The effect of the suspension order is to delay the setting aside of the exploration right, until the Minister decides Shell's pending application for the third and final renewal of that right.

10. The SCA reasoned that the suspension order was necessary because—

    10.1 The High Court failed to consider the question of just and equitable relief under section 172(1)(b) of the Constitution. When making its order, the High Court did not weigh the relevant factors, including the adverse consequences that would allegedly flow from the setting aside exploration right.[11]

    10.2 The setting aside should be "*tempered*" to "*in a way that minimizes the negative effects*". The SCA favoured an approach that suspends the order reviewing and setting aside the right so that "*something remains in place, as imperfect as it may be*".[12]

    10.3 In order to 'temper' the negative effects, the SCA suspended the 'setting aside' and directed that a further consultation process must be conducted to cure the "*identified defects*" in the process already undertaken. The further

[10] SCA judgment, vol 22, p 2289.58, para 32(b).

[11] SCA judgment, vol 22, pp 2289.55-2289.56, para 27 - 29.

[12] SCA judgment, vol 22, pp 2289.57, para 30.

consultation process was to be "*part and parcel of a proper consideration of the third renewal application*." [13]

11. We submit that the suspension order is fundamentally flawed for the following reasons:

    11.1 First, the suspension order is not legally competent. The exploration right has been set aside ("**the setting aside order**"). The suspension order purports to suspend the operation of the setting aside order, until the Minister decides Shell's third renewal application. At that point, the setting aside order will come back into operation. If the third renewal application is granted, its effect will be to extend the exploration right for a further two-year period. However, at that point, the exploration right will no longer exist and there will be nothing to extend or renew.

    11.2 Second, the suspension order is not permissible in law. When determining the appropriate remedy, the High Court exercised a true discretion. The SCA is entitled to interfere in the High Court's remedial order in limited circumstances. Those circumstances did not exist. Hence, the SCA was not permitted to interfere by granting the suspension order.

    11.3 Third, the suspension order is impermissibly vague and violates the rule of law.

    11.4 Fourth, the suspension order is not just and equitable, or effective, because:

[13] SCA judgment, vol 22, p 2289.58, paras 31.

11.4.1 It cannot effectively vindicate the constitutional rights of the applicants (and other affected parties) that have been infringed.

11.4.2 The decision regarding the exploration right has already been made, and the renewal application has already been submitted. As a consequence, a further participation process cannot influence the outcomes of these decisions.

11.4.3 In any event, consultation regarding the renewal application would be far narrower than consultation regarding the grant of the exploration right. The issues to be considered in deciding whether to renew a right are substantially narrower than the issues to be considered in deciding whether to grant the underlying exploration right. Therefore the SCA's direction to conduct a consultation process in respect of the renewal cannot remedy the manifestly inadequate consultation process that led to the review and setting aside of the exploration right.

12. In the remainder of these submissions, we address each of these flaws, in turn. Thereafter, we demonstrate that the requirements for leave to appeal are satisfied.

THE SUSPENSION ORDER IS NOT LEGALLY COMPETENT

13. The SCA upheld the High Court's orders setting aside the grant of the exploration right and the renewals of that grant. The suspension order puts these findings on hold until Shell's third renewal application is decided. At that point, and regardless of the outcome of the third renewal application, the exploration right will be invalid and of no force and effect.

14. The suspension order is intended to keep the exploration right alive for the duration of the renewal application process. The SCA explicitly sought to *"temper the setting aside... so that something remains in place, imperfect as it may be".*[14]

15. Once a decision is made on the renewal application, the suspension order falls away and the declaration of invalidity of the underlying exploration right takes effect.[15]

16. The suspension order is based on the premise that –

    16.1 If the third renewal application is denied, then there will be no exploration right in place, and Shell will not be permitted to proceed with the seismic survey.

    16.2 If, however, the third renewal application is granted, this will extend the life of the exploration right, on the strength of which the seismic survey may be conducted.

