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

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

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

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This matter concerns seismic survey operations being conducted by Shell off the Wild Coast of South Africa ("**the seismic blasting**"). This blasting will likely cause significant and irreparable harm to marine life in the affected area. This, in turn, will impact upon the livelihood, constitutional rights and customary rights (including customary fishing rights) of coastal communities.

2. Despite the potentially devastating impact that the seismic blasting will have on marine life and these communities, Shell did not:

    2.1. adequately consult (or consult at all) with affected the communities when it obtained its Exploration Right eight years ago; or

    2.2. obtain an environmental authorisation under the National Environmental Management Act ("**NEMA**") for the seismic blasting.

3. These omissions render Shell's seismic blasting unlawful and invalid.

4. In the remainder of these submissions, we address the following issues in turn:

    4.1. First, we demonstrate that Shell was required to obtain an environmental authorisation under NEMA. It is neither permissible nor sufficient for Shell to rely solely on the EMPr that was previously submitted and approved as part of Shell's application for an exploration right under the Mineral and Petroleum Resources Development Act ("**MPRDA**");

    4.2. Second, we show that Shell failed to meaningfully consult with the applicant communities. The consultation carried out by Shell was inadequate – Shell chose to consult with monarchs, rather than the communities themselves;

Shell failed to adequately notify affected, traditional, rural communities (particularly fishing communities); and Shell did not make sufficient effort to identify, locate and consult with those communities;

4.3. Third, we set out the requirements of interim relief and show that they are satisfied in this matter;

4.4. Fourth, we address the issue of urgency;

4.5. Finally, we deal with the question of costs.

SHELL REQUIRES AN ENVIRONMENTAL AUTHORISATION UNDER THE NEMA

5. It is common cause that Shell has not secured environmental authorisation under the NEMA.[1] It relied on an EMPr that was submitted and approved as part of an application for an exploration right to use seismic surveys to seek out oil and gas reserves in terms of section 79 of the MPRDA. That EMPr was approved by the Petroleum Association of South Africa on 9 September 2013 and by the Director-General of Mineral Resources and Energy on 17 April 2014.[2]

6. Shell denies that it is required to obtain environmental authorisation under the NEMA in addition to its EMPr under the MPRDA, contending that *"an additional EA was and is not required. … Shell has in fact gone above and beyond its minimum obligations to ensure compliance with the relevant regulatory framework. … [T]he*

[1] Founding affidavit, para 126, p 47; answering affidavit, para 62, p 553.

[2] Founding affidavit, paras 85 – 88, pp 36 – 37.

allegations that Shell has not justified its survey from an environmental perspective are simply factually unsustainable."[3]

7. Shell acknowledges that it could be required to secure environmental authorisation at the development and production stage, but denies any obligation to seek such authorisation at this stage.[4]

8. The question as to whether Shell requires environmental authorisation at this time therefore requires a determination of the following:

   8.1. First, whether the NEMA applies to activities that are regulated by the MPRDA; and;

   8.2. Second, whether the seismic survey constitutes a listed activity under the NEMA.

The application of the MPRDA does not exclude the application of the NEMA

9. The MPRDA and the NEMA were both enacted to give effect to section 24 of the Constitution, which provides as follows:

   Everyone has the right –
   (a) to have an environment that is not harmful to their health or wellbeing; and
   (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
      (i) prevent pollution and ecological degradation;
      (ii) promote conservation; and

[3] Answering affidavit, para 62, p 553.

[4] Answering affidavit, para 65, p 554,

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

10. In *Maccsand*, the Constitutional Court described the role of the NEMA in environmental management and enforcement as follows:

> *NEMA was enacted as a general statute that co-ordinates environmental functions performed by organs of state. It also provides for "co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment". As is evident from the long title, NEMA was passed to establish a framework regulating the decisions taken by organs of state in respect of activities which may affect the environment. It lays down general principles which must be followed in making decisions of that nature.*[5]

11. The NEMA's provisions make clear that it applies to all aspects of environmental management and enforcement plans, without qualification or exception. In particular, section 2 of the NEMA provides that its guiding principles, *inter alia* –

11.1. apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

11.2. serve as the general framework within which environmental management and implementation plans must be formulated;

[5] *Maccsand (Pty) Ltd v City of Cape Town and others* 2012 (4) SA 181 (CC) para 9.

11.3. serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the NEMA or any statutory provision concerning the protection of the environment; and

11.4. guide the interpretation, administration and implementation of the NEMA, and any other law concerned with protection or management of the environment.

12. There can be no question that the MPRDA falls within the scope of *"any other law concerned with protection or management of the environment".*[6] The interpretation of its provisions must therefore be informed by the environmental management principles as set out in section 2 of the NEMA.[7]

13. Among the principles enumerated in section 2 of the NEMA is that *"environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option."*[8]

[6] The Preamble to the MPRDA affirms *"the State's obligation to protect the environment for the benefit of present and future generation, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development."* Section 2(h) of the MPRDA further lists, as one of the objects of the MPRDA, to *"give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development."*

[7] *MEC for Agriculture, Conservation¸ Environment and Land Affairs v Sasol Oil (Pty) Ltd and another* 2006 (5) SA 483 (SCA) para 15.

[8] Section 2(4)(b) of NEMA.

14. As such, the NEMA recognises that activities that affect the environment do not operate in silos, and that an approach that takes account of every aspect of their possible impact is required by section 24 of the Constitution.

15. An example of this is the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (**"ICMA"**), which does not provide for its own environmental authorisation process but rather lists, in section 63, eleven additional factors that must be taken into account for environmental authorisations required under ICMA. This is, we submit, an explicit recognition that the NEMA operates as the base statute for all matters affecting the environment, and that it is supplemented where necessary by statutory provisions enacted to deal with specific environmental considerations.

16. Section 4(1) of the MPRDA provides that *"When interpreting a provision of this Act, any reasonable interpretation which is consistent with the object of this Act must be preferred over any other interpretation which is inconsistent with such objects."* This includes the shared object between the NEMA and the MPRDA, namely to give effect to section 24 of the Constitution.

