IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No.: 3941/2021

In the matter between:

IMPACT AFRICA LIMITED	**Applicant**
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
MINISTER OF MINERAL RESOURCES AND ENERGY	Tenth respondent
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Eleventh respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA BV	Twelfth respondent
BG INTERNATIONAL LIMITED	Thirteenth respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicant ("**Impact**") intends applying, on a date and at a time to be determined by the Registrar of the above Honourable Court, for leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and order, including the order as to costs, of the Full Court dated 1 September 2022.

TAKE NOTICE FURTHER THAT the bases on which leave to appeal is sought are that:

a) reasonable prospects of success exist; and

b) other compelling reasons exist why the appeal should be heard.

A. REASONABLE PROSPECTS OF SUCCESS

1. Impact submits that reasonable prospects of success exist that a court of appeal would come to a different conclusion on any one or more of the following bases.

1) Unreasonable delay

i. Section 3 of PAJA was incorrectly applied

2. There is a reasonable prospect that another court would conclude that section 3 of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") does not apply on the facts of this case, which concerns 'administrative

action' affecting the public. Section 3 of PAJA applies to administrative action affecting a person, as does Regulation 23(b) of the Regulations published in terms of section 10 of PAJA. Section 4 of PAJA applies to administrative action affecting the public. The applicants' review application alleged that the rights of the public were affected.

3. Therefore, there is a reasonable prospect that another court would reject the basis on which this Court distinguished the case before it from the Supreme Court of Appeal's decision of *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) ("***OUTA***").[1] This Court distinguished the application before it from *OUTA* on the basis that no notice had been given to the applicants of the decision to grant the exploration right, as required by section 3 of PAJA.[2] Since section 3 of PAJA does not apply, so another court would reasonably conclude, this Court erred in law by considering itself not bound by the Supreme Court of Appeal's judgment in *OUTA*.[3] This Court's finding that the applicants were not informed of the decision to grant the exploration right and of their right to review or appeal against that decision was the only ground upon which this Court found that the review application was not barred by section 7(1) of PAJA. If that ground is wrong in law, this Court's conclusion that the applicants are not barred by section 7(1) of PAJA must also be wrong.

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[1] Para 27.

[2] Judgment para 69.

[3] Judgment para 68 - 69(a), (b) and (d) and paras 71, 72 and 73.

ii. The correct application of section 4 of PAJA

4. There is a reasonable prospect that another court would conclude that had this Court correctly applied section 4 of PAJA, it would have found that the public at large reasonably became aware of the exploration right in 2013, when there was public notification of the exploration right application. [4]

5. There is a reasonable prospect that another court would conclude that this Court erred in finding that in terms of section 7(1)(b) of PAJA the 180-day time-period was to be calculated "from the date when the applicant might reasonably have been expected to have become aware of the action and the reasons."[5] Had the court applied the correct provision, i.e. section 4 of PAJA, it would have found that the time-period does not commence from the date of furnishing reasons. [6]

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[4] Judgment para 61 – 62, where it is correctly acknowledged that the intervening parties were part of the consultative process in 2013.

[5] Judgment para 67.

[6] *Mostert NO v Registrar of Pension Funds and Others* 2018 (2) SA 53 (SCA) at paras 43, 44, 49, 50 and 52.

iii. The factual inquiry in relation to undue delay

6. There is a reasonable prospect that another court would conclude that this Court erred in the factual inquiry concerning whether there was an undue delay: [7]

6.1. This Court concluded that "[n]o facts were put up to controvert the allegation made in the founding papers that, due to the failure of the relevant Department to inform the interested and affected parties and the public at large that the exploration right had been granted, they did not learn of the decision until October 2021".[8]

6.2. That conclusion is, with respect, erroneous. As this Court itself found,[9] the *OUTA* decision makes it plain that in cases such as this, where the impugned decision affects the public at large, the knowledge of the applicant for review is irrelevant. It follows that the respondents were not required to "controvert" the intervening applicants' version of when they came to know that the exploration right had been granted.

6.3. There is a reasonable prospect that another court would conclude that *inter alia* Impact's answering affidavit pleads extensive facts

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[7] Judgment para 74.

[8] Judgment para 63. See further paras 64 – 66.

