IN THE EASTERN CAPE HIGH COURT

CASE NO:

In the matter between

BORDER DEEP SEA ANGLING ASSOCIATION	First Applicant
KEI MOUTH SKI BOAT CLUB	Second Applicant
GREENPEACE AFRICA	Third Applicant
NATURAL JUSTICE	Fourth Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA LTD	Third Respondent
IMPACT AFRICA LTD	Fourth Respondent

APPLICANTS' HEADS OF ARGUMENT

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1. The correct approach to disputes of fact in motion proceedings for interim relief is set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W), as explained in *Gool v Min of Justice* 1955 (2) SA 682 (C) at 688:

"In granting the rule *up* in the present case HERBSTEIN, J., adopted and applied the views expressed by CLAYDEN, J., in *Webster v Mitchell*, *supra*, the head-note of which reads as follows:

> "In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

"With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell*, *supra*, is the correct approach for ordinary interdict applications."

2. The answering affidavit broadly raises three contentions:

2.1. the first is urgency. There is an allegation that the attorney who acted for various IAPs in 2013 had known of the ER and approval of the EMPr since that time. The further contention is that there was unreasonable delay between 29 October 2021 and the institution of proceedings on 29 November 2021;

2.2. the second is a contention that the applicants exaggerate the environmental impacts of the intended 3D seismic survey;

2.3. the third is that it would less prejudicial to the environment and the Applicants to refuse interim relief.

3. As to the first point, there is an affidavit by the attorney, Mr Stone, explaining the position. Neither he nor the IAPs he represented received notifications of the outcome of the EMPr process of 2013, or of the granting of the Exploration Right in 2014. The email addresses used for Mr Stone in AA3 were not operative in 2020, and the emails should have bounced back. Presumably, the sender will be in possession of such evidence.

4. The email correspondence between Mr Stone and SLR Consulting, and Mr Sampson of Shell' attorneys, speaks for itself. Strangely, it was not disclosed by Shell, although it seems that it was itself made aware of the request for information to SLR.

5. Contrasted to that, there is no evidence by Shell, its predecessors or anyone else, that proper notice was given to either Mr Stone or any of the other IAPs he represented in 2013 either of the outcome of the EMPr process, in 2014 of

the grant of the Exploration Right, or in 2020 with regard to the audit report. There is therefore no dispute of fact as to the failures to give notice on which the Applicants rely.

6. As to the second point, the Applicants information was obtained largely from the EMPr itself. This aspect is returned to in relation to the apprehension of harm, below. There is no genuine dispute of fact as to the likelihood of harm to the receiving environment.

7. The third point is addressed under the apprehension of irreparable harm and the balance of convenience, below. The possible prejudice to Shell is either of its own making (in not having complied with the precautionary and mitigation measures in the EMPr, and delaying the proposed survey until now), or stated speculatively as consequences that “could” follow.

8. Its reference to “breach” of its “obligations” to acquire 3D under the Exploration Right is unsubstantiated. It has not been linked to any of the provisions of sec 82 (2) of the MPRDA.

Urgency

9. Rule 6 (12) (b) obliges an applicant who avers urgency to show that it cannot be afforded substantial redress at a hearing in due course. (*IL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C).) What amounts to

substantial redress depends on the circumstances of the case and the nature of the rights involved.

10. The rights in this case are those guaranteed by secs 24 (Environment) and 33 (Just Administrative Action) of the Constitution. For purposes of the interim application the focus falls on the environmental rights.

11. The 3D seismic survey is due to start on 1 December 2021. Although **FA9** states that the survey will commence "from the earliest on 1 December 2021" para 2 of the letter of 26 November 2021 by the attorneys for Shell (**FA13**) states that "the surveys are due to start on 1 December 2021". According to **FA9** it is due to continue for 4 to 5 months.

12. Paragraph 78 of the founding affidavit refers to passages in the 2013 EMPr that acknowledge the presence of sensitive marine fauna in the proposed survey area in December.

