IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 3491/2021

In the matter between:

SUSTAINING THE WILD COAST NPC	First Applicant
MASHONA WENT DLAMINI	Second Applicant
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
NTSHINDISO 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 ORGANISATION	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 B V	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent

THIRD AND FIFTH RESPONDENTS' APPLICATION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE THAT application will be made by Shell (third and fifth respondents in the application under the above-mentioned case number), on a date

and at a time to be arranged with the Registrar, for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of a Full Court of this Division (Mbenenge JP, Nhlangulela DJP and Norman J) in the above-mentioned application delivered on 1 September 2022.

TAKE NOTICE FURTHER that the grounds on which leave to appeal will be sought are the following:

Delay

1 The learned members of the Full Court erred in making the following findings:

1.1 The respondents did not deny that the applicants only became aware of the proposed seismic survey in November 2021 and that they had "contented themselves with merely contending that the applicants and their communities were neither denied nor precluding from registering as interested parties pursuant to the newspaper advert of 2013 and from attending any one of the group meetings held as part of the public consultation process" (at paragraph 61 of the judgment).

1.2 The respondents had put up insufficient evidence to demonstrate that the intervening applicants (the 8th and 9th applicants) had known about the impugned decisions before 2021 even though the deponent to their founding affidavit registered as an interested and affected party in 2013 (judgment at paragraphs 62-3).

1.3 The intervening parties only became aware of the impugned decisions in October 2021 and the applicants in November 2021 (judgment at paragraph 66).

1.4 In the decision of the Supreme Court of Appeal in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) ("**the *OUTA* SCA decision**"), the Court held that, in cases where administrative action affects the public at large, a court must take a broad view of when the public at large might reasonably have been expected to have had knowledge of the action, not dictated by knowledge or lack of it of the particular member or members of the public who have chosen to challenge the acts. However, that case is distinguishable from the present case because in the present case there was no compliance with section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") because the decision-maker did not give adequate notice of the awarding of the exploration right or the two renewals (at paragraphs 68 to 71 of the judgment).

1.5 Shell was accordingly wrong to argue that the applicants had objectively to be seen as having known about the decisions by no later than 2020 because there is no evidence that the "intended recipients of the notice were informed of their right to review or appeal the decision or the right to request reasons for the decision" (at paragraph 72 of the judgment).

1.6 There was accordingly no undue delay in bringing the review applications (at paragraph 74 of the judgment).

2 The Full Court ought to have held:

2.1 The findings of this Court in *Border Deep Sea Angling Association v Minister of Mineral Resources and Energy* 2021 JDR 3208 (ECG) at paras 27-29 support Shell's argument that the 8th and 9th applicants delayed unduly before launching the review application (which took the form of launching the application for leave to intervene in the application brought by the 1st to 7th applicants).

2.2 On the basis of those findings, and in the light of the reasoning in the *OUTA* SCA decision, objectively speaking the public must be deemed to have known about the granting of the exploration right and the first renewal by no later than 20 May 2020. This is because the notice to which this Court referred in paragraph 29 of its judgment in the BDSA application would have alerted all recipients, including the attorney of record of the 8th and 9th applicants, of the existence of the exploration right.

2.3 The question is not whether, as a matter of fact, people like the attorney of the 8th and 9th applicants read the email and understood its import. The question is whether, objectively, that notice qualified to put affected persons on notice about the decisions which had been taken.

2.4 This Court was correct to find, in the BDSA application, that it was.

2.5 Furthermore:

2.5.1 The fourth applicant had, on his own version, known about the impugned decisions sinch April 2021.

2.5.2 After launching this litigation no attempt was made to review the exploration rights and their renewals (this only happening in late January 2022 by way of amendment). Therefore, the inference was inescapable that a strategic decision had been made to go for an interdict rather than a review (because of the delay problems) and only when the shoe pinched in Part A was a decision taken to introduce the review – some 9 months after the fourth applicant, on his own version, acquired knowledge of the impugned decisions.

2.6 It could never be in the interests of justice as envisaged by section 9(2) of PAJA for the 180-day period in section 7(1) to be extended where an applicant is aware of the impugned decision and makes a strategic decision not to pursue the review (even if only initially). This is especially so when Shell explained comprehensively in its affidavits what prejudice it suffered as a result of the undue delay of the applicants in launching the review.

