

## **FACTSHEET: SHELL SEISMIC SURVEYS OFF THE WILD COAST OF SOUTH AFRICA**

**Sustaining the Wild Coast NPC and others v Minister of Mineral Resources and others**

*Last updated: May 2022*

### **BACKGROUND AND PARTIES**

In October 2021, **Shell Exploration and Production SA** announced it would commence with seismic surveys off the Wild Coast of South Africa, starting from 1 December 2021. Shell appointed Shearwater GeoServices to undertake these surveys in order to assess the oil and gas prospects off the coastline. The survey would cover an area of about 6,011 square kilometres, located between Port St Johns and Morgan Bay.

Shell had acquired an exploration right through a farm-out agreement. In this agreement, Shell acquired an interest in the exploration right from Impact Africa, who had received it in 2014.

Interest in the Wild Coast exploration began in 2013 when Impact Africa submitted an application to the Petroleum Agency of South Africa (PASA) for an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act (MPRDA) to explore for oil and gas in the Transkei and Algoa Exploration Areas off the East Coast of South Africa.

Impact Africa appointed Environmental Resources Management Southern Africa (Pty) Ltd (ERM) as the Environmental Assessment Practitioner to develop an Environmental Management Programme (EMPr) in terms of the MPRDA for the seismic surveys. Impact Africa then received the exploration right from the Department of Mineral Resources and Energy (DMRE) in May 2014, but did not undertake an environmental impact assessment, nor did Impact Africa obtain an environmental authorisation in terms of the National Environmental Management Act (NEMA).

A first renewal of this license was granted in 2017<sup>1</sup>. In May 2020, Impact Africa applied for the second renewal of the exploration right and commissioned ERM to conduct an Environmental Compliance Audit of the 2013 EMPr. ERM prepared both the 2013 EMPr and 2020 audit, and this audit failed to include any of the scientific research on the harmful impacts of seismic testing published between 2013 and 2020.

In August 2021, PASA granted the second renewal of the exploration right in terms of the MPRDA for a two-year period. On 31 August 2021, Impact Africa announced the completion of the farm-out transaction between Impact and BG International Limited, a wholly owned subsidiary of Royal Dutch Shell PLC, for a 50% working interest and operatorship in the exploration right.

Although the EMPr that Impact Africa had commissioned was approved in 2014, SLR Consulting, acting on behalf of Shell, only announced commencement of the surveys seven years later, on 29 October 2021.

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<sup>1</sup> ExxonMobil Exploration and Production South Africa Limited (EMEPSAL) and Impact Africa jointly applied for the first renewal of the exploration right in May 2017, and simultaneously assigned 75% of its undivided share in the exploration right to EMEPSAL. In August 2017, EMEPSAL assigned a 35% undivided share in the exploration right to Equinor South Africa BV, and in March 2018, Impact Africa, EMEPSAL, and Equinor were informed that DMRE had accepted the application for renewal—extending the exploration right through 13 March 2020. Thereafter, EMEPSAL and Equinor withdrew from the exploration right and transferred their participating interests back to Impact Africa.

**Court case one (*Border Deep Sea Angling Association and others*):**

On 29 November 2021, Border Deep Sea Angling Association, Kei Mouth Ski Boat Club, Natural Justice and Greenpeace Africa, represented by their lawyers, Cullinan & Associates, instituted rule *nisi* proceedings in the Grahamstown High Court<sup>2</sup> calling upon the Minister of Mineral Resources and Energy, the Minister of Forestry, Fisheries and Environment, BG International Limited, Shell Exploration and Production South Africa BV, and Impact Africa Limited to show cause, if any, why the court should not issue an **urgent interim, interim interdict** restraining BG International, Shell, and Impact Africa from commencing the seismic testing.

The requested interim, interim interdict would allow the applicants time to place the expert evidence before the court for a fuller hearing of the interdict application. The applicants would also bring a further application for the review and setting aside of the decisions of the Minister of Mineral Resources and Energy to grant the exploration right and its renewals.

**Rule *nisi* proceedings:** The applicants sought an urgent interdict to stop the seismic surveys from continuing until the full case was heard, arguing that an urgent interim interdict was necessary due to the continued migration of humpback whales in December and the harm that testing would cause to marine species in the period prior to further hearings on the matter. The applicants noted the need for expert evidence to establish irreparable harm, which they needed time to prepare, as well as opportunity for the numerous interested and affected parties with important perspectives to come before the court.