17. This is in line with the Constitutional Court's instruction that when interpreting legislation, and as part of the duty to promote the spirit, purport and objects of the Bill of Rights, our courts are enjoined to *"prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees"*[9]

[9] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53, cited in *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another* 2019 (1) SA 1 (CC) para 45.

18. We submit that an interpretation of the MPRDA that excludes the requirement to obtain environmental authorisation in terms of the NEMA for any listed activity in terms of section 24 thereof would fall foul of the manner in which the management principles in section 2 of NEMA ought to be applied, as well as the obligation to give the fullest possible effect to section 24 of the Constitution.

19. The broad application of the NEMA is also supported by the specific provisions applicable to environmental authorisations, in particular:

    19.1. Section 24(2), which empowers the second respondent to identify activities which may not commence without environmental authorisation. This provision is couched in unqualified terms.

    19.2. section 24(8)(a), which provides that *"authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L."*[10]

    19.3. sections 24K (dealing with consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction) and 24L (dealing with alignment of environmental authorisations) of the NEMA, which clearly contemplate that certain activities may require authorisation under both the NEMA and other legislation, and empower the relevant authorities to co-ordinate the

[10] Section 24L of the NEMA provides for integrated environmental authorisation. Shell does not contend that this provision is applicable.

requirements of both. These provisions do not, however, empower those authorities to dispose of either set of requirements.[11]

20. Also relevant is the express recognition in NEMA of the distinction between and EMPr and environmental authorisation:

    20.1. The NEMA defines the terms "EMPr" and "environmental authorisation" separately and with no reference to one another, suggesting that these are entirely independent – albeit related – processes; and

    20.2. The same conclusion may be drawn from the power conferred on the minister of Mineral Resources by section 24N(1) of NEMA to require the submission of an EMPr prior to considering an application for environmental authorisation.

21. We submit that an approach that conflates an EMPr and environmental authorisation would accordingly be inconsistent with the text of the NEMA.

22. The case law supports the conclusion that NEMA imposes a self-standing obligation on potential prospectors to obtain an NEMA environmental authorisation (in addition to the approval of an EMPr under the MPRDA):

    22.1. In *Mining and Environmental Justice Community Network of South Africa*[12] the Court was faced with an application to review and set aside a decision to permit coal mining activities in a protected wetlands area.

[11] *City of Cape Town v Maccsand (Pty) Ltd and others* 2010 (6) SA 63 (WCC) at 77.

[12] *Mining and Environmental Justice Community of South Africa and others v Minister of Environmental Affairs and others* [2019] 1 All SA 491 (GP).

22.1.1. The Court held that the party seeking to conduct such mining activities would be required to obtain five different authorisations, including the approval of its EMPr in terms of section 39 of the MPRDA and environmental authorisation for listed activities in terms of section 24 of NEMA.[13]

22.1.2. The Court held that *"[t]he proper approach to a purposive interpretation of a* statutory *provision consists of the process of attributing meaning to the words used, having regard to the context provided by reading the provision in light of the document . . . as a whole and the circumstances attendant upon its coming into existence (in this case, section 24 of the Constitution)."*[14]

22.1.3. Accordingly, the Court held, despite the fact that a person seeking to conduct mining activities may have obtained all the necessary authorisations required in terms of the statutory provisions applicable to mining activities, the fact that the land on which they sought to conduct such activities was a protected environment as contemplated in the National Environmental Management: Protected Areas Act 57 of 2003 (**"NEMPAA"**) meant that the authorisations as contemplated in the NEMPAA ought to have been secured as well.[15]

[13] Id para 4.11.

[14] Id para 10.6.

[15] Id para 10.7.

22.2. The Court in *Mineral Sands Resources* adopted the same view, albeit obiter, in finding that an EMPr constitutes authorisation for mining activities, but not necessarily for the activities listed in terms of section 24 of the NEMA. Accordingly –

> *Prior to 8 December 2014,[16] therefore, the Mining Minister's decision to approve an applicant's Mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. At the same time, the applicant would typically have needed to obtain from the MEC or Environment Minister a NEMA environmental authorisation preceded by the approval of a NEMA EMP.[17]*

22.3. In *Global Environmental Trust*,[18] the Supreme Court of Appeal was called upon to consider whether the respondent was conducting mining activities without the necessary authorisations and approvals.

22.3.1. One of the key questions for determination was whether the approval of the respondent's EMPr was sufficient or whether the respondent required environmental authorisation in terms of the NEMA as well.

22.3.2. The majority of the Court did not delve into the substantive questions before it, on the basis of its finding that the question did not arise on the papers. However, Schippers JA squarely dealt

[16] Being the date of commencement of the NEMA Amendment Act 62 of 2008, which brought about the rollout of the "One Environmental System" to streamline licensing processes. Prior to the introduction of One Environmental System, an applicant would be required to obtain the approval of its EMPr and then to secure separate environmental authorisation.

[17] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC) para 17. Reference added; our emphasis.

[18] *Global Environmental Trust and others v Tendele Coal Mining (Pty) Lt and others* [2021] 2 All SA 1 (SCA).

with the fact that a separate environmental authorisation under the NEMA was required in his minority judgment:

> *It is clear, simply from the above provisions of NEMA, that an environmental; authorisation granted by a competent authority under NEMA is not the same thing as an EM approved under the MPRDA. In Minister of Mineral Resources v Stern (to which we were not referred), this court assumed, without deciding, that an environmental authorisation under NEMA is essentially the same as an EMP. In my view, it is not. An environmental authorisation is required for the commencement of an activity identified in a listing notice. The impacts of listed activities on the environment are assessed in order 'to give effect to the general objectives of integrated environmental management' in Chapter 5 of NEMA, which lays down rigorous processes for that assessment.*[19]

23. Based on the above, we submit that Shell's approved EMPr under the MPRDA does not absolve it of the duty to obtain environmental authorisation for any listed activities in terms of the NEMA.