[9] Judgment para 69.

refuting the alleged lack of knowledge of the exploration right until only October 2021.[10] In this regard there is a reasonable prospect that another court would conclude that this Court's approach to disputes of fact in motion proceedings was, with respect, wrong.[11]

7. There is a reasonable prospect that another court would conclude that, had this Court applied the correct approach to disputes of fact (and section 4 of PAJA read with *OUTA*) it would have found that there was an undue delay. The delay between the institution of proceedings and the date upon which the exploration right was granted was so manifest that the applicants were required to satisfy this Court that the proceedings were brought within the period stipulated in section 7(1) of PAJA.[12] They made no attempt to do so.

iv. Condonation of undue delay

8. There is a reasonable prospect that another court would conclude that this Court erred in not considering the second stage of the inquiry to determine whether relevant factors existed to condone the lateness in terms of section

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[10] See e.g. Record vol 6 pp 2381-2384 paras 21-28; Record vol 6 pp 2387-2388 paras 34-36; Record vol 6 p 2393 para 50; Record vol 6 p 2394 para 52; Record vol 6 p 2446 para 186; Record vol 6 pp 2468-2470 paras 258-261; Record vol 6 p 2498 paras 337-339; Record vol 6 p 2516 para 395. See, too, Record vol 8 p 3432 para 111 (and Record vol 2 p 564 para 88), read with Record vol 2 p 1879 para 22.

[11] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

[12] *Mostert N.O*. supra at para 52.

9 of PAJA. This Court's judgment does not conduct such inquiry.[13] The inquiry requires a consideration of the factors identified by the Constitutional Court in *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC).[14]

8.1. The factors include the effect of the delay on the administration of justice and other litigants. A reasonable prospect exists that a court of appeal would conclude that the administration of justice is adversely affected by such a long delay.

8.2. A reasonable prospect also exists that a court of appeal would conclude that Impact itself was prejudiced –

8.2.1. in the conduct of the litigation by the delay; and

8.2.2. by being effectively deprived of a vested interest and limited real right, after R1.1 billion has been invested,[15] over a period of almost eight years (since April 2014), in reliance on this right.

8.3. A reasonable prospect further exists that a court of appeal would conclude that the public is prejudiced by overlooking the delay,

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[13] This Court's judgment does not cite or apply the Constitutional Court's binding precedent in *Aurecon* (or any of the other precedents cited in Impact's heads of argument in the context of delay).

[14] At para 46.

[15] Impact's answering affidavit at record pp 2471 – 2472 at paras 263 – 264.

since the review was intended to preclude exploration activities which could have resulted in the generation of significant public revenue, socio-economic development, and contributed to South Africa's access to various sources of energy.

9. Therefore there is a reasonable prospect that another court would conclude that the applicants' undue delay could not be condoned.

v. Further issues relating to undue delay

10. There is a reasonable prospect that another court would conclude that this Court erred in finding, as a fact, that it was not disputed "that the applicants concerned only became aware of the proposed seismic survey in November 2021."[16]

10.1. What section 7(1)(b) of PAJA requires is imputed knowledge of the 'administrative action', i.e. the grant of the exploration right, not the subsequent seismic surveys (which surveys do not constitute administrative action). Thus, it is not knowledge of the proposed seismic survey which is relevant for purposes of the delay, but *imputed* knowledge of the <u>impugned decisions</u> preceding December 2021.

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[16] Judgment para 61.

10.2. Therefore, a reasonable prospect exists that another court would conclude that this Court erred, with respect, in applying section 7(1)(b) of PAJA.

11. There is, furthermore, a reasonable prospect that another court would conclude that this approach (invoking a failure to notify interested and affected parties) is, in any event, with respect, incorrect for conflating the purported review ground based on the alleged failure to provide notice of the decision or reasons therefor in terms of PAJA, with the issue of undue delay.

12. There is, further, a reasonable prospect that another court would conclude that this Court erred, with respect, in holding that none of the respondents suggested that the declaratory or interdictory relief sought is affected by the undue delay.[17] Another court would hold that Impact explicitly argued that delay affected the entire case, including declaratory relief (and consequential interdictory relief).[18]

2) Procedural unfairness

13. There is a reasonable prospect that another court would find that this Court erred in its finding that "Impact did not give the applicant communities proper

[17] Judgment para 59.

