IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No: 3941/2021

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
NATURAL JUSTICE	Eighth Applicant
GREENPEACE ENVIRONMENTAL ORGANIZATION	Ninth Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA BV	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent

FIRST RESPONDENT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the First Respondent (the Applicant in this application for leave to appeal - for the sake of convenience referred to as *"the Minister"* save where the context requires otherwise; furthermore and for the sake of convenience, the parties are referred to as in the Application) hereby intends making application on a date to be arranged for leave to appeal against the whole Judgment and Order delivered by the Full Court on 1 September 2022.

BE PLEASED TO TAKE NOTICE FURTHER that the Minister applies for leave to appeal to the Supreme Court of Appeal.

BE PLEASED TO TAKE NOTICE FURTHER that the Minister contends that leave to appeal should be granted as the appeal would have a reasonable prospect of success and that there are compelling reasons that the appeal should be heard, having regard to the court's acknowledgement that this case is significant for all the parties involved, that it raises novel issues of law which warranted a Full Court sitting as a court of first instance and that the issues raised are matters of considerable public importance. Accordingly, the Minister's grounds for seeking leave to appeal are set out hereunder.

1. The court erred in analysing the issue of undue delay by incorrectly applying section 3 of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), which deals with administrative action affecting individuals, instead of section 4 of the

aforesaid Act, which deals with administrative action affecting the public at large. The court therefore erred in conflating sections 3 and 4 of PAJA.

2. The court correctly stated that, where administrative action affects the public at large, the enquiry is not when a particular applicant knew or ought to have known about the administrative action, but rather when the public at large might reasonably have been expected to have gained knowledge thereof. The court erred thereafter in determining the issue of undue delay from the premise that the individual Applicants and intervening parties only discovered that the exploration right had been granted in November and October 2021 respectively.

3. The court accordingly erred in deviating from the trite and binding prescripts and legal principles that, where administrative action affects the public at large, the enquiry is not when a particular applicant knew or ought to have known about the administrative action, but rather when the public at large might reasonably have been expected to have gained knowledge thereof. This deviation was incorrectly based on a finding that the applicants had not been given notice of the granting of the exploration right and its renewals, as purportedly required by section 3 (2) (b).

4. The Court accordingly erred in finding that the 180-day period prescribed by section 7(1)(b) of PAJA runs only from the date when the particular Applicants in this case actually became aware of the administrative action and the reasons therefore, being in October and November 2021.

5. In concluding that no facts were put up to controvert the allegation made in the founding papers, that the Applicants were not aware of the granting of the exploration right until October 2021, the court incorrectly focused its attention on the date on which the Applicants actually became aware, instead of determining when the general public might reasonably have been expected to become aware of the decision.

6. Given the lengthy lapse in time between the date that the exploration right was granted and the date on which the review was instituted, the court erred in finding that condonation was not required and in not analysing whether there was any merit in the Applicant's condonation application.

7. The court erred in not considering the adverse effects of the delay on the administration of justice and the prejudice to all other litigants.

8. The court erred in not assessing procedural fairness in the context of the existing legislative framework for the granting of an exploration right, being section 79(4)(a) of the Minerals and Petroleum Resources Development Act, 28 of 2002 (**"the MPRDA"**), read with Regulation 3, which provisions were not impugned and still stands.

9. The court erred in quoting and relying upon the version of Regulation 3 as amended by GN R420 of 27 March 2020, instead of the version of the aforesaid Regulation which was in place in 2013 when the exploration right was granted, and which version was introduced by GN R349 of 18 April 2011.

10. The Court erred in criticising the additional measures undertaken by the Fourth Respondent (**"Impact"**) such as the generation of a database as set out in the EMPr and in finding that such measures, not prescribed by either Section 79(4)(a) of the MPRDA or Regulation 3, renders the consultation process defective and that the granting of the exploration right was therefore reviewable.

11. The Court erred in applying the precautionary principle under circumstances where there is no uncertainty regarding the potential harm to the environment which may arise from by the seismic survey. This is in light of the scientific evidence put forward by the Respondents and in particular by Impact, to the effect that the seismic survey poses no significant threat to the environment. Faced with a dispute of facts regarding the effects of the seismic survey on the environment, the court erred in not applying the Plascon – Evans Test as it should have. Instead, it applied the precautionary principle when it should not have done so.

12. The court erred in applying the precautionary principle in a manner that resulted in a total prohibition on the seismic survey, as opposed to a manner which permitted the seismic survey to proceed, but with additional mitigation measures.

13. The court erred in finding that the processes prescribed by the MPRDA are discrete stages in a single process, that culminates in the production and combustion of oil and gas. The court impermissibly amalgamated the separate and distinct processes prescribed by sections 79 to 81 and 82 to 86 of the MPRDA for the granting of exploration rights and production rights respectively. The MPRDA makes it clear that exploration and production are two separate and discrete processes.

14. In requiring that the impacts of climate change on the environment be assessed at the stage when an exploration right is applied for, the court erred in ignoring the distinct and separate requirements imposed by the Legislature in sections 79 and 84(1)(c) of the MPRDA, for the granting of exploration rights and production rights respectively. The requirement that the Minister may only grant a production right if the production will not result in unacceptable pollution, ecological degradation or damage to the environment, applies only to section 84(1)(c) of the MPRDA and not to section 79 thereof.

15. The court erred in finding that it was the Minister's contention that sections 12 and 21 of ICMA are only applicable in instances where an Environmental Authorisation (**"EA"**) is required and that the aforesaid provisions were not considered. It is rather the Minister's contention that only section 63 of ICMA did not apply, as the aforesaid provision is only triggered if an EA is required, as was contended by the Minister in the main Application.

16. The Court erred in failing to consider that undertakings regarding the objects of section 2(d) or and (f) of the MPRDA are contained and set out in clause 20 of the exploration right itself, as well as in the EMPr. The objects of the aforesaid sections were therefore considered by the Minister before the granting the exploration right.

17. The court erred in failing to consider the provisions of section 172 (1) (b) of the Constitution of the Republic of South Africa, Act 108 of 1996, more particularly as it relates to a just and equitable remedy.

18. Having reviewed and set aside the administrative actions of the Minister, the court erred in not considering its wide remedial powers to grant a just and equitable remedy which is proportional, having regard to the inordinate delay and the resultant prejudice to all parties.

19. The court accordingly erred in granting judgement in favour of the Applicants with costs.

DATED at MAKHANDA on this 22ND day of SEPTEMBER 2022

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