24. What remains to be determined is whether the seismic survey falls within the listed activities requiring environmental authorisation under the NEMA. We turn to this issue next.

There is no problem with the pleadings

25. Perhaps because they are so weak on the merits, Shell seeks refuge in the defects of other litigation.

26. Specifically, This does not help Shell at all. I note that section 5A was not considered in *Tendele*.

[19] Id para 39.

27.

28. But I note that Shell does not deny that exercising their exploration right under the MPRDA became a listed activity in 2014, and remains a listed activity. This is undisputable.

29. Section 24(1) of the NEMA provides as follows:

> *In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for the impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act.*

30. Section 24F of the NEMA prohibits the commencement of a listed activity unless the competent authority of the Minister responsible for mineral resources has granted an environmental authorisation for the activity.

31. Shell contends that the applicants' ought to have provided specific detail as to the listed activity that requires environmental authorisation, as well as the time at which Shell is alleged to have been required to obtain such authorisation, and that the applicants' failure to do so is fatal to their case.[20] This contention is, with respect, contrived.

32. It is common cause that Shell has an exploration right issued in terms of the MPRDA.[21]

[20] Answering affidavit, para 63, p 553.

[21] Founding affidavit, para 125, p 47; answering affidavit, para 197, p 635.

33. Section 5A of the MPRDA provides as follows:

> ***Prohibition relating to illegal act***
> *No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –*
> *(a) an environmental authorisation;*
> *(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and*
> *(c) giving the landowner or lawful occupier of the land in question at least 21 days' written notice.* (emphasis added)

34. The term '*environmental authorisation'*, in terms of section 1 of the MPRDA, *"has the meaning assigned to it in section 1 of the [NEMA]."*

35. It follows that it is not only the development and production phase that attracts the obligation to secure environmental authorisation; the exploration phase does so independently of what activities may or may not follow.

36. Moreover, the Environmental Impact Assessment Listing Regulations Listing Notice 1 of 2014[22] lists as activity number 21C –

> *Any activity including the operation of that activity associated with an onshore seismic survey which requires an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act, as well as any other applicable activity as contained in this Listing Notice or in Listing Notice 3 of 2014, required to exercise the exploration right, excluding-*
> *(a) any desktop study;*
> *(b) any aerial survey; and*
> *(c) a hydraulic fracturing activity which is included in activity 20A in Listing Notice 2 of 2014, in which case that activity applies.*

[22] Published under GN R983 in *GG 38282* of 4 December 2014.

37. There can therefore be no doubt that Shell was prohibited from commencing its exploration activities until it had obtained environmental authorisation.

"Listed activity" adequately pleaded

38. Shell relies upon the *Tendele* judgment to allege that the Applicants have failed to plead which listed activities Shell is conducting.

39. In *Tendele*, the mining commenced before the one environmental system made MPRDA listed activities in 2014. It was therefore necessary for the Applicant to cite specific listed activities that Tendele was conducting.

40. As we set out in our founding affidavit, section 5A of the MPRDA says that no exploration may happen without an environmental authorisation under NEMA.[23] This was not pleaded in *Tendele*.

41. This was the pleaded case put to Shell.

42. Shell did not deny that they are exploring without an environmental authorisation under NEMA.

43. The pleaded case is clear. The listed activity complaint is unfounded. In any event, it is common cause that the exercise of an exploration right under the MPRDA became a listed activity with effect from 2014.

[23] Founding affidavit, paras 127 and 132, pp 47 – 48.

INADEQUATE CONSULTATION

44. Shell was required to meaningfully consult with communities and individuals that would be impacted by the seismic blasting. Shell's duty to do so derives from the following:

    44.1. First, the obligations that were imposed upon Shell, as an applicant for an exploration right, by the MPRDA and its regulations;[24]

    44.2. Second, the self-standing duty to consult with the applicant communities, as holders of existing customary rights (particularly customary fishing rights) that would be limited by the seismic blasting.

45. Shell failed to fulfil these obligations. This failure renders the seismic blasting unlawful and invalid. This applicants' right to meaningful consultation constitutes a *prima facie* right, which is deserving of protection by way of an interim interdict.

46. It is no answer to say that the present notice of motion in Part B is of limited scope. The applicants are entitled (upon the grant of the interim order), to amend the relief sought in Part B of the application to include prayers reviewing and setting aside the unlawful exploration right.

47. We expand upon Shell's duty to meaningfully consult below.

Inadequacy of the consultation under the MPRDA

[24] These are contained in MPRDA, the MPRDA Regulations GN 527 of 2004, and the generic EMPr guideline and template documents. Shell Answering affidavit, para 70.

48. Shell acknowledges that it was under an obligation under the MPRDA to consult with interested and affected communities.[25] Shell maintains that it took reasonable steps to do so.[26]

49. This is denied. The adequacy of a consultation process must be determined on the facts of the particular case.[27] On the facts, Shell's consultation process was manifestly inadequate.

50. The inadequacy of the consultation process is clear from Shell's EMPr. This shows that:

    50.1. Shell was aware of the traditional communities that would be affected by the seismic blasting.[28] In its EMPR, it refers to subsistence fishers in small-scale, rural fishing communities on the coast.[29] Yet Shell it made no real attempt to locate and consult with those communities.

    50.2. The only specific attempt that Shell made to consult with traditional communities was to engage with "traditional monarchs" and an individual names Richard Stephenson, who was allegedly mandated to represent four

[25] These are contained in MPRDA, the MPRDA Regulations GN 527 of 2004, and the generic EMPr guideline and template documents. Shell Answering affidavit, para 70.

[26] Shell alleges that it followed a comprehensive public participation process in respect of all of the relevant stakeholders in relation to the seismic survey. This consultation process was initiated in 2013, in the course of developing their EMPr in accordance with the MPRDA.

[27] In In *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC), the Constitutional Court quoted the following with approval, when commenting on the requirement of public consultation:

> *"[w]hat is required is that a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case*".

[28] RA, para 51.

[29] Founding Affidavit, para 32, p 22. EMPr, p 651.