[18] See e.g. para 39 of Impact's heads of argument.

notice of the nature and purpose of the proposed seismic survey…".[19] Had this Court applied the correct standard:

13.1. It would have found that the seismic survey did not constitute 'administrative action' in terms of PAJA and therefore notification thereof was not legally required.

13.2. It would have assessed the adequacy of the consultative process conducted in 2013, in relation to the grant of the exploration right (granted in 2014), because it was only the latter right that constituted 'administrative action' affecting the public, not the 3D seismic survey to be conducted 8 years later in 2021. Neither section 79(4)(a) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") nor Regulation 3 applies to seismic surveys.

13.3. Thus, the Court erred in conflating the seismic survey notice of commencement (given in 2021) with the exploration right (which was granted in 2014).

14. The legislative framework was not impugned. Absent a direct challenge to the legislative scheme, this Court was bound to assess procedural fairness in relation thereto, and in failing to do so, there is a reasonable possibility

[19] Judgment para 102 read with para 90.

that another court will find that this Court erred in its application of the legislative scheme.[20] Had the Court applied the correct legislative framework, it would have found that the legislative scheme does not make allowance for the Court's expansive interpretation of the obligations of either the Minister or Impact.[21]

15. There is a reasonable prospect that another court would find that this Court erred in not applying the correct test in relation to procedural unfairness:

15.1. The correct test is whether, in applying the legislative framework, i.e. - section 79(4)(a) read with Regulation 3 prescribed under the MPRDA, reasonable opportunities were provided to interested members of the public to participate, in relation to the grant of the exploration right. [22]

15.2. Had this Court applied the correct test, it would have found that there were reasonable opportunities provided to the public, in relation to the grant of the exploration right, in that the legal

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[20] *Public Protector v Commissioner for the South African Revenue Service* 2022 (1) SA 340 (CC) at para 25 – 27.

[21] Judgment paras 100 – 103.

[22] *OUTA v SANRAL* [2013] 4 All SA 639 (SCA); and *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 4321 (SCA) at para 43.

framework (which was not impugned) was complied with, and in fact, exceeded. [23]

16. In any event, another court would reasonably find that this Court's expansive interpretation is misplaced because the legislative scheme was not impugned, and the principle of subsidiarity dictates that the legislative scheme must first be applied, before the Constitution is relied upon.

17. There is a reasonable prospect that another court would find that this Court erred in finding that the additional measures which were employed over-and-above the baseline requirement of the legislative framework, amounted to material reviewable irregularities.[24]

18. Another court would reasonably find that this Court's reliance on *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) was misplaced, in that:

18.1. *Bengwenyama* applies to section 16(4)(b) of the MPRDA (read with section 10 of the MPRDA); and

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[23] *OUTA v SANRAL* [2013] 4 All SA 639 (SCA); and *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 4321 (SCA) at para 43

[24] Judgment paras 89 – 93.

18.2. *Bengwenyama* dealt with section 3 of PAJA, whereas this matter deals with section 4 of PAJA. [25]

3) Failure to take into account relevant considerations[26]

i. Harm to marine and bird life[27]

19. Another court would reasonably conclude that this Court erred in applying *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).[28] *Fuel Retailers* concerned a situation where the decision-maker failed to consider inter alia the environmental consequences of the proliferation of filling stations, wrongly believing that to be within the purview of another functionary. Thus, in *Fuel Retailers* there was a complete absence of relevant scientific evidence placed before the decision-maker. That is fundamentally different from the facts of this case, where there was an abundance of relevant scientific evidence that was placed before decision-maker and this Court.

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[25] *Bengwenyama* para 74.

[26] Judgment paras 106 – 132.

[27] Judgment paras 108 – 110.

[28] Judgment para 109.

20. Another court would reasonably conclude that this Court erred in applying the precautionary principle, in that:

20.1. The correct approach is first to determine whether the party seeking to rely thereon has established: (a) that the activity poses a threat of serious irreversible environmental damage; and (b) whether there is scientific uncertainty as to the environmental damage.

20.2. Only once the precautionary principle has been activated does the onus thereafter shift, and the other party must establish that the threat either: (a) does not exist; or (b) is negligible.

20.3. The Court with respect erred in finding that it was established that: (a) the activity poses a threat of serious irreversible environmental damage; and (b) there was scientific uncertainty as to the environmental damage. There was an abundance of expert evidence put forward by Impact (and the other parties that opposed the application) and insofar as there was any uncertainty regarding the expert opinion because of disputes between them, the resolution thereof required the application of *Plascon-Evans* rule, not the 'precautionary principle'.