In order to grant an interim interdict, the judge must find that the applicants have clear *prima facie* legal rights, that they have a well-grounded apprehension of irreparable harm, that the balance of convenience favours granting an interim interdict, that the applicants have no satisfactory alternative remedy, and that this is an appropriate matter for the Court to exercise its discretion in favour of awarding an interim interdict.

The rule *nisi* was unsuccessful, with Acting Judge Govindjee dismissing the urgent interdict with costs. On 3 December 2021, the High Court [concluded that the applicants had succeeded in establishing that they had \*prima facie\* prospects](#) of success due to the apparent inadequate public participation processes followed, but failed to convince the judge that there was a reasonable apprehension of “irreparable harm” if the interdict were not granted and that, given financial and other prejudice to Shell if the seismic surveys were delayed, the “balance of convenience” was in Shell’s favour.

In his judgment, the judge did not acknowledge that the application had been brought for an interim, interim interdict, pending further evidence to be placed before the court. Consequently, the High Court dismissed the application.

Subsequently, the applicants lodged an application for leave to appeal, which Acting Judge Govindjee heard on 19 May 2022. The decision on the application for leave to appeal has yet been handed down.

**Envisaged Review:** As indicated in their application for an interim interdict, the applicants planned to seek judicial review of the decisions made by the Minister of Mineral Resources and Energy to grant and renew the exploration right. However, after Acting Judge Govindjee’s decision to dismiss the request for an interim interdict, and Judge Bloem’s subsequent granting of an interdict (see below), the applicants sought to join the proceedings in *Sustaining the Wild Coast NPC and others*.

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<sup>2</sup> Acting Judge Avinash Govindjee

Shell Counsel: Adrian Friedman and Sarah Pudifin-Jones

Ministry of Mineral Resources and Energy Counsel: Senior Counsel, Albert Beyleveld

Applicants’ Counsel: Senior Counsel: Willie Duminy and Dawid Welgemoed

### **Court case two (*Sustaining the Wild Coast NPC and others*):**

On 2 December 2021, the Legal Resources Centre (LRC) and Richard Spoor Attorneys also filed an urgent interim application<sup>3</sup> on behalf of the Amadiba, Cwebe, Hobeni, Port Saint Johns and Kei Mouth communities. **This case is split into two parts:**

**Part A:** An interdict to stop the seismic surveys from continuing until the full case is heard and **Part B:** the larger court case which argues that 1) Shell does not have the necessary environmental authorisation in terms of the National Environmental Management Act (NEMA) to lawfully undertake seismic exploration activities in the area, 2) Shell failed to consult affected communities and stakeholders properly, and 3) that seismic testing would violate rights protected under the Constitution. Part B was then expanded to include a judicial review of the decisions to grant the exploration right and renewals.

Part A was successful, and, on 28 December 2021, the Grahamstown High Court ordered Shell to stop the seismic surveys. Judge Gerald Bloem held that there was a reasonable apprehension of irreparable harm on the basis that the applicants' constitutional rights—including spiritual, heritage and cultural rights—could be harmed if Shell was allowed to continue the testing until the hearing of Part B. Shell has been interdicted pending the finalisation of Part B of the application.

On 17 February 2022, the Grahamstown High Court [dismissed Minister Gwede Mantashe and Shell's application for a leave to appeal](#) its December decision to grant an interim interdict against the company's seismic survey in the Wild Coast.

### **Upcoming hearings: Joinder and Part B (*Sustaining the Wild Coast NPC and others PART B*)**

Due to the similarities between the two court cases, two of the parties from the *Border Deep Sea Angling Association and others* case — **Natural Justice and Greenpeace Africa** — filed an application in February 2022 requesting that their judicial review application be joined with the application in the *Sustaining the Wild Coast NPC and others* case in order to argue Part B before the court.

The government ministries and Shell raised no objections to Natural Justice and Greenpeace Africa filing an application to join proceedings, while Impact Africa, having now split legal representation from Shell, objected to the joinder application.

Both matters will be heard by Judges Mbenenge JP, Nhlangulela DJP and Norman J in the Port Elizabeth High Court in Gqeberha, over three days from 30 May - 1 June 2022<sup>4</sup>.

