IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 3491/2021

In the matter between:

SUSTAINING THE WILD COAST NPC	First Applicant
MASHONA WENT DLAMINI	Second Applicant
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
NTSHINDISO NONGCAVU	Fourth Applicant
SAZISE MAXWELL PEKAYO	Fifth Applicant
CAMERON THORPE	Sixth Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

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

THIRD, FOURTH AND FIFTH RESPONDENTS' HEADS OF ARGUMENT

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1 This is an application to interdict an ongoing seismic survey being conducted by the fifth respondent ("Shell") in terms of an exploration right held by the fourth respondent ("Impact").

THE DEFECTS IN THE APPLICATION – OVERVIEW

2 This is the second urgent application heard by this Court in the past two weeks (judgment in the first was delivered on 3 December 2021 – precisely two weeks before the hearing of this matter) concerning this seismic survey. As this Court (Govindjee AJ) had occasion to say in the first urgent matter ("the BDSA application" or the "BDSA judgment" depending on the context)[1]:

2.1 The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court.[2]

2.2 An application to interdict a seismic survey off the Wild Coast, following millions of dollars of expenditure, is not common place.[3]

3 This is, indeed, an extraordinary case. The applicants have admitted in their founding affidavit that they knew about the BDSA application.[4] But, for totally unacceptable reasons, they elected not to join that case. They instead sought to bring their own application, in which they ask for the identical relief in Part A and

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1 Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others Case no 3865/2021 3 December 2021 (ECD) ("BDSA judgment") at para 35

2 BDSA Judgment at para 25, quoting the Eriksen Ltd case (infra)

3 BDSA Application at para 8

4 FA para 123, p 46.

Part B of the notice of motion. So, they put themselves in the unusual position of appropriating to themselves three bites of the cherry (the first urgent, this urgent and Part B of their notice of motion) to obtain an interdict to stop the seismic survey. And all three bites of the cherry (the first, though, having now been dismissed) will be final in effect because Shell has explained that, if the survey is stopped in its tracks now, it will effectively bring an end to the whole exploration project.[5]

4 The whole purpose of interim relief is to preserve the status quo pending a dispute to be heard in due course. Traditionally, the dispute in due course was an action, at which evidence would be led. Recognising that interim measures might be needed to prevent the trial from being rendered moot by conduct of one of the parties, our courts fashioned the remedy of interim relief. Another good example of a process where freezing the status quo might be necessary is pending a judicial review, in which the applicant needs the opportunity to supplement its case having seen the record. By the time that the review is heard, irreparable steps might have been taken in terms of the unlawful decision.

5 In substance, what the applicants have to show in this case is that, if they are not granted an interim interdict now, they will not be able to get redress when Part B is heard in a few weeks' time. Because of this, this Court can be certain: since the applicants seek the same relief, on the same papers, in Part B, they will seek to set Part B down on the ordinary roll as soon as the recess is over. So, again,

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5 AA para 128.4 p 589.

the applicants need to show that, if they are not granted an interim interdict now, the Part B relief will be meaningless, even if they win that application. This comes up under more than one legal heading. It is the test to make out a case for urgency under rule 6(12).[6] It is the test to satisfy the requirement of irreparable harm in the context of an interim interdict. And it is relevant to the balance of convenience enquiry too.

6 In the argument below, it will be shown that Shell and Impact stand to lose hundreds of millions of Rands and will have to walk away from the project of surveying for oil and gas if the interim interdict is granted. There will be many observers of this case who will not be worried about that. Indeed, if one looks carefully at the applicants' papers, they are premised on the notion that any evidence of possible environmental harm as a result of the seismic survey is sufficient to stop it in its tracks, even if this means the loss of all of the time and money invested in the project.

7 But the court will be astute to the fact that, as important as the environmental right is, all of the environment-law cases engage a balancing act in order to ensure that commerce proceeds and development (to the benefit of all South Africans) occurs without causing undue harm to the environment. The evidence in this matter demonstrates that seismic surveys are, to begin with, relatively benign activities. They do not involve "blasting" as the applicants have so emotively claimed throughout their papers. They involve the generation of

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6 The detailed principles on urgency are addressed below

seismic waves through compressed air directed at the sea-bed.[7] But, more importantly, they may only proceed if detailed mitigation measures are adopted by the operator – in this case, Shell. And the evidence in this case shows that Shell is using some of the most advanced mitigation measures in the world – measures which exceed not only international standards but the requirements of the Environmental Management Programme ("EMPr") itself.