3 The Full Court accordingly ought to have held that the applicants delayed unduly in bringing the review applications and that they ought therefore to have been dismissed.

Internal remedies

4 The learned members of the Full Court erred in finding that:

4.1 The public statements of the Minister gave rise to a reasonable apprehension of bias on the part of the applicants (including the intervening applicants) and that an appeal under section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("**the MPRDA**") would have been an exercise in futility (at paragraph 81 of the judgment).

4.2 This was, therefore, a "classic case" of an internal remedy which would not have been implemented (at paragraph 81 of the judgment).

4.3 The present case was "very exceptional" (at paragraph 82 of the judgment).

4.4 The applicants had therefore made out a case to be exempted from the obligation to exhaust internal remedies (at paragraph 83 of the judgment).

5 The Full Court ought to have held that:

5.1 The Constitutional Court has confirmed in *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) that the duty to exhaust internal remedies under PAJA is considerably more stringent than its common law counterpart.

5.2 In the present case, the Applicants' submissions do not come close to meeting the "*exceptional circumstances*" threshold.

5.2.1 At best for the Applicants, the statements made by the Minister on Twitter displayed a partisan response to the litigation unfolding at the time, which was entirely understandable in the circumstances.

5.2.2 But, in any event, the remarks on Twitter attributed to the Minister could not serve as a basis to absolve the applicants from their duty to exhaust internal remedies. Those remarks were made only after the litigation was launched when the section 96 remedy ought to have been exhausted before the litigation was commenced.

5.2.3 The other explanations given by the applicants for their decision to bypass section 96 of the MPRDA do not pass muster.

5.3 Accordingly, the Applicants were barred from pursuing the review by virtue of section 7(2) of PAJA.

Consultation

6 The learned members of the Full Court erred in finding that, on the basis of the following findings, there was inadequate consultation with the applicants before the exploration right was granted in 2014:

6.1 That Shell or Impact did not conduct investigations to "unleash the identity of the communities" represented by the applicants (paragraph 90 of the judgment).

6.2 It is not in dispute that newspapers (in which advertisements of the application for an exploration right were placed) "are out of reach of the Dwesa-Cwebe, Xolobeni and the Pondoland area communities" and that when "the newspapers finally came to hand, they turned out to have been in the English and Afrikaans languages, which members of the affected communities barely understood as they are Xhosa speaking" (at paragraph 91).

6.3 "Impact and Shell" were wrong to adopt an attitude of consulting "only the monarchs or the communities" and that "a reading of the application papers" revealed that the "traditional leaders concerned urged the consultants to deal directly with members of the affected communities, to no avail" (at paragraph 92).

6.4 "For all we know", the consultants did not comply with regulation 3 of the MPRDA Regulations because the requisite notices were not made available, provincial and national newspapers were used rather than local newspapers and the newspapers chosen have little coverage in Transkei (at paragraph 99 of the judgment).

6.5 The advertisement in *Die Burger* was in Afrikaans which is a language which is hardly spoken in the Transkei (at paragraph 99 of the judgment).

6.6 To the extent that the *Daily Dispatch* circulates widely in the Transkei and Algoa areas, it did not reach the applicant communities of Xolobeni and Dwesa-Cwebe who could not in any event understand it because they "are not conversant with English" (at paragraph 99 of the judgment).

6.7 The consultants who ran the consultation process should rather have selected a newspaper or radio station which used a language spoken by the majority of the people in the area concerned (at paragraph 99 of the judgment).

6.8 The use of a website to give interested and affected persons access to more information was inadequate because a great number of the population especially in rural areas do not have access to email or internet facilities (judgment at paragraph 101).

7 The Full Court ought to have held:

7.1 There was insufficient factual material on the papers to support the findings summarised in paragraphs 6.2, 6.5 and 6.6 above.

7.2 On the basis of the steps set out in paragraph 19 of the Full Court's judgment, there was substantial compliance with regulation 3 of the regulations made under the MPRDA ("**the MPRD Regulations**").