17. We submit that this premise is fundamentally flawed.

18. The renewal of an exploration right in terms of the MPRDA is not a fresh, free-standing right; it is an extension or continuation of the initial exploration right. Therefore, the renewal depends – for its own existence – on the existence of a valid, underlying exploration right. The inextricable link between the initial

[14] SCA judgment, vol 22, p 2289.57, para 30.

[15] The legal consequence is that the administrative action is regarded as a nullity from the outset and has no effect in law. *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) para 52.

exploration right and the renewals thereof is evident from the language of section 81 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**"), which provides as follows:

(1) Any holder of an exploration right who wishes to apply to the Minister for the renewal of 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) An application for renewal of an exploration right must-

(a) state the reasons and period for which the renewal is required;

(b) be accompanied by a detailed report reflecting the exploration results, the interpretation thereof and the exploration expenditure incurred;

(c) be accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation; and

(d) include a detailed exploration work programme for the renewal period.

(3) The Minister must grant the renewal of an exploration right if the application complies with subsections (1) and (2) and the holder of the exploration right has complied with the-

(a) terms and conditions of the exploration right is not in contravention of any relevant provision of this Act or any other law;

(b) exploration work programme; and

(c) conditions of the environmental authorisation.

(4) An exploration right may be renewed for a maximum of three periods not exceeding two years each.

(5) An exploration in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused.

19. Section 81 of the MPRDA makes clear that –

    19.1 An applicant for the renewal of an exploration right must be the holder of a valid exploration right, capable of being renewed;

    19.2 The applicant must demonstrate compliance with the terms and conditions of the initial exploration right in order to be considered for renewal;

    19.3 The application must include the results of activities performed in terms of the underlying exploration right and how these activities will be carried forward in the renewal period; and

    19.4 The underlying right will remain in force until a decision has been taken as to whether to grant the renewal sought.

20. In other words, the legal effect of the third renewal is derived entirely from the existing exploration right; the renewal will simply carry the existing right forward, if approved.

21. If the underlying exploration right is invalid and of no force and effect, any purported extension thereof must follow a similar fate.

22. The courts have held that an unlawful administrative act is capable of producing legally valid consequences only insofar as, and for as long as, that administrative act is not set aside.[16] Once that act is set aside as invalid, it can no longer give

[16] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004(6) SA222 (SCA) para 26. See also *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO and others*2020 (4) SA 375 (CC).

rise to consequences that depend on its existence. The Supreme Court of Appeal has held as follows in this regard:

> "Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words '... an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.' . . . The author concludes as follows: '[I]t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void'
>
> . . .
>
> Thus 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 the initial act is not set aside by a competent court."[17] (our emphasis)

23. In terms of the suspension order, once a decision is taken on the third renewal application, the exploration right will, in addition to being legally invalid, cease to

[17] *Oudekraal* (supra), at paras 29 and 31.

exist in fact. In other words, the effect of the suspension order is that, upon a decision being taken in respect of the third renewal application, there will be nothing to renew.

24. As such, the suspension order creates a self-nullifying loop: the condition that triggers the lifting of the suspension of invalidity (namely, the renewal decision) simultaneously leads to the demise of the very right that the renewal decision aims to extend. Such an order is not legally competent.

SCA WAS NOT PERMITTED TO INTERFERE WITH HIGH COURT ORDER

25. The High Court ordered that the grant of the exploration right (and the renewals thereof) be set aside.

26. In doing so, the Court exercised its remedial discretion under s 8 of PAJA and s 172(1) of the Constitution. This is a discretion in the true sense, in that the court has a wide range of equally permissible options available to it.[18] When a lower court exercises a discretion in the true sense, an appellate court may not interfere unless it is satisfied that this discretion was not exercised—

> "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[19]

[18] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) **("*Trencon Construction*")** at para 85 ("*A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it.")* and para 90 ("*This applies with equal force to the wide decision-making powers available to the courts under section 8(1) of PAJA*.")

[19] *Trencon Construction,* supra*,* at para 88.