8 Although the applicants have paid lip-service to the need to show irreparable harm, they have pointed to nothing irreparable which will happen if the survey is not stopped in the next week, two weeks or three weeks. And we have, with respect, to be frank with ourselves and each other about what this case is about. If, on the basis of the facts pleaded by the applicants in their founding papers, this Court believes that the requirements of interim relief have been met, a profound precedent would have been set. It will mean that, in substance, an applicant may enter a hotly contested scientific terrain, point to, as of yet, inconclusive evidence of speculative harm and, just by doing so, stop a multimillion Rand project in its tracks. And, it can do so, even when the very Minister responsible for issuing environmental authorisations has said in this matter that he is satisfied that Shell has the necessary environmental authorisations in place.[8]

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7 See BDSA judgment at para 1

8 Minister's AA para 4, pp 1433.

9 An interim interdict is an extraordinary remedy. For the reasons given below, it is respectfully submitted that the applicants have not remotely cleared the hurdle of justifying the extraordinary remedy which they seek.

THE FUNDAMENTAL MISUNDERSTANDING OF CIVIL PROCEDURE

10 It is trite that affidavits are to set out clearly and simply the facts on which the relevant party relies "without argument".[9] In one of the leading cases on this topic, *Swissborough Diamond Mines (Pty) Ltd*,[10] the Court pointed out that the "facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter". And, as early as 1963, the Appellate Division held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it, even if the arguments are not specifically mentioned in the papers, as long as the arguments arise from the facts alleged.[11] The one exception to all of these rules may be that an applicant in a judicial review is obliged to plead its review grounds (which of course constitute argument and not evidence) clearly.[12]

11 Despite this, at roughly 7h15 this morning (16 December 2021), the applicants filed an unsigned replying affidavit in which they essentially argue that Shell has

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9 See, for example, Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 79I

10 Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324

11 Van Rensburg v Van Rensburg 1963(1) SA 505 (A) at 509-510

12 See, for example, Palala Resources (Pty) Ltd v Minister of Minister Resources and Energy 2014 (6) SA 403 (GP) at 411

"made no effort whatsoever to explain why it feels entitled to ignore the plain text of the MPRDA and the NEMA" and has not offered the same argument as the Minister – ie, that the EMPr constitutes an environmental authorisation under NEMA.[13] They seem to advance this argument in order to bolster their submission that they have established either a strong prima facie right or a clear right.[14]

12 Shell made clear in its answering affidavit that it considers itself to be acting lawfully.[15] It expressly said that it would explain its position in argument,[16] as it was not only entitled, but on the principles above, obliged to do. With respect, the presumptuousness of the applicants in this matter is astounding. They have breached every rule of simple procedure imaginable in this case: first by deliberately appropriating to themselves a second bite of the cherry by declining to participate in the first matter, then by requiring Shell to respond to over 500 pages of founding papers in less than a week, then by promising in a case-management meeting to file their reply by 16h00 on 15 December and then simply reneging and filing it (unsigned) more than 15 hours late (as these heads are being finalised, it remains unsigned). They now seek to criticise Shell for following a basic rule of civil procedure (no argument in affidavits) in circumstances where the obvious priority of the answering affidavit was to deal

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13 RA at paras 12-13, p 1438.

14 RA at paras 14-15

15 AA at paras 142 p 625 and 156 p 627

16 AA at para 199 p 638; para 200 p 638; para 201 p 638

with the copious evidence directed at Shell, some of it almost a week after the application was launched.

13 As demonstrated below, the applicants have established no right whatsoever. The opportunistic attempt to suggest otherwise in the replying affidavit should be rejected.

THE REQUIREMENTS OF INTERDICTORY RELIEF

14 It is trite that the requirements that an applicant must satisfy in order to obtain interim relief are the following:

14.1 A prima facie right to the relief sought in the main proceedings;

14.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

14.3 The balance of convenience favours the granting of interim relief; and

14.4 The applicant has no alternative remedy.[17]

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[17] See Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A) at 691C-E

NO IRREPARABLE HARM

15 The applicants have to demonstrate that, if they do not obtain an interim interdict now but succeed in Part B, they would have suffered irreparable harm by the time that the order is granted in Part B.