"Transkei Kingdoms". The relevant footnotes in the EMPr only lists three 'Kings' that were consulted.[30] These Kings exclude the Kingship of Eastern Mpondoland, which has jurisdiction over at least one of the applicant communities.[31]

50.3. The public was notified about the proposed project through adverts that were placed in four newspapers on 22 March 2013 (The Times, Die Burger (Eastern Cape), The Herald and the Daily Dispatch).[32] These notices informed the reader of the proposed project and provided details of the consultation process and information about how members of the public could provide comments.

50.4. The process then allowed 21 days for I&APs to provide comments.[33] The comments were then compiled. A draft EMPr was put up on the project website and I&APs were given 30 days to comment.[34] Notification was sent directly to all I&APs. Over the period that followed, a series of in-person group meetings and focused group meetings were held as part of the engagement process. All I&APs on the stakeholder database were invited to these meetings.[35]

51. This consultation process was fatally flawed in a number of respects.

[30] EMPr, p 771.

[31] Founding Affidavit, para 33, p 22.

[32] EMPr, p 651.

[33] Ibid.

[34] EMPr, p 652.

[35] EMPr, p 652.

51.1. First, the above approach to consultation is outdated and invalid.

51.1.1. Shell considered it adequate to speak only to the "Kings" of communities and to assume that those Kings spoke for their subjects. This model of engagement derives from the colonial and apartheid eras.

51.1.2. A number of communities, such as the Amadiba community, have strict rules about consultation that emphasise the importance of seeking consensus. This is part of their customary law and avoids the imposition of top-down down decision-making.[36]

51.1.3. Meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations.[37] The "King" cannot make representations on behalf of all of the

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[36] Founding affidavit, p 24, para 38. See Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP) at para 10:

> "Decisions according to the customary law of the Mpondo community, typically does not take place on a majoritarian basis and decisions are seldom taken on the basis of a majority vote: Often a higher degree of consensus and circumspection is required to pass a decision in respect of issues that has the potential of conflict and division."

[37] See *Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck) at para 492:

> "However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the views so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them."

community members.[38] There is no justification for Shell's top-down approach.

51.1.4. In any event, the monarchs in question do not have jurisdiction over large communities who are affected by the seismic blasting. In particular, they do not have jurisdiction over amaMpondo aseQaukeni (Eastern Pondoland) and none of them empowered to speak on behalf of customary fishers' anywhere along the Wild Coast.[39]

51.2. Second, Shell did not follow through with the defective consultations proposed in its EMPr.

51.2.1. In the EMPr, Shell's consultants state that "*two traditional monarchs and their senior advisors were met in Mthatha, as well as Richard Stephenson who is mandated to represent 4 of the Transkei Kingdoms regarding this project.*"[40]

51.2.2. In the EMPr, Shell's consultants merely note a request for five additional meetings to be held with the Kings, but do not appear to have held them.[41] There is no mention of further meetings beyond the initial meeting. The applicants are not aware of any

[38] RA, para 33 and 43.

[39] RA, para 48.

[40] EMPr, p 771.

[41] Founding affidavit, p 28, para 54. Shell denies these allegations in its Answering affidavit, but does not provide details information about any further consultations.

ongoing consultation and the 2020 audit does not mention communities at all.[42]

51.3. Third, Shell did not consult with a number of impacted communities. For example, Shell does not dispute the applicant communities were not aware of the planned seismic survey in 2013 or even in 2020.[43] Shell responds to this criticism as follows:

51.3.1. Shell states that it took reasonable steps to consult with affected individuals. Specifically, its consultants developed a "stakeholder database" through "stakeholder analysis" using previous studies in the area. It gives no detail about what this "stakeholder analysis" entailed. The list of Interested and Affected Persons ("I&APs") on the database was supplemented with reference to feedback received following consultation and the disclosure process.[44] A Bid Information Document, containing details regarding the proposed exploration activities was then distributed to the I&APs. Later, in 2020, Shell sent a notification of the 2020 Audit to all I&APs who registered in the 2013 process, inviting them to comment on the audit results.[45]

51.3.2. Shell maintains that persons who are part of the monarchies but were not consulted through the engagement with the Kings, were

[42] Founding affidavit, p 28, para 54.

[43] Replying Affidavit, para 20 and 55.

[44] Shell Answering Affidavit, para 71.1.

[45] Shell Answering Affidavit, para 88.

free to register as I&APs pursuant to the newspaper notices (described above). Such persons, Shell contends, could have attended group meetings and engaged through that process.[46] Thus, Shell persists in its claim that it fulfilled its obligations to consult.

51.4. Shell's response is unsustainable for the following reasons:

51.4.1. In order to become an I&AP, community members had to know about the seismic survey, as well as the contact details of Shell's consultants. Given the nature of the communities in question, the notification provided by Shell was inadequate. The notifications were published in newspapers in English and Afrikaans. They were not published in African languages or community newspapers, radio stations, community stations and were only accessible to literate persons with access to the newspapers in question. Later, the draft EMPr was published on the "project website" and notification was sent to registered I&APs. Unless a person was already registered as a I&APs, they would not know where to find the draft EMPr and how to comment. Thus, there was little prospect of community members registering as I&APs or otherwise discovering the relevant documents.

51.4.2. Shell provides no explanation of how its "stakeholder analysis" was conducted or why it considered the "previous studies" that it

[46] Shell Answering Affidavit, para 80.

relied upon to be sufficient. This analysis and these studies were clearly insufficient because they did not identify the numerous small scale and subsistence fishing communities all along the coastline where Shell will operate.

52. In light of the above, it is clear that the consultation process was inadequate.

Inadequacy of the consultation with customary rights holders

53. The applicant communities are holders of customary fishing rights.

53.1. These rights were explicitly recognised in the Supreme Court of Appeal's judgment in *Gongqose and others v Minister of Agriculture, Forestry and Fisheries and others.*[47] There, the appellants faced criminal charges for fishing in a marine protected area without permission, in breach of the Marine Living Resources Act 18 of 1998. Their defence was that they were the holders of a customary right of access to marine resources, and that their conduct was accordingly lawful.