7.3 Regulation 3 of the MPRD Regulations was the applicable rulebook on consultation at the time when Impact applied for an exploration right.

7.4 In the absence of a challenge to the validity of regulation 3 of the MPRD Regulations, it had to be treated as valid until set aside.

7.5 It could not therefore be concluded that, despite compliance with regulation 3, there was inadequate consultation.

7.6 What the applicants seek to do in these proceedings, impermissibly, is *retrospectively* to alter the standard that applied to the 2014 EMPr process, and to require *additional* consultative processes that are not contained in the Regulations and that were not required by the Minister.

7.7 If the applicants' interpretation is correct, then the MPRD Regulations are not worth the paper that they are written on because they cannot indicate "*with reasonable certainty to those who are bound by [them] what is required of them*" and would not allow applicants for exploration rights to "*regulate their conduct accordingly*". This would render the regulations themselves unconstitutional and contrary to the rule of law.

7.8 Therefore, the interpretation proposed by the applicants was both unfair and undesirable.

7.9 As a result, the attack based on procedural unfairness had to fail.

Failure to consider relevant considerations

8 The members of the Full Court erred in finding that, because of the "apparent dispute between the experts as to the adequacy of the mitigation measures minimising the known effect of seismic surveys", the decision maker ought to have applied the precautionary principle and that there was an onus on the respondents to establish that the precautionary principle was of no application (at paragraphs 109 and 110 of the judgment).

9 The Full Court ought to have held that:

9.1 There is no onus on either party when it comes to the application of the precautionary principle. It is a principle which must be taken into account as one of the factors relevant to sustainable development as set out in section 2(4) of the National Environmental Management Act 107 of 1998 ("**NEMA**").

9.2 The precautionary principle is not a trump which prevails over all of the other principles set out in section 2(4) of NEMA.

9.3 The precautionary principle, in any event, requires no more than that a risk-averse and cautious approach be applied.

9.4 The extensive body of scientific research on which Shell relied in defence of this application demonstrated that there would be minimal risk to marine life as a result of the seismic survey. Much of that evidence was placed before the decision-maker in the form of the EMPr which supported the application for the exploration right.

9.5 There was no therefore merit in the applicants' attack on the decision on the basis that the possibility of harm was not adequately considered.

10 The members of the Full Court erred in finding that:

10.1 When the impugned decisions were taken, the possibility of harm was not considered (at paragraph 119 of the judgment).

10.2 None of the measures contended for by the respondents "addresses the potential harm to the applicants and their religious and ancestral beliefs and practices" (at paragraph 119 of the judgment).

10.3 There was no evidence of the decision-maker taking account of "the alleged remedial measures" (at paragraph 119 of the judgment).

11 The Full Court ought to have held that:

11.1 The distance between the shoreline and the proposed area of the seismic survey was a material consideration when determining what harms ought to have been anticipated by the decision-maker when considering whether to grant the exploration right.

11.2 Given the evidence of the minimal impact of the survey on marine life and its distance from the shore, it could not (applying an objective standard) have been anticipated by the decision-maker that the applicants' cultural and spiritual rights could be impacted by the survey.

11.3 The decision-maker could accordingly not be criticised for failing to consider the possible impact of the survey on the cultural and spiritual rights of the applicants and that this ground of attack accordingly had to fail.

12 The learned members of the Full Court erred in finding that the decision to approve the exploration right (and the two renewals) ought to have been taken only after the conducting of a comprehensive assessment of the need and

desirability of exploring for new oil and gas reserves in so far as climate change is concerned (judgment at paragraph 125).

13 The Full Court ought to have held that:

13.1 The only way, in the context of this case, that a failure to consider climate change could be rendered relevant, is if there had been a policy decision, at cabinet level, not to exploit any hydrocarbons for energy. If that were the case, then it might have made sense to describe the decision to grant the exploration right as irrational to the extent that climate change was not adequately considered before it was taken. In that context, it could be argued that it would be pointless (and therefore irrational) to allow prospecting for hydrocarbons to be conducted, since no permission could ever be given to exploit them.

13.2 However, no such blanket decision has been made by the South African government and the use of hydrocarbons clearly forms part of government's planning.