The context in which the arguments on irreparable harm are made

16 Before we address the applicants' case on irreparable harm, it is necessary to give the proper context in which the case on irreparable harm must be understood:

16.1 First, there have been 35 seismic surveys operated offshore in South Africa, 11 of which were conducted in the last five years. There is, to date, **no evidence globally showing serious injury, death or stranding of marine mammals from exposure to sound from seismic surveys when the appropriate mitigation measures are implemented**.[18]

16.2 Second, Shell has implemented detailed and onerous mitigation measures to minimise harm to marine life:

16.2.1 There are seasonal restrictions in place, to avoid the whale migration window.[19]

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18 AA para 29 pp 546-7

19 AA para 136.7.4.1 p 598.

16.2.2 The airgun used in the survey is one of the lowest volume airguns used at such depths, meaning that the sound at source level is lower.[20]

16.2.3 The survey area has been carefully drawn to ensure that it is as small as possible and that no unnecessary or speculative exploration is carried out.[21]

16.2.4 The survey lines are orientated in such a way that minimises the duration of the survey.[22]

16.2.5 The recommended buffer zone for a Marine Protected Area (**MPA**) is 2km. Shell has adopted a 5km buffer zone around MPAs.[23] No survey activities will be undertaking in any declared MPA.[24]

16.2.6 The typical mitigation and exclusion zone has been extended from 500m to 800m to provide further protection to marine mammals, particularly low frequency cetaceans.[25]

16.2.7 Operational measures include the following:

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20 AA para 136.7.4.2 p 599.

21 AA para 136.7.4.3 p 599.

22 AA para 136.7.4.4 p 599.

23 AA para 136.7.4.5 p 599.

24 AA para 41 p 549.

25 AA para 136.7.4.6 p 599.

16.2.7.1 Prior to any start, there will be a 60 minute pre-watch period.[26] This means that the procedure may only commence if, for a period of at least 60 minutes, no marine animals are observed in the mitigation zone of 800m around the sound source.[27]

16.2.7.2 Passive Acoustic Monitoring ("PAM") will run 24 hours a day for the full duration of the survey.[28]

16.2.7.3 Independent Marine Mammal Observers ("MMO") will be on board the seismic vessel to observe and record responses of marina fauna to the survey. The MMOs are able to request that the start be delayed or the survey be suspended if required for the safety of marine life.[29]

16.2.7.4 Each time the airgun is initiated, it will be carried out as a "soft-start", meaning that the sound source is ramped up slowly to full sound over a period of a minimum of 20 minutes. This allows marine life to detect it and move away from the source.[30]

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26 AA para 136.7.4.7 p 600.

27 AA para 57.3 p 554.

28 AA paras 136.7.4.7 p 600; 138.5.3 p 611 and 139.2.6 p 614.

29 AA para 38 p 549.

30 AA para 39 p 549 and 57.3 p 544.

16.2.8 All these measures taken together make for comprehensive mitigation of any of the adverse effects of the seismic survey.

16.3 Thirdly, this Court has, in the past two weeks, confirmed in the first urgent application brought in respect of this seismic survey (on precisely the same answering evidence as is now before this Court) that there is "no basis on the papers to suggest that the detailed mitigation strategy (emanating from a 600 page EMPr) is inadequate or to gainsay that Shell will implement the promised range of mitigation measures and do so properly. Indeed, Shell is obliged to do so in terms of the EMPr to ensure that its activities remain in the low risk-band."[31] In other words, this Court has made these remarks in respect of the precise mitigation strategy summarised in paragraph 16.2 above.

16.4 Fourthly, since this Court gave its judgment in the first urgent, the seismic survey has begun and Shell has put up evidence to show that the mitigation measures are working exactly as planned.[32]

17 The considerations mentioned above are crucial to understand the context in which this application is brought. Against that background, the applicants require overwhelmingly strong evidence to demonstrate the type of irreparable harm necessary to be granted interim relief.