27. Otherwise put, an appellate court may not interfere unless it is clear that the choice preferred by the lower court *"is at odds with the law*".[20]

28. The High Court's decision on remedy did not meet this high threshold.

    28.1 The SCA criticised the High Court for setting aside the grant and renewals of the exploration right, without more. In the SCA's view, the High Court should have (i) considered the negative consequences that would flow from setting aside the exploration right (particularly for Shell and Impact); and (ii) crafted an order that mitigated this harsh impact (such as the SCA's suspension order).

    28.2 We respectfully submit that the SCA's criticism is misplaced. The High Court was correct to set aside the exploration right, for the following reasons:

        28.2.1 The default position is that unlawful exercises of public power must be set aside.[21] In addition, orders of constitutional invalidity ordinarily apply from the date upon which they are made.[22] There is a presumption against suspension of such an order.[23] Reasons must be given for the deviation from the default position.

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[20] *Trencon Construction,* supra*,* at para 89, quoting See *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC), at para 113.

[21] *Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd And Others* 2022 (6) SA 106 (SCA) at para 42.

[22] Woolman, Klaaren and Bishop, *Constitutional law of South Africa,* (2nd ed) , Juta &Company (Pty Ltd) available online at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Closa-Consolidation.pdf], ("*Constitutional Law of South Africa*"), Vol 1, Chapter 9, section 9.4(e)(i) "Suspensions", p 9-111, para (aa)(x).

[23] *Constitutional Law of South Africa* (supra)*,* Vol 1, Chapter 9, section 9.4 (e)(i) "Suspensions", p 9-121, para (bb)(y).

28.2.2 Before the High Court, the respondents did not make any serious attempt – in their affidavits or legal argument – to engage on the question of just and equitable relief or to convince the Court to deviate from the default position. The respondents bore the onus in this respect and failed to discharge it.

28.2.3 In these circumstances, the setting aside of the exploration right (without more) was warranted.

28.3 The High Court exercised its remedial discretion judicially. It was not influenced by wrong principles of law or a misdirection on the facts. Its choice of remedy was not "at odds with the law".

29. In light of the above, the SCA was not empowered to interfere with the High Court's order. The suspension order is legally impermissible.

THE SUSPENSION ORDER IS IMPERMISSIBLY VAGUE

30. Court orders must be written in a clear and accessible manner. Impermissibly vague orders violate the rule of law.[24]

31. The principles governing the interpretation of court orders are well-established:

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

[24] *NW Civil Contractors CC v Anton Ramaano Inc and Another* 2020 (3) SA 241 (SCA) at para 10.

case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[25]

32. The SCA's suspension order provides that:

> "Paragraphs 1, 2 and 3 [of the High Court order] are suspended pending determination of the application submitted on 21 July 2023 pursuant to s 81 of the Mineral and Petroleum Resources Development Act 28 of 2002 for the renewal of exploration right 12/3/252."

33. This order must be read in light of the reasons given for the order in the SCA's judgment:

> "the exploration right remains in force until the third renewal application has been granted or refused. It would thus be entirely within the power of this Court to direct that as part and parcel of a proper consideration of the third renewal application, a further public participation process be conducted to cure the identified defects in the process already undertaken, especially as the parties who claim to have an interest in the matter have now been identified and the matters warranting consideration have been fully canvassed in a 19-volume record consisting of some 4000 pages."[26]

34. Read together, the purpose of the suspension order is to suspend the High Court order (setting aside the exploration right) until Shell's third renewal application has been decided. As part of the process of "considering" the renewal application, a further participation process will be carried out. The aim of this process is to cure the defects that have been identified in the earlier participation process.

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[25] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013* (2) SA 204 (SCA) at para 13.

[26] SCA judgment, vol 22, p 2289.58, paras 31.

35. Despite this interpretation, the suspension order is impermissibly vague. The following aspects are not clear:

35.1 First, what issues will be covered in the further participation process? Will interested parties be consulted on Impact's original application for a prospecting right? Or will they be consulted on Shell's third renewal application? The scope of such consultations are different, because (as we demonstrate below) the requirements for an application to renew an exploration right are far narrower than the requirements for the grant of an exploration right.