13.3 It therefore remained possible – but not inevitable – that permission would in the future be given to Shell or some other applicant to exploit any hydrocarbons found as part of the survey. At that stage – ie, at the point where the actual decision whether to permit that exploitation must be made – the decision-maker will be required to consider all relevant factors before allowing actual mining. At the stage of mere exploration, however,

consideration of the impact of climate change from exploitation is premature.

13.4 The impugned decisions could not therefore be attacked on the basis that the decision-maker illegitimately failed to consider the impact of the use of fossil fuels on climate change because that was not a relevant consideration at the exploration stage.

14 The learned members of the Full Court erred in finding that the impugned decisions ought to be set aside because of the failure of the decision-maker to consider the National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("**the ICMA**") and that the argument that consideration of the ICMA is only necessary when an environmental authorisation under NEMA is required "is a legal argument" (at paragraph 128 of the judgment).

15 The Full Court ought to have held that:

15.1 Section 63 of the ICMA, which requires the authorities to take a list of factors into account before granting an environmental authorisation under NEMA, only applies to that category of environmental authorisations and was therefore inapplicable to this case.

15.2 The other provisions of the ICMA on which the applicants rely (section 12 and 21) enshrine broad principles which would have been taken into account by the decision-maker as part of the assessment of the EMPr.

15.3 The decisions could not therefore be impugned on the basis that there was a failure to consider the ICMA.

16 The learned members of the Full Court erred in finding that the impugned decisions fell to be set aside because there was non-compliance with section 80(1)(g) of the MPRDA (paragraphs 134 to 136 of the judgment).

17 The Full Court ought to have held that:

17.1 Section 80(1)(g) is peremptory – it says that the decision-maker must grant an exploration right if the granting of the right will further the objects in sections 2(d) and 2(f) of the MPRDA. This does not mean, however, that no exploration right may be granted unless those objects will be met.

17.2 The EMPr, in any event, contained sufficient information to demonstrate that those objects would be met if this particular exploration were to be authorised.

17.3 There was, therefore, no basis on which the applicants could attack the decision for non-compliance with section 80(1)(g).

Remedy

18 Having found that one or more of the grounds of review had been established, the Full Court erred in concluding (at paragraph 138 and 139 of the judgment)

that it followed axiomatically that the granting of the exploration right as well as the renewals thereof fell to be set aside.

19 The Full Court ought to have found that:

19.1 A "setting aside" does not flow automatically from a finding of invalidity. Rather a court is required to consider what is just and equitable in the circumstances and to apply its mind to the question of remedy.

19.2 Even assuming that any of the grounds of review had been found to have been established, there was a spectrum of remedies available to the Full Court. These ranged from, on the one hand, setting aside the three decisions in their entirety to, on the other end of the spectrum, a mere declaration of unlawfulness but preserving the impugned decisions. There were moreover intermediate remedies available, including a referral back to the decision-maker on a limited basis to reconsider those aspects which the Court had found to be deficient, but which did not require the decision-making process to start the process from the beginning.

19.3 Had these remedies been properly considered, the Full Court would have concluded that the remedy of setting aside of all three decisions was neither just nor equitable.

Decision to uphold the applications

20 For the reasons given above, the learned members of the Full Court erred in granting the relief set out in paragraph 141 of the Full Court's judgment.

21 The Full Court ought to have dismissed the application with costs, including the costs of two counsel (in so far as Shell is concerned).

Reasonable prospects of success on appeal

22 For the reasons given above, there is a reasonable prospect that an Appeal Court will reach a conclusion different to the Full Court.

Additional considerations – public importance

23 In addition to the contention that leave to appeal should be granted because Shell has reasonable prospects of succeeding on appeal, Shell contends that leave to appeal should be granted because there is a compelling reason for the appeal to be heard. This is because:

23.1 The judgment of the Full Court raises an issue of public importance as to the circumstances in which climate change ought to be taken into account before exploration rights are granted under the MPRDA.

23.2 The judgment of the Full Court raises an issue of public importance – which will be relevant to future decisions to grant rights under the MPRDA – as to the scope of the consultation requirements under the applicable legislation (including delegated legislation).

DATED AT UMHLANGA ON THIS THE 22nd DAY OF SEPTEMBER 2022

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