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31 BDSA judgment at para 35

32 AA para 138.6 pp 611–612

The applicants' case on irreparable harm

18 The applicants have alleged that they will suffer irreparable harm for two reasons:

18.1 First, disrespect for "our ocean and our culture" will cause "irreparable harm to us on a spiritual and cultural level through upsetting our ancestors".[33]

18.2 Secondly, the EMPr itself contemplates harm and once the "blasting begins" the "damage will be irreversible".[34]

The applicants have simply demonstrated nothing irreparable

19 These allegations, do not, with respect, remotely satisfy the test for irreparable harm.

<u>The spiritual and cultural dimension</u>

20 The applicants in essence say that, simply by virtue of the seismic survey proceeding, their ancestors will be offended and this is irreparable.

21 It is, of course, necessary for every South African to respect the spiritual and cultural beliefs of every other South African. However, we need to be clear that

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33 FA para 154.1 p 55

34 FA paras 154-5 pp 55-6

the survey will be conducted at distances of 20 to 80km from the shoreline.[35] The *closest* the survey will come to the shoreline is 20km. This is equivalent to the land distance from Makhanda to Blaaukrantz Bridge.

22 In these circumstances, and given how far the survey site is from the coastline where the applicant communities reside, this Court is being asked to recognise an unprecedented category of harm. It is being, in substance, asked to allow the subjective cultural and spiritual views of the applicants to trump the interests of Shell, and more importantly, the detailed structure of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") and the National Environmental Management Act 107 of 1998 ("NEMA"). Because in this regard, we have to separate two issues: if the applicants are right that the seismic survey is unlawful, then it is unlawful. And then the only debate is: what is the proper procedure to challenge this unlawfulness? But the question of irreparable harm is an entirely separate enquiry. In the context of this element of the applicants' case, this Court has to ask itself: if Part B is heard, and granted, in a month's time, will the applicants suffer irreparable cultural and spiritual harm?

23 At a practical level, this allegation is impossible to sustain. The applicants deliberately chose not to intervene in the BDSA application, which was heard **before** the seismic survey began. In doing so, they deliberately took the risk that the survey would have commenced by the time that their urgent application was heard. And now the evidence shows that the survey would have proceeded for

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35 AA para 104 p 570.

roughly 10 days by the time of argument in this matter; and of course, this Court requires at least some time to consider its judgment. So, this Court is being placed in the awkward position of being asked to find irreparable cultural and spiritual harm in the form of offence to ancestors arising from something which has already started. How do we quantify this? How to do we assess the impact of ten days' worth of alleged offence versus four weeks (or whatever the relevant period of time might be)? This is simply not addressed on the papers and is conceptually impossible to determine.

24 At a principled level, the allegation is also impossible to sustain. If this Court recognises this form of harm as irreparable (justifying the granting of an interim interdict in respect of major projects of the type relevant to this case), then the subjective cultural or spiritual views of every South African could, in principle, be used to halt any project, even kilometres away. As rich as our Constitution is, this has never remotely been our law.

The "irreversible" harm to the sea

25 We need to be very precise about what the applicants have alleged:

25.1 In the founding affidavit, they say, in general, unsubstantiated terms, that "once the blasting of the sea commences, damage will be irreversible".[36]

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36 FA para 155 p 56

25.2 In one of the supporting affidavits, on behalf of the third applicant, the applicants say that the survey "may have irreversible, harmful and disastrous effects on the coastal environment, marine life and our own culture, including our fishing practices".[37]

25.3 In the supplementary founding affidavit, filed on 7 December, the applicants attempted to bolster their case on harm by filing expert evidence. One of the supporting affidavits was filed by Dr Nowacek. In purporting to summarise the findings of Dr Nowacek, the deponent to the main supplementary founding affidavit (ie, the same person who signed the initial founding affidavit on behalf of all of the applicants) said that Dr Nowacek's evidence shows that the "seismic survey may cause irreparable harm to species at both individual and population levels". However, a few days after the affidavit was served on the respondents, the applicants' attorneys wrote a letter in which they retracted this allegation.[38] They subsequently filed an amended page of the supplementary founding affidavit showing this allegation crossed through.[39] This constitutes an important concession that one of the applicants' leading experts **has not** alleged that any irreparable harm will be caused by the survey.

25.4 In the supplementary founding affidavit, the deponent also refers to a supporting affidavit of Mr Lynton Burger. Reference is made to an "open

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37 Affidavit of Mncedi Mhlangala, para 54 p 136

38 See AA para 133 p 592

39 Supplementary Affidavit at para 12 p 332

letter", which Mr Burger and several colleagues signed. In the letter, which is annexed to Mr Burger's affidavit, it is stated that there is a "growing body of evidence pointing to the immediate and long-term, and largely unmitigable, negative impacts (including irreparable harm) of this invasive method on marine creatures".[40] However, this apparent risk of irreparable harm is never explained. It is simply asserted in the letter and never substantiated.