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<sup>3</sup> The judgment was made by Judge Gerald Bloem. Applicants' counsel: Tembeka Ngcukaitobi SC; Emma Webber; Nikki Stein instructed by Richard Spoor Inc and Legal Resources Centre. Third to Fifth Respondents' (Shell) counsel: Adrian Friedman; Lauren Crow. First Respondent's (Minister Mantashe) counsel: Olav Ronaasen SC. Minister Creecy abided the outcome of the application.

<sup>4</sup> Counsel for Applicants 1-7 of the joined case are as follows: Tembeka Ngcukaitobi SC; Emma Webber; Nikki Stein (instructed by the Legal Resources Centre and Richard Spoor Inc Attorneys). Counsel for Applicants 8-9 of the joined case are as follows: Nick Ferreira and Cingashe Tabata (instructed by Cullinan & Associates). Counsel for the Minister of the Department of Mineral Resources are as follows: Albert Beyleveld SC and Avian Barnett (instructed by Whitesides Attorneys). Counsel for the Minister of the Department of Forestry, Fisheries and the Environment is as follows: Jennifer Willians (instructed by Whitesides Attorneys). Counsel for Shell and BG International are as follows: Adrian Friedman and Sarah Pudifin-Jones (instructed by Shepstone & Wylie Attorneys). Counsel for Impact Africa are as follows: Jeremy Gauntlett SC QFC; Frank Pelser; Adiel Nacerodien; Nikiwe Nyathi (instructed by Cliffe Dekker Hofmeyr Inc).

## **SUMMARY OF THE ARGUMENTS**

The applicants will argue that Shell failed to meet the requirements for an exploration right under the MPRDA because it 1) did not obtain an environmental authorisation, 2) did not comply with consultation obligations arising from section 79(4)(a) of the MPRDA and NEMA, and 3) because it failed to establish that granting the exploration right would “substantially and meaningfully expand opportunities for historically disadvantaged persons...” and “promote employment and advance the social and economic welfare of all South Africans”, as required under section 80(1)(g) of the MPRDA.

The applicants will also argue that the EMPr should not have been approved, as it failed to adequately assess the potential negative impacts on the environment and the mitigation measures proposed therein are inadequate.

Further, the applicants will argue that the Minister of Mineral Resources failed to take relevant considerations into account. These include: 1) the impact of exploration activities on coastal communities’ spiritual and cultural rights, 2) the cumulative impact of exploration, prospecting and reconnaissance activities, 3) the National Environmental Management: Integrated Coastal Management Act’s requirement that the State ensure that coastal public property is used in the interests of the whole community and adopt a long-term perspective that takes into account the interests of future generations, and 4) the climate change impacts associated with oil and gas exploration and exploitation.

The applicants will argue that these reasons for why the exploration right should not have been granted apply in equal force to the renewals of the exploration right.

The applicants will argue that there was a reasonable apprehension of bias on the part of the Minister in light of the public comments that he has made denouncing environmental activists and promoting oil and gas exploration at all costs. This is augmented by the fact that the Batho Batho Trust, which has a substantial stake in Shell’s broad-based black economic empowerment partner, donated R15 million to the African National Congress in the period October to December 2021, when Shell commenced its seismic survey without an environmental authorisation.

## **IMPACT OF WINNING THE CASE**

If successful, several fatally flawed decisions on the part of the Minister of Mineral Resources will be set aside, and Shell and Impact Africa will be prohibited from undertaking seismic surveys under the exploration right in question.

The relief sought, as amended, includes 1) the review and setting aside of the Minister of Mineral Resources’ decision to grant the Exploration Right to Impact Africa in April 2014, 2) the review and setting aside of the Minister’s decisions to renew the exploration Right in December 2017 and August 2021, 3) the review and setting aside of the decision to allow Shell to commence the seismic survey without having obtained an environmental authorisation in terms of NEMA, and 4) a final interdict prohibiting Shell from undertaking seismic survey operations under the exploration right.

However, in light of the number of exploration rights and reconnaissance permits which have been granted throughout South Africa’s waters, this case also seeks a declaration that a holder of an exploration right under the MPRDA may not undertake any seismic survey if it has not been granted an environmental authorisation. Thus, an EMPr under the MPRDA is not equivalent to an environmental authorisation under NEMA.

This will ensure that any future seismic testing abides by the dictates of the law, including the adequate public participation processes, need and desirability assessments and environmental impact assessments that obtaining an environmental authorisation under NEMA requires.