35.2 Second, what will be done with the information obtained? How will it be used to cure the defects in the consultation process that was undertaken? The suspension order provides no guidance on how the defects are to be cured.

35.3 Third, what will be the method or manner of consultation? The SCA judgment states the consultation will cure "identified defects". The SCA appears to suggest that, rather than conducting a public participation process, the decision-makers will simply consider the SCA appeal record (on the basis that all who claim to have an interest in the matter have been identified and all of the issues are canvassed in the record). However, this may not "cure" the defects in the consultation process, but exacerbate them. There may be other interested and affected parties who were not notified of Impact's application for a exploration write and/or who were not able to

participate in these review proceedings.[27] These parties may wish to raise additional issues that are relevant to the grant of the exploration right. Confining the further participation process to the appeal record would prevent them from doing so. It is unlikely that the SCA intended such a consequence.

35.4 Fourth, what is the timeline for completion of the further participation process? When must it be completed?

36. This lack of clarity will make it difficult (if not impossible) for the parties to agree on the implementation and effect of the suspension order. It is not clear and accessible. Therefore, it violates the rule of law.

THE SUSPENSION ORDER IS NOT JUST AND EQUITABLE

i) Applicable legal principles

37. Administrative action that is unlawful or procedurally unfair is inconsistent with section 33 of the Constitution (which entrenches the right to just administrative action).

38. This triggers sections 38 of the Constitution (which empowers courts to grant "appropriate relief" where a constitutional right is threatened or infringed) and section 172(1) of the Constitution (which requires a court to declare any conduct

[27] Immediate examples are two of the persons who sought to interdict Shell's exercise of exploration right in separate proceedings (*Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others* (3865/2021) [2021] ZAECGHC 111 (3 December 2021).

that is inconsistent with the Constitution invalid, and empowers the court to grant a just and equitable remedy).[28]

39. To be "appropriate", relief must be effective. The remedy must effectively vindicate the right that has been infringed. In *Fose*, this Court reiterated this principle:

> *"*Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."[29] (our emphasis)

40. This Court has set out the following principles regarding the proper approach to determining a just and equitable remedy:[30]

    40.1 The remedy must fit the injury;

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[28] *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA1 (CC) para 65 ("*The Court's obligation to provide appropriate relief, must be read together with section 172(1)(b) which requires the Court to make an order which is just and equitable*.") Section 8 of PAJA gives effect to section 172(1)(b) in relation to administrative action, empowering a court in proceedings for judicial review in terms of section 6(1) of PAJA to grant a just and equitable order.

[29] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

[30] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) ("*Allpay No.2*") at para 29 (citing *Steenkamp*, supra, at para 29) and para 30 – 33.

40.2 The remedy must be fair to those affected by it, yet vindicate effectively the right violated;

40.3 The purpose of the remedy is to pre-empt or correct or reverse the improper administrative function;

40.4 The remedy must be just and equitable in light of the facts, the implicated constitutional principles and the controlling law;

40.5 Effective relief requires that "relief be afforded not only to the specific litigant, but to all people who are similarly situated."[31]

ii) The breach of constitutional rights

41. The SCA held that the grant of the exploration right threatened or infringed the constitutional rights of the applicants (particularly the applicant communities). In this respect, it held that:

41.1 Prior to the grant of the exploration right, interested and affected communities were not meaningfully consulted.[32]

41.1.1 Such consultation is central to the constitutional right of procedurally fair administrative action (to which PAJA gives effect), and is required by section 79 of the MPRDA.[33]

[31] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32. See also *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC) at para 71.

[32] The grant of an exploration right under the MPRDA constitutes administrative action. See SCA judgment, vol 22, p 2289.52, para 19.

[33] SCA judgment, vol 22, p 2289.52 - 2289.54, paras 19 - 24.