25.5 Mr Burger makes a similar assertion – ie, that "many studies and expert reviews quote irreparable damage" – in a document which he annexes to his supporting affidavit.[41] But, again, this "irreparable damage" is never explained.

26 The only example of harm to the applicants' fishing interests is against them, not for them. They point to a "Chinese" vessel which docked 900m from the shoreline and say that, for the two days that it was there, they did not catch any fish.[42] As Shell has pointed out, this serves to confirm Shell's contention that impact on the location of fish, should there be any, will be temporary. And this is of course proximate to the survey site, not 19km away.[43]

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40 Supplementary Affidavit at para 19 p 336

41 Papers p 472

42 Nongcavu Affidavit at para 21 p 301

43 AA para 177 p 634

27 It can be seen from the above that the applicants have not made out a case on irreparable harm in their founding papers. They cannot be granted an interim interdict merely be asserting that they will suffer irreparable harm. They need to show, with reference to actual allegations, that they have a reasonable apprehension that, by the time Part B is heard, they would have suffered something irreversible. By failing to explain how that may be so, their founding papers cannot support a request for interim relief.

28 We have already referred above to the unsigned replying affidavit which was emailed on the morning of the day on which these heads of argument are due. In it, the applicants attempt to bolster their case on irreparable harm. In the first place, as we explain below in a different context with reliance on the *Tendele* judgment of the SCA,[44] any attempt to make out a case in reply is, as the SCA put it, "too late". But, in any event, the reply does nothing to advance the case on irreparable harm. The allegations in the reply take two forms: (a) an allegation that it is expensive to conduct the relevant research and so in cases of doubt one must apply caution and assume harm and (b) various allegations, taking a similar form to those in the founding affidavit, of harm to culture and livelihood. What is strange about this section of the replying affidavit is that, despite conceding that Dr Nowacek has not given evidence of irreparable harm, the applicants include his evidence under the heading of irreparable harm.[45] We mention this not to take a cheap technical point. It is evidence of the overarching problem with the

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44 The citation is given below

45 RA at para 100

applicants' case. They conflate allegations of harm with allegations of irreparable harm. They are not the same thing. The applicants, even in reply (which would have been impermissible anyway) have not pointed to any tangible, irreparable harm, arising from the survey.

29 In addition, the applicants' insistence that Shell must take a precautionary approach in the absence of evidence of irreparable harm is misplaced. The applicant bears the onus of establishing the requirements of an interim interdict, one of which is the reasonable apprehension of irreparable harm. The applicants must therefore establish that there is irreparable harm. It is not enough (in an application for an interim interdict) to say that although there is no evidence of irreparable harm, Shell must take a precautionary approach and therefore be interdicted from carrying out the survey. That is not the test.

Summation on irreparable harm

30 We deal below, when considering the balance of convenience, with some of the examples of harm on which the applicants rely. However, the discussion above demonstrates that, on their own pleaded version, the applicants have failed to make sufficient allegations to sustain a claim based on irreparable harm. For this reason alone, the application must be dismissed.

NO PRIMA FACIE RIGHT – PART B WILL INEVITABLY FAIL

31 For the reasons set out below, we submit that the application for interim relief must fail because the applicants are wrong on the law. We substantiate this

contention below, first by setting out the regulatory landscape relevant to this case; and then, secondly, by explaining why, in our submission, the EMPr in terms of which the seismic survey is being conducted constitutes a valid environmental authorisation under NEMA.

The regulatory landscape applicable to this case

32 It is essential to a proper understanding of the legal arguments discussed below, for us to start by explaining the regulatory context in which this application is brought.

The exploration right and the MPRDA

33 On 1 March 2013, the Petroleum Agency of South Africa ("PASA") accepted an application submitted by the fourth respondent ("Impact") for an exploration right as envisaged by section 79 of the MPRDA.[46] At that time, section 79 of the MPRDA read as follows:

> "**79. Application for exploration right.**—(1) Any person who wishes to apply to the Minister for an exploration right must lodge the application—
>
> (*a*) at the office of the designated agency;
>
> (*b*) in the prescribed manner; and
>
> (*c*) together with the prescribed non-refundable application fee.
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> (2) The designated agency must, within 14 days of the receipt of the application, accept an application for an exploration right if—

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46 FA para 85 p 36

no other person holds a technical co-operation permit, exploration right or production right for petroleum over the same land and area applied for.