53.2. In upholding their defence, the Court held as follows:

> *[37] In this case there is extensive evidence concerning the nature of a customary system governing all aspects of life in the Dwesa-Cwebe communities, having regard to the study of the history of those communities and their usages. These aspects range from relations between parents and children, husbands and wives, household heads and neighbours, headmen and subheadmen. They include ceremonial events (weddings, payment of bridal wealth and circumcision); access to and use of natural resources, more particularly land, forest and marine resources; and the resolution of disputes. There is historical evidence of fishing and collection of shellfish since at least the 18th century.*

[47] 2018 (5) SA 104 (SCA).

[38] Knowledge of the customary system was transmitted from generation to generation, typically from father to son as regards fishing and from mother to daughter with regard to the harvesting of intertidal resources. Knowledge was also conveyed through a range of rituals and practices within the larger customary system within which fishing was located. All of this evidence was not disputed by the state. Indeed, the prosecutor put it to Ms Sunde that the state did not deny that the Dwesa-Cwebe communities had a right in terms of customary law (of access to marine resources), and that customary law had to be given equal recognition as legislation.

[39] The appellants accordingly proved that, since time immemorial, the Dwesa-Cwebe communities, of which they are part, have a tradition of utilising marine and terrestrial natural resources. It is thus not surprising that the magistrate found that the evidence established the existence of a customary right to fish within the relevant coastal waters by the Dwesa-Cwebe communities. The High Court described that right and its regulation as follows:

> *'[23] . . . (T)hey understood that nature had a way of protecting itself and this is what regulated their harvesting; the tides and the weather did not allow them to go fishing every day; they also had their own way of making sure that there would be enough fish for the generations to come, having been taught by their fathers and elders not to take juveniles and to put the small fish back. These rights were never unregulated, and were always subject to some form of regulation either under customary and traditional practices.'*

54. The proposed seismic blasting will impact negatively upon these rights. The negative impact upon these rights is set out below, in the section on irreparable harm.

55. As holders of existing customary rights that are threatened by the seismic blasting, the customary fishers of the Wild Coast had a self-standing right to consultation in respect of that blasting. As is demonstrated above, the consultation process carried out by Shell was woefully inadequate. The exploration right, which was awarded on the basis of that defective consultation process, is thus unlawful and invalid.

REQUIRMENTS OF AN INTERIM INTERDICT

56. The applicants seek an order interdicting Shell from continuing to undertake seismic survey operations under Exploration Right 12/3/252 pending the finalisation of Part B of the application.

57. The legal requirements for an interim interdict are trite. The applicant must demonstrate (i) a prima facie right worthy of protection; (i) a reasonable apprehension of irreparable harm; (iii) that the balance of convenience favours the grant of the interdict; and (iv) that there are no reasonable alternative remedies available.

58. The applicants have satisfied these requirements.

Prima facie right

59. The applicants have demonstrated the following *prima facie* rights (if not clear rights) that require the protection of an interdict:

    59.1. First, the statutory right of the applicants (as well as the public) under NEMA which requires that prospectors must obtain an environmental authorisation under NEMA for exploration for oil and gas. The prospector (in this case, Shell) has self-standing obligations under NEMA to obtain a NEMA environmental authorization in addition to the approval of its EMPr under

the MPRDA. The NEMA obligations give effect to the rights of affected communities and the public in relation to the environment.[48]

59.2. Second, the applicant communities have a right to be meaningfully consulted about proposed seismic blasting, which will impact upon their customary rights (including customary fishing rights).

59.3. Third, the applicant communities have self-standing rights under the Constitution to participate in the cultural life of their choice (section 30 of the Constitution). The sea forms an integral part of the communities' cultural practices and is of spiritual significance to them. The communities' traditional healers rely on the ocean for the performance of their rituals.[49] The traditional healers also go to the sea to commune with ancestors who live in the sea. The community views it as important not to disturb or upset these ancestors through pollution and other disturbances to the sea (such as seismic blasting).[50]

Reasonable apprehension of irreparable harm

[48] This includes the protection of marine animals against cruelty. The Constitutional Court affirmed in National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development

2017 (1) SACR 284 (CC) at para 58 that the welfare of animals is connected to the constitutional right to have the environment protected, stating that "this integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values."

[49] Founding Affidavit, p 26 para 49.

[50] Founding Affidavit, p 15, para 9.

60. The following explanation of 'reasonable apprehension' was quoted with approval in *Nordien* [51] -

> *A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant*.[52]

61. In *Setlogelo*, Innes, J.A., dealing with the need to show irreparable harm, said:

> '*The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such a case he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant relief if the discontinuance of the act complained of would not involve irreparable injury to the other party*.'[53]

62. In the context of harm as contemplated in the NEMA and the MPRDA, namely harm to the environment and to its associated community and cultural rights, we submit that the assessment as to whether there exists a reasonable apprehension of harm is to be conducted through the lens of the precautionary principle.

63. In other words, we submit that, in addition to the data that does exist in relation to the harm that would arise from Shell's continuation with its operation, any gaps or

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[51] *Minister of Law and Order and Others v Nordien and Another* 1987 (2) SA 894 (A) at 896G-I.

[52] *Nestor and Others v Minister of Police and Others* 1984 (4) SA 230 (SWA) at 244.

[53] *Setlogelo* at p 227.

areas of uncertainty in the data ought to be decided in the applicants' favour as well.

The Precautionary Principle

64. The origin of the precautionary principle is in Principle 15 of the Rio Declaration on Environment and Development, which states as follows:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

65. The principle is entrenched in the national environmental management principles enumerated in NEMA, which provides in section 2(4)(a)(vii) that sustainable development requires the consideration of all relevant factors, including *"that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions."*

66. In *Fuel Retailers*[54] the Constitutional Court examined the duties arising from the proper interpretation of the precautionary principle. The issue before the Court was the lawfulness of a decision to authorise the construction of a filling station, and particularly whether the authorities had adequately considered the socio-economic consequences of the filling station they had authorised.