41.1.2 The breach of these rights was egregious. The SCA described the consultation process that was followed as "*more illusory than real*" and "*manifestly inadequate*". [34]

41.2 As a consequence of the manifestly inadequate consultation process, the Minister failed to take into account the potential impact of the proposed seismic survey on a number of other constitutional rights, including:[35]

41.2.1 First, the spiritual and cultural rights of affected communities (which are entrenched in sections 30 and 31 of the Constitution).[36]

41.2.1.1 Before the High Court, the applicant communities contended that ocean is the sacred site where their ancestors live and that they have a duty to ensure that their ancestors are not unnecessarily disturbed. If seismic blasting were to create a disturbance (as they expected), the communities must be given the opportunity to follow their customary practices for dealing with the anticipated disturbance.[37]

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[34] SCA judgment, vol 22, pp 2289.54, para 24.

[35] SCA judgment, vol 22, pp 2289.54 – 2289.55, para 25.

[36] When considering the proper approach to cultural rights, the High Court (at p 2289.92, para 112), quoted the following remarks of O'Regan J in *MEC for Education, KwaZulu-Natal and others v Pillay* 2008 (1) SA 474 (CC), para 157 (minority judgment) with approval:

> "an approach to cultural rights 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*",*

[37] High Court judgment, vol 22, p 2289.93, para 115.

41.2.1.2 The High Court held that it was incumbent on the relevant authorities to consider the spiritual and cultural rights of communities during the decision-making process.[38] In this regard, the High Court endorsed the remarks made by Bloem J in the Part A, interdict proceedings:[39]

> "I accept that the customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they 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…"[40]

[38] High Court judgment, vol 22, p 2289.92, para 114.

[39] *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG) at para 32.

[40] High Court judgment, vol 22, p 2289.92, para 113.

41.2.2 Second, the right to the protection of the environment in terms of section 24(2) of the Constitution, to the extent that it is given effect by ICMA.[41] In this respect, the High Court found that:[42]

41.2.2.1 The area to which the exploration right applies enjoys a special legal status. This affords the environment within that area a particularly high level of protection. Decisions affecting the area must be taken in compliance with the requirements of ICMA.[43]

41.2.2.2 Sections 12 and 21 of ICMA imposed duties on the decision-makers (i.e. the Minister and his delegates) to:[44]

41.2.2.2.1 Ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community;

[41] The Preamble of ICMA explains that the ICMA was enacted to give effect to the constitutional right to have the environment, including the coastal environment, protected for the benefit of present and future generations.

[42] The SCA Judgment, at para 25, held that the decision-maker failed to take into account the requirements of ICMA. The requirements of ICMA are discussed in the High Court judgment, vol 22, pp 2289.95, para 130.

[43] High Court judgment, vol 22, pp 2289.95 - 2289.96, paras 126 - 132.

[44] High Court judgment, vol 22, p 2289.95, para 126.

41.2.2.2.2 Control and manage any activity on or in coastal waters in the interest of the whole community.[45]

41.2.2.3 The decision-makers were duty-bound to take these factors into account when deciding whether to grant the exploration right.[46] It is common cause that they did not do so.[47]

41.2.3 Third, the right of communities along the Wild Coast to their livelihood (given that the sea is their primary, and in some instances only, source of income and nutrition).[48] The right to a livelihood derives from the constitutional right to dignity.[49]

42. The SCA's decision on the merits (including its decision on the existence and extent of the rights infringements, detailed above) does not fall within the scope of this appeal. Shell and Impact's application for leave to cross-appeal on the merits (to this Court) was dismissed.[50] Therefore, the SCA's decision on the merits

[45] The "interests of the whole community" is defined in section 1 of ICMA as "collective interests of the community" which are determined by (a) prioritising the collective interests in the coastal property of persons in South Africa over those of a particular group; (b) adopting a long-term perspective that takes into account the interests of future generations in inheriting the coastal property and a coastal environment characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable; (c) taking into account the interests of other living organisms that are dependent on the coastal environment.

[46] High Court judgment, vol 22, p 2289.96, para 131.

[47] High Court judgment, vol 22, p 2289.95, paras 126 and 128.