(*a*) the requirements contemplated in subsection (1) are met;

(*b*) no other person holds a technical co-operation permit, exploration right or production right for petroleum over any part of the area; and

(*c*) no prior application for a technical co-operation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.

(3) If the application does not comply with the requirements of this section, the designated agency must notify the applicant in writing within 14 days of the receipt of the application and provide reasons.

(4) If the designated agency accepts the application, the designated agency must, within 14 days from the date of acceptance, notify the applicant in writing—

(*a*) to notify and consult with any affected party; and

(*b*) **to submit an environmental management programme in terms of section 39 within a period of 120 days from the date of the notice**.

(5) Any technical co-operation permit in respect of which an application for an exploration right has been lodged in terms of subsection (1) shall, notwithstanding its expiry date, remain in force until such right has been granted or refused."[47]

34 It may be seen that, in terms of section 79 as it read at the time, an applicant for an exploration right had to submit an EMPr to support its application. Impact duly did so.[48] At the time (because the provision has subsequently been repealed), section 39 of the MPRDA gave the details of what was to be contained in an EMPr. It provided as follows:

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47 It should be noted that there appears to be an error in the way that section 79(2) is presented. The part reading "no other person holds a technical co-operation permit. . ." ought to have been in sub-section (a), with the rest to follow. However, this is how the provision was published in the original Government Gazette.

48 The EMPr appears at p 644 of the paginated papers. See also FA paras 85 to 88 pp 36-7

39. Environmental management programme and environmental management plan.—(1) Every person who has applied for a mining right in terms of section 22 must conduct an environmental impact assessment and submit an environmental management programme within 180 days of the date on which he or she is notified by the Regional Manager to do so.

(2) Any person who applies for a reconnaissance permission prospecting right or mining permit must submit an environmental management plan as prescribed.

(3) An applicant who prepares an environmental management programme or an environmental management plan must—

(*a*) establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;

(*b*) investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations on—

(i) the environment,

(ii) the socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and

(iii) any national estate referred to in section 3 (2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), with the exception of the national estate contemplated in section 3 (2) (*i*) (vi) and (vii) of that Act;

(*c*) develop an environmental awareness plan describing the manner in which the applicant intends to inform his or her employees of any environmental risks which may result from their work and the manner in which the risks must be dealt with in order to avoid pollution or the degradation of the environment; and

(*d*) describe the manner in which he or she intends to—

(i) modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;

(ii) contain or remedy the cause of pollution or degradation and migration of pollutants; and

(iii) comply with any prescribed waste standard or management standards or practices.

(4) (*a*) Subject to paragraph (*b*), the Minister must, within 120 days from the lodgement of the environmental management programme or the environmental management plan, approve the same, if—

(i) it complies with the requirements of subsection (3);

(ii) the applicant has complied with section 41 (1); and

(iii) the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative impacts on the environment.

(*b*) The Minister may not approve the environmental management programme or the environmental management plan unless he or she has considered—

(i) any recommendation by the Regional Mining Development and Environmental Committee; and

(ii) the comments of any State department charged with the administration of any law which relates to matters affecting the environment.

(5) The Minister may call for additional information from the person contemplated in subsection (1) or (2) and may direct that the environmental management programme or environmental management plan in question be adjusted in such way as the Minister may require.

(6) (*a*) The Minister may at any time after he or she has approved an environmental management programme or environmental management plan and after consultation with the holder of the reconnaissance permission, prospecting right, mining right or mining permit concerned, approve an amended environmental management plan or environmental management programme;

(*b*) For the purposes of paragraph (*a*), subsection (4) applies with the necessary changes.

(7) The provisions of subsection (3) (*b*) (ii) and the subsection (3) (*c*) do not apply to the applications for reconnaissance permissions, prospecting rights or mining permits."