[54] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (6) SA 4 (CC).

67. The Court emphasised that the approach adopted in NEMA is one of risk-aversion and caution, which entails *"taking into account the limitation on present knowledge about the consequences of an environmental decision."*[55] Later in its judgment, the Court held that the precautionary principle is applicable *"where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development."*[56]

68. Similarly, in *Space Securitisation,*[57] the Court held that the precautionary principle applies where *"scientific data might not have been finally crystallised, but where there is some context where the environments and or society might be endangered."*[58] The Court defined the four elements of the precautionary principle as follows:

> *There must be a willingness to take action in advance of formal justification of proof; there must be a proportional response; a preparedness to provide ecological space and margins for error.*[59]

69. This Court also confirmed that Principle 15 of the Rio Declaration establishes that the onus is to be discharged by the party arguing against the application of the precautionary principle.[60] As such, it is up to the respondents to establish that there exists no threat of irreparable harm.

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[55] Id at para 81.

[56] Id at para 98.

[57] *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and others* [2013] 4 All SA 624 (GSJ).

[58] Id at para 48.

[59] Id.

[60] Id at para 45.

70. In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others,*[61] the Court analysed the approaches in international and comparative law to the precautionary principle, and particularly the development of and reliance on the principle in Australia.[62] In doing so the Court held that –

> *Furthermore, prudence suggests that 'some margin of error should be retained' until all consequences of the activity are known. Potential errors are 'weighted in favour of environmental protection', the object being 'to safeguard ecological space or environmental room for manoeuvre.*[63]

71. The Court went on to set aside the decision under review on the basis that the decision-maker had not established that the risks were absent or negligible.

The applicants have established a threat of irreparable harm

72. The applicants rely on the following aspects of threatened harm:

    72.1. Cultural and spiritual harm;

    72.2. The threatened harm to marine life; and

    72.3. The negative impact on the livelihood of small-scale fishermen, arising from the harm to marine life.

<u>Cultural and spiritual harm</u>

73. The applicants have provided an account of the impact that the seismic survey would have on their cultural and spiritual beliefs. This includes the following evidence:

> *The material basis of Dwesa-Cwebe's ocean-coastal culture comprises three elements - sense of place linked to their coastline, a relational ontology*

[61] 2019 (2) SA 403 (WCC) para 104.

[62] *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133.

[63] *WWF South Africa* above n 61 para 104.

connecting them to their ancestors and the way meaning is substantiated through socio-ecological interactions (performing rituals in the sea, the sea providing sustenance through fishing and harvesting activities), thus including both tangible and intangible culture. This is very evident in the Dwesa-Cwebe communities' coastal land-ocean culture today.[64]
Many Nguni clans believe that the ancestors reside in the sea and in certain rivers and streams [...] This isiXhosa belief is confirmed in research conducted elsewhere along the Eastern Cape coast. The ancestors of these clans reside in the ocean. In addition, most Dwesa-Cwebe residents believe that there are ancestral spirits in the ocean and hence the ocean is sacred, with its significance increasing with depth. Disturbing these ancestors will cause them great distress.[65]

Residents of the Hobeni community recognise specific rocks as belonging to specific clans. For example, amaDingatha have got their own rocks at the sea where they come for spiritual healing. They would come to that rock to talk to their ancestors.[66]

74. Shell does not deal with these aspects at all in its answering affidavit. It follows that the threat of harm to cultural and spiritual beliefs is to be treated as undisputed

Harm to marine life and resultant economic harm

75. Shell's denial of a threat of irreparable harm is based in large part on the mitigation measures provided for in its EMPr.[67] The reference to these mitigation measures must be premised upon the acceptance that there is some harm to mitigate. The question is whether the evidence before the Court establishes the threat of irreparable harm even with such measures in place.

[64] Supporting affidavit of Dr Sunde, para 18, p 203.

[65] Supporting affidavit of Dr Sunde, para 24, p 205.

[66] Supporting affidavit of Dr Sunde, para 21, p 204.

[67] These are set out in Shell's answering affidavit, at paras 35 – 41, pp 545 – 546.

76. The applicants have relied on the evidence of the following leading marine experts in establishing the reasonable prospect of harm to marine life should the seismic survey proceed:

76.1. Dr Simon Elwen and Dr Tess Gridley,[68] who caution the Court that the EMPr relied upon by Shell in denying any significant harm is an eight-year-old document, and that a more refined understanding of the ecological context requires that an up-to-date assessment be conducted to establish the true nature and extent of the potential harm that may arise from the seismic survey. They anticipate based on their expertise that the seismic survey would have an impact on individual animals, whole populations of animals and on the ecosystem as a whole. Importantly, Dr Elwen and Dr Gridley note that while no studies have directly linked seismic surveys to stranding or death of cetaceans, multiple studies have shown that cetaceans have a behavioural response, the long-term effects of which have not yet been thoroughly studied. There are also emerging concerns as to the impact on seabirds and fish species, many of which require further in-depth investigation. Dr Elwen and Dr Gridley are of the view that the mitigation measures relied on by Shell are directed at the localised and short-term impacts, and do not adequately address the threat of harm.