20.4. Similarly, the Court with respect erred in finding that Impact (and the other parties that opposed the application) had failed to establish that the risks were at acceptable levels.

20.5. It is further significant that there have been two 2D seismic surveys in 2013/2014 and 2018[29] in the same area. A seismic 2D survey is in all material respects similar to the 3D seismic survey which forms the subject matter of the present dispute between the parties. It is significant that these two 2D seismic surveys were conducted without any of the material environmental harm that was alleged having materialised.[30]

20.6. The precautionary principle is in any event context specific, and presupposes that mitigation measures other than prohibition may be adopted. The court's approach, with respect, infers that the precautionary principle mandated a prohibitionary stance, which is as a matter of principle erroneous.

ii. The relevant communities' spiritual and cultural rights and their rights to livelihood[31]

21. Another court would reasonably conclude that this Court with respect erred in finding that there was a failure to consider the relevant communities' spiritual and cultural rights and their rights to livelihood, in that:

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[29] Judgment para 21(b).

[30] Impact's answering affidavit at record p 2450 paras 201 – 202; pp 2452 – 2453 at paras 209 and 212 – 213.

[31] Judgment paras 112 – 119.

21.1. The correct starting position is the extant MPRDA procedure, read with section 4 PAJA. Absent a direct challenge to the aforegoing, this Court erred in finding that for the purposes of acting fairly, the specific customary law practices of each community needed to be considered.[32] Customary law is neither parallel nor superior law, but is subject to the Constitution and PAJA.

21.2. Decision-makers cannot depart from binding, extant processes recognised by PAJA in favour of systems of law which do not apply to all. In this case the decision-maker acted fairly by applying the general procedure enjoying statutory recognition, because the 'administrative action' in question related to the public and not only to the unique customary practices of the specific communities. In short, where the administrative action contemplated will affect the public at large, a section of the public cannot insist that the customs or laws which apply within that section regarding the resolutions of disputes be applied by the decision-maker.

22. Another court would reasonably conclude that this Court with respect erred in finding that there were infringements of the relevant communities' spiritual and cultural rights and their rights to livelihood, in that:

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[32] *Public Protector v Commissioner for the South African Revenue Service* 2022 (1) SA 340 (CC) at paras 25 – 27.

22.1. This Court relied solely on the lay and anecdotal evidence of Mr Zukulu to find that climate change had *inter alia* affected their rights.[33] Instead, the Court was required to determine this issue in relation to the expert evidence filed, and by applying the *Plascon-Evans* rule.

22.2. The uncontested evidence was that there were two 2D seismic surveys in 2013/2014 and 2018 in the same area. A seismic 2D survey is in all material respects similar to a 3D seismic survey. The two 2D seismic surveys were conducted without any of the material harm that was alleged would materialise with a 3D seismic survey and indeed without any of the applicants or the communities they were alleged to represent taking notice of the surveys.[34] In the circumstances, this Court ought to have treated the evidence advanced by the applicants of the dire consequences of the conduct of the seismic surveys with a degree of scepticism.

iii. Climate change[35]

23. Another court would reasonably conclude that this Court erred, in that:

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[33] Judgment para 117.

[34] Impact's answering affidavit at record p 2450 at paras 201 – 202; pp 2452 – 2453 at paras 209 and 212 – 213.

[35] Judgment paras 120 – 125.

23.1. This Court erred in relying on *Director: Mineral Development, Gauteng Region and another v Save the Vaal Environment and others* [2017] 2 All SA 519 (GP)[36] to find that the applicable "processes are discrete stages in a single process that culminates in the production and combustion of oil and gas".[37] The *Save the Vaal Environment* matter related to the repealed Minerals Act 50 of 1991.[38] The correct legal regime is the MPRDA, which makes it plain that exploration and production are discrete processes. Sections 79 to 81 of the MPRDA deals with exploration rights. Whereas sections 82 to 86 of the MPRDA deals with production rights.

23.2. The discrete nature of the exploration and production phases is also made plain by the distinction between sections 79 and 84(1)(c) of the MPRDA. The latter provision makes it plain that when granting a production right the Minister must grant it if – "the production will not result in unacceptable pollution, ecological degradation or damage to the environment". A similar provision is not found in section 79 of the MPRDA (i.e. the grant of an exploration right). It accordingly follows that the legislative scheme envisages that

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[36] Judgment paras 124 – 125.