35 After the EMPr was approved on 17 April 2014, the exploration right was granted on 29 April 2014.[49]

36 As this Court explained in its judgment in the first urgent application, the exploration right was renewed on 17 December 2017.[50] A second application for

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49 FA para 88 p 37

50 BDSA judgment at para 16

its renewal was made in May 2020 and was granted in August 2021.[51] The executed renewed exploration right, which was executed on 26 August 2021, forms part of the papers in this matter.[52]

37 The renewed exploration right (ie, the right issued on 26 August 2021) is the legal instrument which authorises the conducting of the seismic survey. In this regard:

37.1 Section 81(2) of the MPRDA provides that, when an applicant wishes to renew an exploration right, it must (a) issue a report in which it shows compliance with exploration results already obtained and (b) submit a detailed work exploration programme for the renewal period.

37.2 The notarial deed of execution of the exploration includes the work exploration programme and constitutes an authorisation to the holder to conduct the exploration activities set out in that programme. This is made clear in Paragraph B, under the heading “NOW THEREFORE THE EXPLORATION RIGHT IS HEREBY RENEWED AS FOLLOWS”.[53]

37.3 In this case, when annexure A (the map showing the area covered by the right) is read with annexure B (the work programme setting out the detail of the work to be done), it is clear that the exploration right authorises the survey which is currently underway off the Transkei/Algoa coast.[54]

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51 BDSA judgment at para 16

52 Annexure HM12 to the AA p 1404.

53 Annexure HM12 to the AA p 1411.

54 Annexure HM12 to the AA p 1414.

38 Section 81, which was amended in December 2014, reads as follows (and it read this way at the material time – ie, when Impact applied for the renewal of the right in May 2020):

> **"Application for renewal of exploration right.**—(1) Any holder of an exploration right who wishes to apply to the Minister for the renewal of an exploration right must lodge the application—
>
> (*a*) at the office of the designated agency;
>
> (*b*) in the prescribed manner; and
>
> (*c*) together with the prescribed non-refundable application fee.
>
> (2) An application for renewal of an exploration right must—
>
> (*a*) state the reasons and period for which the renewal is required;
>
> (*b*) be accompanied by a detailed report reflecting the exploration results, the interpretation thereof and the exploration expenditure incurred;
>
> (*c*) be accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation; and
>
> (*d*) include a detailed exploration work programme for the renewal period.
>
> (3) The Minister must grant the renewal of an exploration right if the application complies with subsections (1) and (2) and the holder of the exploration right has complied with the—
>
> (*a*) terms and conditions of the exploration right is not in contravention of any relevant provision of this Act or any other law;
>
> (*b*) exploration work programme; and
>
> (*c*) conditions of the environmental authorisation.
>
> (4) An exploration right may be renewed for a maximum of three periods not exceeding two years each.
> (5) An exploration in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused."

NEMA

39 Section 24(1) of NEMA provides that “the potential consequences for or 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.” NEMA says that the term “competent authority” “in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity”.

40 Section 24(2)(a) then provides that the Minister (ie, the environment Minister) may identify “activities which may not commence without environmental authorisation from the competent authority”. The term “environmental authorisation” “when used in Chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. Section 24 appears in chapter 5. This definition therefore applies to the term, as used in section 24.

41 Section 24C of NEMA identifies the method to be used to determine the identity of the “competent authority”. Section 24C(2A)(a) of NEMA makes clear that, where the listed activity is directly related to “exploration of a mineral or petroleum resource” the Minister of Mineral Resources and Energy is the competent authority.

42 The identification of the competent authority is also addressed by way of regulation:

42.1 On 4 December 2014, four sets of regulations were published simultaneously.[55] These were the main Environmental Impact Assessment Regulations, 2014 ("the EIA Regulations")[56] and then three so-called "Listing Notices".[57] As the name suggests, the Listing Notices serve the purpose of listing the various activities requiring environmental authorisation under NEMA.

42.2 Each Listing Notice contains a few short provisions, mainly dealing with its purpose (ie, to list activities for the purposes of section 24 of NEMA and to identify the competent authority or authorities under section 24 of NEMA) and definitions. It then contains an appendix (Appendix 1, in all three listing notices), which lists all of the listed activities covered by the notice.

42.3 At the beginning of each of the Appendices in each of the Listing Notices, it is provided that the competent authority for a "mining application" is the Minister responsible for mineral resources (ie, the first respondent in this application). In each of the Listing Notices, in section 2 of each notice, the term "mining application" is defined as "an application for an environmental authorisation for a permission, right, permit or consent

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55 These are GNR982, GNR983, GNR984 and GNR985

56 GNR982

57 These are GNR 983, GNR984 and GNR985

required in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) and includes hydraulic fracturing and reclamation."