13. The mitigation measures proposed in the EMPr, para 79 of the founding affidavit, expressly include "avoid surveying during December".

14. It is submitted that the only way of affording the applicants any redress at all in respect of the proposed seismic survey activities in December 2021, is to treat this application as urgent, as contemplated in Rule 6 (12).

15. By letter dated 25 November 2021 (**FA12**) the Applicants' attorneys sought an undertaking from Shell ensure that the seismic surveys planned for the Transkei Exploration Area would not commence before February 2022.

16. Paragraph 2 of the letter recorded that Southern Right and Humpback whales and had not yet fully returned from their annual migration and that some were still on their way back and will likely to be transiting the survey area shortly, and that commencement of seismic surveys during December (or even January 2022 for that matter) would have a particularly severe impact on those cetaceans.

17. Paragraph 10 of the answer by Shell's attorneys on 26 November 2021 (**FA13**) made reference to the factual position referred to in **FA12**, but did not put those allegations in issue. This is returned to below.

18. **FA13** recorded that Shell not only declined to give the requested undertaking but claimed that there was no urgency in the matter because the Applicants' attorneys had been aware of the intended seismic operations for "a few months".

19. That allegation is refuted in paragraphs 23.2 and 23.3 of the founding affidavit, and the replying affidavit of Mr Stone.

20. In the circumstances it is submitted that there was no unreasonable delay nor self-created urgency.

Prima facie right

21. In the present context a *prima facie* right may be established by demonstrating prospects of success in the intended review (see *SA Informal Traders Forum City of Johannesburg* 2014 (4) SA 371 CC), par [25]). The logical starting point is therefore to consider the Consultant's prospects of success on review.

22. The impugned administrative acts are:

22.1. the decision to grant the Exploration Right, which was taken on or about 20 May 2014;

22.2. a decision on or about 17 May 2017 to renew that right (**"**the First Renewal Decision**"**);

22.3. a decision taken during or about May 2020 for the second renewal of the Exploration Right (**"**the Second Renewal Decision**"**).

23. The Applicants have standing under sec 32 of the National Environmental Management Act, number 107 of 1998 (as amended) ("NEMA"), secs 6 (Administrative justice) of the Mineral and Petroleum Resources Development Act, 28 of 2002 (the MPRDA) and sections 24 (b) (Environmental rights), 33 (Just administrative action) and 38 of the Constitution.

24. Sec 6 of the MPRDA specifically makes the provisions of PAJA applicable to any administrative process conducted or decision taken in terms of the MPRDA.

25. The focus is on sec 3 of PAJA. Sec 3 (1) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Sec 3 (2) (b) provides that, subject to subsection (4), in order to give effect to the right to procedurally fair administrative action, an administrator must give a person referred to in subsection (1) -

25.1. adequate notice of any right of review or internal appeal, where applicable (subsec (d)); and

25.2. adequate notice of the right to request reasons in terms of section 5 (subsec (e)).

26. No such notices were given to the First or Second Applicants either of the approval of the EMP in 2014, nor of the grant of the exploration right or the renewals thereof (founding affidavit para 61).

27. In addition to non-compliance with sec 3 of PAJA *per se*, the failure to give the First and Second Applicants notice of the award of the ER, and their rights under section 96 of the MPRDA, deprived them of the opportunity of having appealed to the Director-General or the Minister at the time.

28. In terms of sec 81 (2) (c) of the MPRDA, an application for renewal of an exploration right must be accompanied by a report reflecting the extent of compliance with the requirements of the environmental authorisation, the rehabilitation to be completed and the estimated cost thereof. The renewal decisions are also administrative action under PAJA and sec 6 of the MPRDA, and are subject to sec 3 of PAJA, referred to above.