[48] SCA judgment, vol 22, p 2289.54-5, para 25. See also High Court judgment, vol 22, p 2289.93, paras 116 and 119.

[49] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC) at para 1 ("strip someone of their source of livelihood, and you strip them of their dignity too").

[50] Shell sought conditional leave to cross appeal against paragraph 32(a) of the SCA's order, which paragraph confirmed paragraphs 1 to 3 of the order of the High Court (See Notice of motion in Shell's conditional application for leave to cross appeal, vol 24, pp 2289.241 – 2289.245). Impact sought

stands. The only live issue before this Court is the just and equitable remedy that ought to flow from the findings of invalidity made by the High Court.[51]

43. It is not open to Shell or Impact to re-open the merits under the guise of argument on remedy. This would amount to an impermissible attempt to *"achieve through the back door what [they] failed to obtain through the front door."*[52]

iii) The suspension cannot cure the breaches

44. The SCA sought to remedy the above defects by directing that a further participation process be conducted.[53] This process would be "part and parcel" of the consideration of Shell's third renewal application.[54]

45. We respectfully submit that the further participation process cannot cure the manifest defects in the consultation process, or the decision-maker's failure to take relevant considerations into account.[55] The reasons are as follows:

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conditional leave to cross appeal the findings made in paragraphs 7 to 14 and 19 to 26 of the SCA's judgment, as well as paragraph 32(a) of the SCA's order (See Notice of motion in Impact's conditional application for leave to cross appeal, vol 23, pp 2289.158 – 2289.161). On 27 August 2024, this Court issued an order dismissing the applications for conditional leave to cross appeal with costs (Order dated 27 August 2024, vol 27, p 2289.638, para 5.) The directions issued on the same date record that the dismissal of the applications for leave to cross appeal is based on there being no reasonable prospects of success. Directions issued on 27 August 2024, vol 27, p 2289.632, para 3.

[51] This Court emphasized the distinction in this regard in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (No 2)* 2014 (4) SA 179 (CC).

[52] *Nabolisa v S* 2013 (8) BCLR 964 (CC) para 74.

[53] SCA judgment, vol 22, p 2289.57, para 31.

[54] Ibid.

[55] In this regard see *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (No 2)* 2014 (4) SA 179 (CC).

45.1 First, the concerns raised by interested and affected persons would have no effect on the exploration right or the renewal application. As such, it would neither cure the defects in the previous consultation process.

45.2 Second, the issues considered in an application for the renewal of an exploration right are far narrower than those that ought to have been considered prior to the exploration right being granted. Thus, consultation on the renewal cannot cure defects in the consultation that was undertaken before the grant of the exploration right.

45.3 Third, the scheme of the MPRDA is such that Shell is permitted to exercise its exploration right pending the decision on the third renewal application and independently of any public participation process embarked on. As such, the seismic survey may commence, and be completed, prior to any further consultation process.

46. We address these issues, in turn, below.

The consultation process will not effectively vindicate the breached rights

47. The concerns raised by the affected communities during the further participation process cannot influence the decision to grant the renewal application or alter the underlying exploration right. This is so for the following reasons:

47.1 First, Shell's third renewal application has already been submitted. The suspension order does not make provision for the amendment of that renewal application in response to feedback received during the further participation process. Nor does the MPRDA. For example, there is no

requirement that Shell must amend its work programme, or that the Minister must impose new conditions, to respond to community concerns.

47.2 Second, the further participation process cannot influence the decision to grant the exploration right because that decision has already been made. The order setting aside the exploration right has been suspended. As such, it stands as it was granted. Neither the suspension order nor the MPRDA make provision for the exploration right to be amended in light of the further participation process.

48. As a consequence, the further participation process will be a mere box-ticking exercise. It cannot cure the manifestly inadequate consultation process that preceded the grant of the exploration right. Nor can it cure the decision-maker's failure to take into account relevant considerations (including the impact of the exploration on the spiritual and cultural rights of coastal communities or on their livelihoods, or the failure to consider requirements of ICMA). It will be ineffective in vindicating the rights that have been breached.

