



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

CASE NO. 3491/2021

In the matter between:

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| SUSTAINING THE WILD COAST NPC | First Applicant |
| MASHONA WENT 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

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| 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 |

JUDGMENT
(application for leave to appeal)

Bloem J.

[1] On 28 December 2021 an order was issued interdicting the third, fourth and fifth respondents from undertaking seismic survey operations under Exploration Right

12/3/252 pending the finalisation of Part B of the notice of motion. A costs order was made against the first and fifth respondents. The first, fourth and fifth respondents now seek leave to appeal to the Supreme Court of Appeal alternatively the full court of this Division against the whole of the judgment and order delivered on 28 December 2021 (the interim judgment or order). The application for leave to appeal is opposed by the applicants. Reference to the parties is the same as they were cited in the main application, albeit that the first, fourth and fifth respondents are the applicants in this application.

[2] The first respondent is the Minister of Mineral Resources and Energy, who was cited in his capacity as the political head of the Department of Minerals and Energy. The first respondent has, through powers delegated to the Director-General of the Department of Minerals and Energy, granted an exploration right to the fourth respondent. That right was renewed with effect from 11 August 2021. It is that right that will form the subject matter of scrutiny at the hearing of Part B. The fourth respondent is Impact Africa Limited and the fifth respondent is BG International Limited. I shall refer to the fourth and fifth respondents as “Shell”.

[3] Section 17(1) of the Superior Courts Act¹ provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- “(a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

¹ Superior Courts Act, 2013 (Act 10 of 2013).

- [4] The test for the appealability of a particular interim interdict is whether or not it would be in the interests of justice for that interim interdict to be appealed. That determination must be made in the light of all the facts of the particular case.²
- [5] The effect of the interim order is that Shell cannot undertake a seismic survey under the above exploration right pending the finalisation of the relief sought under Part B of the notice of motion. The hearing of Part B (the main application) has been set down for 30 May 2022. The court hearing the main application will either dismiss it or grant the relief sought. If the main application is dismissed, the interim order will have no effect thereafter. Shell would then be entitled to undertake a seismic survey under the above exploration right. Similarly, if the relief sought in Part B is granted, the effect thereof would be that Shell would be unable to place any reliance on the above exploration right. The inability to give effect to the exploration right would, under those circumstances, be the result of the judgment in the main application, and not as a result of the interim judgment. Either way, the interim order has effect only until delivery of the judgment in the main application. In other words, the interim order will be discharged as soon as the judgment in the main application has been delivered.
- [6] Shell acknowledges that the environmental management programme provides that the window to undertake seismic survey is between 1 December and 31 May of every year until 10 August 2023. At the hearing of the application for leave to appeal, Mr Motau, counsel for Shell who appeared with Mr Friedman and Ms Pudifin-Jones, informed the court that Shell will not undertake a seismic survey under the above exploration right before 31 May 2022, even if allowed to do so. It will only do so during the period 1 December 2022 and 31 May 2023, once again, if allowed to do so.

² *Economic Freedom Fighters v Gordhan and others* 2020 (6) SA 325 (CC) at par 50.

- [7] It means that, even if leave to appeal be granted and the main application be dismissed, Shell will not conduct a seismic survey before the end of November 2022, approximately ten months away. The refusal of the application for leave to appeal will accordingly not have any effect on Shell until the end of November 2022.
- [8] It is highly likely that judgment in the main application would be delivered long before the end of November 2022, regard being had to the fact that the main application will be heard on 30 May 2022. That would be the case even if allowance is made for a possible postponement of the hearing, for whatever reason. The effect of the judgment in the main application will be to discharge the interim order, whether the main application is dismissed or the relief sought therein be granted, as explained above. In the circumstances, an appeal against the interim judgment will have no practical effect, certainly not before 1 December 2022. The application for leave to appeal should be dismissed on that ground alone.
- [9] Furthermore, the interim order did not determine any of the issues which will be determined in the main application. Even it could be said that the court made a finding or findings in the interim judgment which may become relevant in the main application, those findings are not final. The court considering the main application would be entitled to revisit those findings and make its own findings thereon, based on the facts before it.
- [10] I have indicated in the interim judgment that the applicants have reasonable prospects of success in the main application. I have also considered that the grant of leave to appeal would lead to a piecemeal adjudication of the litigation in the application.
- [11] I am of the opinion that, on the merits, the appeal would have no reasonable prospects of success and, in respect of the above circumstances and factors, there is no compelling reason why the appeal should be heard. In all the circumstances, it would not be in the

interests of justice to grant leave to appeal against the interim judgment to the first, fourth and fifth respondents.

[12] The first respondent was represented by one counsel, the fourth and fifth respondents by three counsel and the applicants by three counsel. There was no objection by any of the parties that the costs of three counsel should be allowed. In my view it was a reasonable precautionary measure. The cost of three counsel should be allowed.

[13] In the result, it is ordered that:

13.1. The application by the first, fourth and fifth respondents for leave to appeal against the judgment delivered on 28 December 2021 be and is hereby dismissed.

13.2. The first, fourth and fifth respondents shall pay the costs of the application referred to in paragraph 1 above, jointly and severally the one paying the other to be absolved, such costs to include the cost attendant upon the employment of three counsel, where so employed.



G H BLOEM
Judge of the High Court

For the applicants:

Ms E Webber and Ms N Stein, instructed by Legal Resources Centre and Richard Spoor Inc Attorneys, Cape Town and Huxtable Attorneys, Grahamstown, the heads of argument having been drafted by Mr T Ngcukaitobi SC, Ms E Webber and Ms N Stein.

For the first respondent:

Mr A Beyleveld SC, instructed by the State Attorney, Port Elizabeth and Whitesides Attorneys, Grahamstown.

For the fourth and fifth respondents:

Mr T Motau SC, Mr A Friedman and Ms Pudifin-Jones, instructed by Shepstone & Wiley, Umhlanga Rocks and Netteltons Attorneys, Grahamstown.

Date of hearing:

10 February 2022.

Date of delivery of judgement:

17 February 2022.