[37] Judgment para 123.

[38] Section 110 read with Schedule I of the MPRDA makes it plain that the Minerals Act 50 of 1991 was repealed by the MPRDA.

issues such as *inter alia* climate change are more appropriately considered at the production phase (if that phase is reached).

23.3. This Court also erred in relying on *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] 2 All SA 519 (GP).[39] *Earthlife* is distinguishable in that, plainly a climate change impact assessment report was required as part of the environmental authorisation application, because *Earthlife* concerned a coal-fired plant which emits significant greenhouse gases. That situation is fundamentally distinguishable from the climate change impact in respect of exploration, as opposed to production.

iv. The National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("ICMA")

24. Another court would reasonably find that this Court erred in finding that:

24.1. the decision-maker's position was that only in the event that an environmental authorisation was needed that sections 12 and 21 of ICMA were triggered.[40] The argument relating to the applicability of

[39] Judgment paras 124 – 125.

[40] Judgment para 129.

ICMA and an environmental authorisation was confined to the issue of whether section 63 of ICMA was triggered.

24.2. sections 12 and 21 of ICMA were not considered.[41] The record demonstrates that the applicability of sections 12 and 21 of ICMA was acknowledged and it was not argued that these sections are only applicable in the event that an environmental authorisation is needed.[42]

24.3. the question of applicability of sections 12 and 21 of ICMA are factual inquiries, as opposed to a legal inquiry.[43] As a matter of law, sections 12 and 21 of ICMA, requires the State to have regard to the 'interests of the whole community'. Section 1 of ICMA defines 'interests of the whole community' as the 'collective interests in coastal public property of all persons living in the Republic over the interests of a particular group or sector of society'. This Court's approach is with respect erroneous, because it does not consider all persons living in the Republic, but rather the narrower interests of the particular group that challenged the administrative decisions.

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[41] Judgment paras 126 – 132.

[42] Record pp 2265 - 2266 paras 37 – 44.

[43] Judgment para 128.

4) Failure to comply with applicable legal prescripts[44]

25. Another Court would reasonably find that this Court erred, in that:

25.1. Properly construed, as a matter of law, section 80(1)(g) of the MPRDA requires that the decision-maker must consider whether the grant of the right will, not shall, further the objects of sections 2(d) and (f) of the MPRDA. Applying that test, the decision-maker must have regard not only to the immediate effect of a grant of application for an exploration right, but also the consequences which may follow if commercially exploitable hydrocarbons are discovered and a production thereafter is granted.

25.2. The precise manner of the objects of sections 2(d) and (f) of the MPRDA can only be determined once an application for a production right has been submitted to the Minister; and it is at that stage that the Minister is able to properly consider the import of these sections of the MPRDA.

25.3. But, in any event, this Court with respect erred in finding that the EMPr lacked a detailed consideration of socio-economic factors.[45] The record reveals that in addition to what was stated in the EMPr,

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[44] Judgment paras 133 – 136.

[45] Judgment paras 133 – 136.

an undertaking was provided in respect of section 2(d) and (f) of the MPRDA in that:[46]

25.3.1. There was an assignment of up to 10% participating interest (State Option) to the National Oil Company of South Africa, should a production right be granted over the area;

25.3.2. The identification of a suitable partner of a historically disadvantaged background ("**HDSA**") to take up equity;

25.3.3. The preferential procurement of suitably qualified HDSAs and local goods and services; and

25.3.4. The implementation of a recruitment, training and unemployment program for HDSA's and the payment of a contribution towards the Upstream Training Trust.

26. The Court further erred in failing to consider that these undertakings were reflected in clause 20 of the exploration right itself.[47]

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[46] Record p 2293, para 49.8; and p 2325 paras 189 – 190.

[47] The exploration right is at the Rule 53 Record pp 334 – 405; clause 20 is at pp 365 – 370.

5) The Court's omission to consider a just and equitable remedy

27. Another court would reasonably conclude that this Court erred, in that:

27.1. There is a complete absence of the consideration of the review court's wide remedial powers. This omission with respect, on its own, warrants granting leave to appeal herein.