49. This undermines the very essence of a meaningful consultation process, which is the ability of those consulted to influence the outcome of the decision through their participation.[56]

50. A further consultation process would only be meaningful and effective if the exploration right were set aside (unconditionally) and Shell applied afresh.

[56] *South African Iron and Steel Institute and others v Speaker of the National Assembly and others* 2023 (10) BCLR 1232 (CC) para 28.

The renewal application is far narrower than the application for an exploration right

51. Under the MPRDA, the initial grant of an exploration right is subject to rigorous substantive and procedural requirements, which are directed at advancing the Act's transformative and environmental objectives.

52. Section 80(1) of the MPRDA provides that the Minister 'must' grant an exploration right only if all of the following requirements are met:

    52.1 The applicant has access to the financial resources and technical ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme;[57]

    52.2 The estimated expenditure is compatible with the intended exploration operation and duration of the exploration work programme;[58]

    52.3 The Minister has issued an environmental authorisation.[59] This environmental authorisation process, which is conducted on terms of section 24 of the National Environmental Management Act 107 of 1998 (**"NEMA"**) entails the following:

        52.3.1 A meaningful consultation process with landowners, lawful occupiers and affected communities;[60]

[57] Section 80(1)(a) of the MPRDA.

[58] Section 80(1)(b) of the MPRDA.

[59] Sections 5A(a) and 80(1)(c) of the MPRDA.

[60] Section 24(4)(v) of NEMA.

52.3.2 An investigation of the potential consequences for or impacts on the environment[61] as well as any heritage considerations;[62]

52.3.3 An investigation of appropriate measures to mitigate these consequences and impacts;[63]

52.3.4 Reporting on any gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties, so as to understand the nature and extent of the environmental impact;[64]

52.3.5 The investigation and formulation of arrangements for the monitoring, management and assessment of environmental consequences;[65] and

52.3.6 Provision for adherence to any specific requirements that may apply in terms of applicable environmental management legislation.[66]

52.4 The applicant for the exploration right has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996;[67]

[61] Section 24(4)(b)(i) of NEMA.
[62] Section 24(4)(b)(iii) of NEMA.
[63] Section 24(4)(b)(ii) of NEMA.
[64] Section 24(4)(b)(iv) of NEMA.
[65] Section 24(4)(b)(v) of NEMA.
[66] Section 24(4)(b)(vii) of NEMA.
[67] Section 80(1)(d) of the MPRDA.

52.5 The applicant is not in contravention of any relevant provision of the MPRDA;[68]

52.6 The applicant has complied with the terms and conditions of the technical co-operation permit, if applicable;[69] and

52.7 The granting of such right will further the objects referred to in sections 2(d)[70] and (f)[71] of the MPRDA.[72]

53. This comprehensive process provides for the consideration and evaluation of all relevant factors (including community interests, impacts on cultural rights and livelihoods, and environmental considerations) at the initial decision-making stage.

54. By contrast, a renewal application under section 81 of the MPRDA is procedurally and substantively narrow. Section 81(3) compels the Minister to grant the renewal application if –

54.1 The applicant lodges the application at the office of the designated agency in the prescribed manner and together with the prescribed application fee;[73]

[68] Section 80(1)(e) of the MPRDA.

[69] Section 80(1)(f) of the MPRDA.

[70] Section 2(d) provides for the substantial and meaningful expansion of opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.

[71] Section 2(f) provides for the promotion of employment and the advancement of the social and economic welfare of all South Africans.

[72] Section 80(1)(g) of the MPRDA.

[73] Section 81(1) of the MPRDA.