76.2. Dr Douglas Nowacek, who has emphasised the importance of sound in the biological activities of marine species, as well as the behavioural and physiological responses to unwanted sound. The exposure to the noise contemplated by Shell, and to the reverberating energy that would follow

[68] Annexure "SE1"to the founding affidavit, p 73 ff.

each blast, can aggregate into species-level consequences, which is of particular concern in the case of endangered populations. Dr Nowacek's opinion that the seismic survey will likely cause significant harm to marine animals is based on his finding that the 2013 EMPr did not use acoustic modelling, but rather relied upon eight-year-old outdated information regarding the presence and abundance of animals, and outdated science regarding the acoustic impact on marine species. He also opines that the mitigation measures relied upon by Shell will be ineffective.[69]

76.3. Dr Harris, Dr Olbers and Dr Wright have similarly analysed the available information, and concluded that *"seismic surveys do cause harm to both species and the ecology, and that significant direct harm to individual animals and harm to populations of endangered species is the most likely scenario in the case of the seismic survey underway off the east coast of South Africa."* They give particular attention to the impact of the seismic survey on turtle hatchlings and zooplankton, and express their views that the mitigation measures relied upon by Shell do not adequately address these concerns.[70]

76.4. Mr Lynton Francois Burger, who highlights that the authors of the EMPr appear to lack any professional marine science or marine environmental training, as well as the fact that the EMPr is substantially out of date. Accordingly, the mitigation measures, which are based on superficial observations by junior-level observers and on an outdated EMPr, and which

[69] Supplementary affidavit, paras 11 – 12, pp 331-332; supporting affidavit of Douglas Nowacek, p 343 ff.

[70] Supplementary affidavit, paras 13 – 15, pp 333 – 334; expert affidavit of Jean Mary Harris, p 421 ff.

fail to take account of advancements in scientific knowledge on seismic surveys (published after 2013), are inadequate. Mr Burger also notes that the fact that a full environmental impact assessment was not conducted signals that consultation with interested and affected parties was limited.[71]

76.5. Prof Michael Bruton, who highlights that, given the scarcity of the coelacanth and the consequent difficulty in conducting research in relation to coelacanths, there is very little evidence that establishes that seismic surveys are safe. However, in his knowledge and experience, the loss of even one coelacanth would have a detrimental impact on the population as a whole.[72]

76.6. Mr David Russell, an independent fisheries consultant based in Namibia. Mr Russell provides an account of the impact on tuna catches of the seismic survey activities conducted by Shell between 2012 and 2017, and the devastating impact that this had on the albacore tuna industry. He states that many seasonal fishermen lost their jobs as a result of this.[73]

77. Shell's response to this expert evidence is through the answering affidavit, which is deposed to by the Country Chair of Shell Downstream (Pty) Ltd. The deponent makes no allegation that he has the requisite expertise to refute the expert evidence relied upon by the applicants. Accordingly, Shell's attempted rebuttal of the expert evidence relied on by the applicant through its own opinions, including

[71] Supplementary affidavit, paras 16 – 17, pp 334 – 336; supporting affidavit of Lynton Francois Burger, p 462 ff.

[72] Confirmatory affidavit of Michael Bruton, p 478 ff.

[73] Confirmatory affidavit of David William Russell, p 510 ff.

its opinions as to the adequacy of the mitigation measures set out in the EMPr, ought not to succeed.[74]

78. This threat of harm to marine life also produces a corresponding threat to the food security and livelihoods of holders of customary fishing rights as well as residents living in localities adjacent to the sea. Shell admits the importance of marine life to the livelihoods of local communities, but denies that its activities will have any impact on these for the same reasons it denies any impact on marine life.[75]

79. This is a curious conclusion to draw: the adoption of mitigation measures must be based on some acceptance of a level of harm to marine life. Without such harm, there would be nothing to mitigate. However, when the harm to marine life is taken to the logical next step of a negative impact on livelihoods, Shell's response is to depart from its mitigation plan and deny any harm at all.

80. This is evident from the fact that the mitigation measures, on which Shell relies heavily in relation to the direct impact on marine life, include no measures at all to mitigate the impact on food security and the livelihoods of small-scale fishermen, which arise from the harm to marine life.

81. It must follow that these measures are wholly insufficient in addressing the threat of irreparable harm.

Balance of convenience

[74] See *Santam Ltd v Smith* 1999 JDR 0557 (D) p 11.

[75] Answering affidavit, paras 92 – 93, p 562.

82. Shell's contention that the balance of convenience favours the refusal of an interim interdict is based entirely on the limited validity period of its exploration right. Should it not be able to conduct the seismic survey now, it asserts that it will not be able to take an informed decision as to whether to apply for a third renewal period for its exploration right, nor will it be able to secure the necessary finances and internal approvals to do so. This will have a number of knock-on effects, including anticipated breaches of contract, loss of data and data quality, the loss of its Licence, financial cost and the loss of the funds invested to date. It will also, Shell continues, create a loss of future exploration opportunities.[76]

83. There are at least four difficulties with this assertion:

    83.1. First is Shell's failure to dispute that its exploration right was awarded to it seven years ago, and that it was intended to be exercised within a three-year period,[77] coupled with the absence of any explanation at all as to why Shell only commenced its activities in 2021. In line with the well-established principles that self-created urgency does not justify the disposal of a matter on an urgent basis,[78] we submit that Shell's self-created urgency in relation to its exercise of its exploration right ought similarly not to form a valid basis for the balance of convenience weighing in its favour. Had Shell sought to conduct the seismic survey within its initial licence period, then the grounds upon which it relies in asserting the balance of convenience would fall away.

[76] Shell answering affidavit, paras 123 – 131, pp 583 – 589.
[77] Replying affidavit, para 67.1.
[78] See for example *Police and Prisons Civil Rights Union v Minister of Correctional Services and another* [2014] 5 BLLR 481 (LC) para 6.

83.2. Second, on its own version, the loss that Shell stands to sustain, while perhaps substantial, is purely commercial in nature. Our courts have expressed *"the greatest scepticism with the proposition that this is the kind of interest which the law will protect."*[79]

83.3. Third, in the event that the applicants are correct in their contention that Shell ought to have secured environmental authorisation prior to commencing their seismic survey – which, we submit, they are – then Shell will be engaging in conduct that the NEMA contemplates as unlawful.

83.4. Fourth and finally, the case involves an alleged breach of several constitutional rights that threaten the livelihoods and well-being of communities as well as their cultural and spiritual rights. Shell's seismic survey is also likely to cause dire and irreparable harm to marine life. Where constitutional rights are in issue, the balance of convenience favours their protection.[80]

84. We accordingly submit that Shell has established no basis for the balance of convenience to weigh in its favour.

85. The applicants, on the other hand, have laid such a basis:

85.1. They rely on anticipated harm to their cultural and spiritual rights, which harm is undisputed;

[79] *Gidani v Minister of Trade and Industry and others* (81420/2014) [2014] ZAGPPHC 960 (9 December 2014) para 47.
[80] *Propshaft Master (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality and others* 2018 (2) SA 555 (GJ) para 10.7.