29. Regulation 34 of the EIA regulations made under NEMA deals with the audit reports contemplated by section 81 (2) (c) of the MPRDA. For the second renewal, the holders of the ER at the time (Exxon Mobil Exploration and Production SA Ltd) engaged Environmental Resources Management Southern Africa (Pty) Ltd (“ERM”) to conduct an environmental compliance audit of the

Exploration Right and the approved exploration environmental management programme (EMPr), purportedly in accordance with regulation 34 of the EIA Regulations, 2014 (as amended). The ERM compliance audit dated 14 May 2020 assessed compliance with the EMPr but not with an environmental authorisation as Shell does not have an environmental authorisation to undertake the Seismic Surveys (founding affidavit para 64).

30. Regulation 34 (6) provides that within 7 days of the date of submission of an environmental audit report to the competent authority the holder of an environmental authorisation must notify all potential and registered interested and affected parties of the submission of that report and make it immediately available to anyone on request and on a publicly accessible website where the holder has such a website. It is contemplated that the party who undertakes an environmental audit under regulation 34 or on whose behalf it is undertaken, would be the holder of an environmental authorisation, and such a party incurs the obligation to give notice.

31. No notice of the audit report was given as required by regulation 34 (6). The second renewal should not have been granted unless the Minister had been satisfied that there had been compliance with sub-regulation (6).

32. It is submitted that the failure to give such notice to the first First and Second Applicants affords them at least a *prima facie* case on review.

33. There is a further issue concerning the validity of the audit report. Regulation 34(2)(a) of the EIA Regulations provide that an environmental audit report must

be prepared by an independent person. The definition of “independent” for this purpose is quoted in paragraph 67 of the founding affidavit.

34. It is respectfully submitted that the party who prepared the initial EMPr is manifestly not **“**independent**”** for these purposes. In this respect it need not be shown that the objectivity of the author was in fact compromised; it is sufficient to show that there are circumstances “that may compromise the objectivity of that EAP”. The test seems to be analogous to that which applies cases for recusal, where a reasonable suspicion of bias (not a reasonable likelihood of bias) suffices (see *BTR Industries SA (Pty) Ltd v MAWU* 1992 (3) SA 673 (A), at 693 I – J).

Apprehension of irreparable harm

35. A well-grounded apprehension of irreparable harm if the interim interdict is not granted and the review is eventually granted is required where the applicant’s right is established *prima facie*, although open to some doubt.

36. However, if the applicant can establish a clear right, it need not show an apprehension of irreparable harm (see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (T), at 383 A – F; 11 LAWSA, 2nd ed, para 405).

37. Between those two extremes lie the intermediate cases (as pointed out by Holmes, J (as he then was), in *Olympic*, *loc cit*). It is evident from *Setlogelo* that it is the reparability of the harm which is the issue. This requirement is closely related to the presence or absence of an adequate alternative remedy.

38. It is submitted that the Applicants have demonstrated a strong case for review. They have also demonstrated the prospect of substantial harm to the receiving environment, based on statements derived from the EMPr itself (founding affidavit, paragraphs 16, 17 and 78).

39. In his replying affidavit, Mr Stone points to a number of respects in which allegations contained in the answering affidavit are not correct, as follows:

39.1. the allegations regarding lack of evidence of harm caused by seismic surveys in paragraph 33, are addressed in an affidavit by Tess Gridley. This paragraph also confuses absence of evidence wit evidence of absence;

39.2. the allegations in paragraph 35.2 do not state where or in what months the survey was conducted. Without that information, reference to that survey is irrelevant;

39.3. the allegations in paragraph 36.2 are not in accordance with pages 6-39 and 6-40 of the EMPr;

39.4. the allegations attributed to the applicants in paragraph 54 are derived from page 2-4 of the EMPr (at p 4 of the bundle of extracts);

39.5. the allegation in paragraph 57 regarding a 5 km buffer zone around MPAs is noted. According to page 6-14 of the EMPr, in water depths of 25 to 50 m airgun arrays are often audible to ranges of 50 to 75 km, and with efficient propagation conditions such as experienced on the

continental shelf or in deep oceanic water, detection ranges can exceed 100 km and 1000 km respectively (at p15 of the bundle).