54.2 The applicant has provided the following prescribed information:

54.2.1 The reasons for the renewal and the period for which the renewal is required;[74]

54.2.2 A detailed report reflecting the exploration results, the interpretation thereof and the exploration expenditure incurred;[75]

54.2.3 A report reflecting the extent of compliance with the conditions of the environmental authorisation;[76] and

54.2.4 A detailed exploration work programme for the renewal period.[77]

54.3 The applicant has complied with the –

54.3.1 terms and conditions of the original exploration right and is not in contravention of any relevant provision of the MPRDA or any other law;[78]

54.3.2 exploration work programme;[79] and

54.3.3 conditions of the environmental authorisation.[80]

[74] Section 81(2)(a) of the MPRDA.

[75] Section 81(2)(b) of the MPRDA.

[76] Section 81(2)(c) of the MPRDA.

[77] Section 81(2)(d) of the MPRDA.

[78] Section 81(3)(a) of the MPRDA.

[79] Section 81(3)(b) of the MPRDA.

[80] Section 81(3)(c) of the MPRDA.

55. Section 81 contains no provision compelling the Minister to reassess the broad objectives outlined in sections 2(d) and (f) of the MPRDA, or to reevaluate the social, cultural, and environmental impact of the exploration.

56. If the documentation is in order and the applicant has adhered to the terms of the existing exploration right, the Minister is obliged to grant the renewal. He has no discretion in this respect.

57. The renewal process is therefore largely administrative in nature, involving scant consideration of the environment or affected communities. Even if a comprehensive consultation process is followed in respect of the third renewal application, it would be a far cry from the comprehensive process that ought to have preceded the grant of the exploration right.

58. By attempting to shoehorn a remedial consultation process into a legislative framework that is not designed to reassess the merits of the original grant, the suspension order fails to effectively vindicate the communities' rights.

The SCA's order permits the seismic survey to proceed during the suspension period

59. The suspension order suspends the setting aside of the exploration right until the third renewal application is decided. Until then, the exploration right remains valid.[81]

[81] Section 81(5) of the MPRDA provides that an exploration right in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused.

60. While the exploration right is valid, Shell is entitled to commence and conduct its seismic survey operations. There is no requirement that Shell hold off until the third renewal application has been decided.

61. Thus, even if it were possible to remedy the defects identified by the SCA through a further consultation process (which is denied), Shell is not bound to wait until that process has been complete and the renewal granted.

62. Were Shell to begin conducting the seismic survey before then, the High Court and SCA's findings of invalidity would be stripped any force and effect. The affected communities would receive no remedy at all. This is antithetical to the duty of the courts to grant just, equitable and effective relief to remedy any violations of rights.

63. In the circumstances, we submit that the suspension order does not constitute just and equitable relief and that it ought, accordingly, to be set aside.

THE REQUIREMENTS FOR LEAVE TO APPEAL ARE SATISFIED

64. Section 167(3)(b) of the Constitution empowers this Court to decide –

64.1 Constitutional matters; and

64.2 Any other matter, if the Court grants leave to appeal, on the grounds that the matter raises an arguable point of law of general public importance that ought to be determined by the Court.

65. In *Dengetenge*, this Court outlined the test for leave to appeal as follows:

> "This court grants leave to appeal if it is in the interests of justice to do so. The factors that it normally takes into account include the importance of the issues raised by the matter, the prospects of success and the public interest."[82]

66. This matter raises constitutional issues of public importance. The SCA has formulated a novel remedy, which may be replicated in other cases. This Court is asked to consider whether the SCA's suspension order is legally competent, and just and equitable. It is an issue that engages squarely with courts' remedial power under section 172(1) of the Constitution.

67. We respectfully submit that, on the basis of what is set out above, the prospects of success are strong.

68. Taking these factors together, it is in the interests of justice that leave to appeal be granted.

CONCLUSION

69. For these reasons, we submit that the Court ought to –

    69.1 grant leave to appeal;

    69.2 uphold the appeal; and

[82] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 (5) SA 138 (CC) para 52, cited with approval in *City of Ekurhuleni Metropolitan Municipality: In re: Unlawful Occupiers: 1 Argyl Street and others v Rohlandt Holdings CC and others* 2025 (1) SA 1 (CC) para 33.

69.3 set aside the suspension order with costs, including the costs of three counsel.

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2 April 2025