27.2. In judicial review proceedings, a two-step approach is mandated: first, a finding regarding the review relief; and second, a consideration of what just and equitable remedy should follow.[48] The Court only engaged with the first step, in setting aside the administrative action, but with respect erred in not considering the second leg of the enquiry: a just and equitable remedy.

27.3. The Constitutional Court has held that there is a clear distinction between the constitutional invalidity of administrative action and the just and equitable remedy that must follow.[49] Furthermore, if a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail the weighing up of all relevant

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[48] In terms of PAJA a finding in terms of section 6 triggers section 8 thereof. Similarly, section 172(1)(a) of the Constitution triggers section 172(1)(b) of the Constitution.

[49] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others V Chief Executive Officer, South African Social Security Agency, And Others* 2014 (1) SA 604 (CC) at para 26.

factors, after the objective grounds for review have been established. [50]

27.4. It is axiomatic that a just and equitable remedy must be proportionate. The Constitutional Court has confirmed this by finding that it is disproportionate to set aside an entire project as a consequence of an imperfect process.[51]

27.5. With respect, the Court erred in not weighing up all of the relevant factors, namely:

27.5.1. The approximately eight-year delay between the granting of the exploration right (April 2014) and the review challenge (December 2021);

27.5.2. The significant prejudice to Impact - (both human resources and significant financial expenditure, namely R1.1 billion);[52]

27.5.3. The prejudice to the public interest;

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[50] *Allpay* at paras 45 and 56.

[51] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para 134.

[52] Impact's answering affidavit at record pp 2471 – 2472 at paras 263 – 264.

27.5.4. The advanced stage of the project (two 2D seismic surveys had been conducted and two renewals of the exploration right had been applied for and granted);

27.5.5. The fact that Impact only has one more opportunity to renew the exploration right;

27.5.6. The possibility of directing that further mitigation measures be implemented; and

27.5.7. The inability of Impact to re-apply for an exploration right in light of the moratorium in place for exploration rights over the entire South African coast. [53]

B. OTHER COMPELLING REASONS WARRANTING GRANTING LEAVE TO APPEAL

28. The Court correctly, with respect, recorded that this case is significant for all the parties involved, and that it raises novel issues of law warranting a Full Court sitting as court of first instance. [54]

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[53] See GN 657 in GG 41743 of 28 June 2018. See further GN 1664 of GG 42915 of 20 December 2019.

[54] Judgment para 30.

1) What is required for a procedurally fair public participation?

29. This Court has held that the consultations with interested and affected persons was flawed, but without clearly indicating what kind of consultative process the law requires. In so doing, this Court has created a degree of uncertainty for applicants for rights under the MPRDA as well as those with existing rights. Furthermore, this uncertainty will deter foreign investment.

2) Energy policy and the separation of powers

30. The Court's judgment and order stand to prejudice the current and related foreign investment in the country generally, and specifically in exploration for more sustainable sources of energy. Sustainable energy sources are urgently required in the light of the geopolitical circumstances experienced internationally, and an imperative under international law for purposes of the required transitioning to alternative sources of energy to alleviate global warming.

31. Therefore the Executive's policy choices in permitting (as it is allowed to do under extant national legislation adopted by Parliament) exploration for more sustainable energy sources may not be pre-empted, as the order of this Court effectively does. Such pre-emption infringes the principle of separation of powers and prejudices Government's ability to give effect to its international obligations to transition to a more sustainable energy source in the form of natural gas (which is one of the fossil fuels for which Impact

explores pursuant to its impugned exploration right). Natural gas is widely regarded as a transition fossil fuel. It is key to reaching global emissions targets.

32. In each of the above respects Impact advanced an arguable case, which in the interests of justice and the importance of the issues involved warrant an appeal to the Supreme Court of Appeal.

C. THE COURT TO WHICH LEAVE TO APPEAL LIES

33. By virtue of section 16(1)(a)(ii) of the Superior Courts Act 10 of 2013, and as a consequence of the court of first instance comprising more than one judge, the appropriate court to which leave to appeal should be granted is the Supreme Court of Appeal.

TAKE NOTICE FURTHER that the Applicant request that the costs occasioned by this application be declared to be costs in the appeal.

KINDLY ENROL THE MATTER ACCORDINGLY

DATED AT CAPE TOWN ON THIS 20th DAY OF SEPTEMBER 2022

T Baker

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AND TO:
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