85.2. They rely on expert evidence of anticipated harm to marine life, which expert evidence has not been disputed by suitably qualified experts; and

85.3. They rely on anticipated harm to their food security and livelihoods, flowing from the harm that will be caused to marine life.

86. In assessing the balance of convenience, the Court is also enjoined to apply the precautionary principle, which we have discussed above. The application of this principle makes clear that where there are any uncertainties as to the harm that may be sustained as a result of the continuation of the seismic survey, those uncertainties ought, for the purpose of this application, to be resolved in favour of the applicants.

87. We accordingly submit that the balance of convenience strongly favours the applicants.

No alternative remedy

88. The applicants do not have a reasonable alternative remedy.

89. Shell argues that there is an alternative remedy open to the Applicants i.e. to apply to the Minister of Minerals and Energy ("**the Minister**") under section 90 of the MPRDA (read with section 47) to suspend or cancel the right on the basis that Shell's exploration is in contravention of the MPRDA.

90. This is not a reasonable alternative for the following reasons:

90.1. First, the Minister's mind is closed to the matter. This is demonstrated by the following:

90.1.1. Minister Mantashe is quoted on Twitter by @GovernmentZA, the "*official South African Government account*", as saying the following in his briefing to "*the media on the latest developments in the upstream petroleum industry in South Africa*":

> "*We consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection*."[81]

90.1.2. This tweet was 'Retweeted' by Minister Mantashe Media Liaison Officer, Mr Nathi Shabangu.

90.1.3. In addition, the Minister has entered the fray as a party, belatedly filing a notice of opposition and an answering affidavit, aligning the Department with Shell.

90.2. Second, the internal section 90 process would likely take significantly longer than urgent court proceedings (particularly over the December/January holiday period). By the time that the internal process were to be finalised, the surveying is likely to be well-advanced or complete. This would render the relied sought moot.

URGENCY

91. This matter is manifestly urgent. If the matter is not heard on the urgent roll, the applicants will not obtain substantial redress in the ordinary course. In this respect, the following bears emphasis:

[81] RA, para 59.

91.1. Shell began its seismic blasting on 8 December 2021 and the surveying is estimated to take between 110 and 140 days.[82] As is explained above, the blasting will cause ongoing harm to marine life, and associated harm to the economic, cultural and social rights of the affected communities.

91.2. Therefore, it is imperative that the surveying be interdicted urgently. If the matter is placed on the ordinary roll, it will only be heard during the course of next year (and likely after the seismic blasting is complete). The damage will have been done and the relief sought will be rendered moot.

92. Shell does not dispute the inherent urgency of the application (other than disputing the harm claimed by the applicants). Rather, it disputes urgency on the basis that the applicants have allegedly failed to act expeditiously in bringing this application. This is denied. The applicants have acted as expeditiously as possible given the following circumstances:

92.1. The applicants are members of rural communities who were not previously represented on this issue.

92.2. The applicants became aware of the issue through media reports in early November 2021 (others learned of this later).[83] When the various applicant communities and individuals first became aware of the proposed seismic survey, they engaged in protest action and other activism in an attempt to convince the state to intervene.

[82] Shell's Answering affidavit, para 127.3.
[83] FA, p 62, para 179.

92.3. The applicants only later discussed the prospect of litigation and briefed attorneys on 22 November 2021.[84] Thereafter, consultations were arranged and conducted in the rural areas in which the applicant communities live. The application was prepared and launched as quickly as possible.

92.4. The applicants' legal representatives engaged with Cullinan's attorneys about the urgent application that was being launched by that firm. However, there was insufficient time to gather the requisite information and compile the necessary affidavits. Cullinans Attorneys launched their application on extreme urgency.[85] The applicants attorneys prepared the papers as soon as possible and filed them on 2 December 2021.

93. This was not an attempt to get a second bite at the cherry. Rather, the applicants worked as quickly as possible to put their case forward. Shell is wrong in contending that the applicants' case is the same as the Cullinan's Attorneys urgent. That urgent does not raise the issue of consultation and customary fishing rights. Nor does it raise the same legal points in relation to the need for a separate NEMA EA.

94. Shell alleges that the conduct of the applicants has been abusive and that it was given insufficient time to file its answering affidavit (particularly in light of the fact that the applicants filed a supplementary affidavit on 8 December 2021). Again, this is incorrect. The applicants participated in the case management meeting called by Shell and willingly agreed to an adjustment of the timelines to give Shell as much time as possible to file its answering affidavit. Indeed, the applicants left

[84] FA, p 46, para 122.
[85] FA, p 46, para 123.

themselves with only one day to reply to the lengthy answering affidavit filed by Shell. This was done in the spirit of co-operation and in an effort to accommodate Shell.

95. In light of the above, the matter should be heard on an urgent basis.

COSTS

96. This application concerns the cultural and environmental rights of the applicants and the public in general.

97. The applicants have been forced to bring this application because of the state's failure to uphold the Constitution or our environmental legislation.[86]

98. If this application is unsuccessful, the *Biowatch*[87] principle and section 32(2) of NEMA should apply.[88] In short, the applicants should not be mulcted for costs.[89]

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EMMA WEBBER
NIKKI STEIN
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16 December 2021

[86] FA vol 1 p 50 para 175.
[87] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).
[88] Section 32(2) of NEMA provides that a court may decide not to award costs against unsuccessful parties who fail to secure the relief sought in respect of any breach or threatened breach of any provision of NEMA, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that they acted reasonably out of a concern for the public interest or in the interest of protecting the environment and made due efforts to use other means reasonably available for obtaining the relief sought.
[89] FA vol 1 p 50 para 176 and Supplementary Affidavit p 329 paras 29-31