40. The harm to the receiving environment does not seem to be capable of being repaired and cannot be addressed by any subsequent remedy. Shell's answer is that the applicants exaggerate the environmental impacts, not that they are reparable.

41. Shell's approach impermissibly perpetuates the notion that the Applicants and the receiving environment must endure the injuries or part with their rights in the interim (per *Fourie v Uys* 1957 (2) SA 125 (C) at 159; *Candid Electronics v Merchandise Buying Syndicate* 1992 (2) SA 459 (C) at 464I – 465 D).

42. It is submitted that the applicants have manifestly satisfied these requirements for the granting of an interim interdict.

The balance of convenience

43. In assessing the balance of convenience, the court must weigh the prejudice to the applicants if the interim interdict is not granted against the prejudice the respondent will suffer if it is (11 LAWSA, para 406).

44. NEMA recognises that any person may seek relief in respect of a breach or threatened breach of any statutory provision concerned with the protection of the environment or the use of natural resources "in the interest of protecting the environment" (sec 32 (1) (e)).

45. It has been recognised that in assessing the balance of (in)convenience, the convenience of the public is a legitimate consideration (*Glaxo Wellcome (Pty) Ltd v Terblanche NO (No 2)* 2001 (4) SA 901 (CAC) at 911A – D). It is submitted that the constitutionally entrenched environmental rights of the public are an equally legitimate consideration.

46. This requirement is also subject to the comparative balance described in *Olympic, supra*.

47. It is submitted that in the present case it is not only the prejudice to the applicants personally that should be weighed, but also the prejudice to the interest of protecting the environment that they represent.

48. It is further submitted that the likely harm to the environment and the concomitant interests of the applicants has been established ((founding affidavit, paragraphs 16, 17 and 78).

49. In the letter by its attorneys, **FA13**, Shell insisted on its right to commence with the seismic survey on 1 December 2021, but did not indicate any inconvenience or harm to itself should it not be able to do so.

50. With reference to **FA13** it is noteworthy that in paragraph 11 Shell insists on its right to commence on 1 December 2021, *inter alia* on the basis of allegedly insignificant impacts on marine fauna, but repeatedly "**with mitigation**". However, the very EMPr on which it relies categorically states, in respect of mitigation that it should "**avoid surveying during December**".

51. The statement in that paragraph that “the assessment allows for seismic acquisition in December, provided that an additional mitigation measure related to Passive Acoustic Monitoring (PAM) be adopted…”, fails to give any recognition to the condition stipulated in the EMPr, namely “**if surveying during this time cannot be avoided**” (see the founding affidavit, para 79.1).

52. The answering affidavit has the same shortcoming. The response in paragraphs 36 (ad paragraphs 78 to 83, pages 30 to 31) fails to deal with the mitigation measures quoted from the EMPr in paragraph 79, namely that surveying in December is to be avoided, and only if it cannot be avoided may it be done subject to stringent enforcement of other mitigation measures and PAM technology.

53. The same applies to paragraphs 58 and 59. Paragraph 59 is particularly egregious. It ignores the condition imposed by the very EMPr, which Shell acknowledges in paragraph 53 to be “legally binding and must be complied with”.

54. No facts are advanced to indicate that surveying during December “cannot be avoided”.

No satisfactory alternative remedy

55. The Third Applicant addressed a letter dated 22 November 2021 (**FA14)** to the First Respondent, seeking copies of the Exploration Right and all renewals. It also sorted to protect its rights on appeal under section 96 of the MPRDA and

requested that the latest renewal decision be suspended under section 96 (2)(a). That was to no avail.

56. The First and Second Applicants attempted to address the situation via the ministries of the First and Second Respondents, but that attempt failed (paragraphs 35 and 36 of the founding affidavit).

57. It is submitted that patently there is no alternative remedy available to the applicants.

Conclusion

58. In the premises, it is submitted that a proper case has been made out for the relief sought in the notice of motion.

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W R E DUMINY SC

D WELGEMOED

Chambers, Cape Town

I December 2021