42.4 So, as we stand now (ie in 2021 as opposed to 2013 when application was made for the exploration right) any party which needs an environmental authorisation under the EIA Regulations, 2014 in respect of any activity covered by a permission, right, permit or consent under the MPRDA, must apply to the Minister of Mineral Resources and Energy for the environmental authorisation.

Act 62 of 2008

43 There is one more piece to the regulatory puzzle. The substantive amendments to NEMA, which introduced the so-called "One Environmental System", were introduced by the NEMA Amendment Act, Act 62 of 2008 (for various reasons not important here, the One Environmental System only finally came into effect in December 2014). Although Act 62 of 2008 is an Amendment Act, it also contained substantive provisions. It is not particularly easy to find, and so we file a copy of the Act together with these submissions.

44 Section 12 is important for present purposes. It provides:

"12. Transitional provisions –

(1) Anything done or deemed to have been done under a provision repealed or 25 amended by this Act –

(a) remains valid to the extent that it is consistent with the principal Act as amended by this Act until anything done under the principal Act as amended by this Act overrides it; and

(b) subject to paragraph (a), *is* considered to be an action under the corresponding 30 provision of the principal Act as amended by this Act.

(2) An application for authorisation of an activity that is submitted in terms of Chapter 5 of the principal Act and that is pending when this Act takes effect must, despite the amendment of the principal Act by this Act, be dispensed with in terms of Chapter 5 of the principal Act as if Chapter 5 had not been amended. 35

(3) Section 24G of the principal Act applies with the changes required by the context in respect of any activity undertaken in contravention of section 22 of the Environment Conservation Act, 1989 (Act No 73 of 1989), if such activity is a listed activity under the principal Act.

(4) *An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act*, *2002* (*Act No 22 of 2002*) *immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act*.

(5) (a) Notwithstanding sub-section (4), the Minister of Minerals and Energy may direct any holder or any holders of an old order right, if he or she is of the opinion that the prospecting, mining, exploration or production operations in question are likely to result in unacceptable pollution, ecological degradation or damage to the environment, ecological degradation or damage to the environment, to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of the principal Act as amended by this Act.

(b) For the purposes of this sub-section, ‘Minister of Minerals and Energy’, ‘holder’ and ‘holder of an old order right’ have the meanings assigned to them in section 1 of the principal Act as amended by the Act.

(6) Any appeal lodged in terms of section 96 of the Mineral and Petroleum Resources Development Act, 2002, against a decision in respect of environmental aspects, that is pending on the date referred to section 14(2) (b) of the National Environmental Management Amendment Act, 2008 must be dealt with in terms of the Mineral and Petroleum Resources Development Act, 2002.

(7) An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the Mineral and Petroleum Resources Development Act, 2002 that is pending on the date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, must be dispensed of in terms of that Act as if that Act had not been amended.” (My emphasis)

45 This provision ultimately came into effect on 8 December 2014.

Summary of Shell's arguments on the law

46 In short, Shell's position is the following:

46.1 On the basis of SCA authority discussed below, the applicants' case is fatally flawed. In order to substantiate their contention that Shell requires an environmental authorisation under NEMA, the applicants had to allege that the seismic survey constitutes a listed activity in terms of section 24(2) of NEMA (see paragraph 40 above) and identify the listed activity in question. They have failed to do so, which is fatal to their case.

46.2 In any event, the High Court has held that an EMPr approved under the MPRDA before 8 December 2014 constitutes an environmental authorisation under NEMA. Since Shell and Impact hold a valid EMPr which was approved under the MPRDA before 8 December 2014 (it was approved in April 2014), they hold an environmental authorisation under NEMA. This undermines the applicants' whole case on illegality.

46.3 Lastly, the approach adopted by the High Court is confirmed in the EIA Regulations, 2014.

47 Each of these contentions is explained below.

Failure to plead a listed activity

48 In the recent decision of the Supreme Court of Appeal in *Tendele Coal Mining (Pty) Ltd* ("Tendele SCA"),[58] the SCA considered an appeal against a decision of the High Court (discussed in more detail below) dismissing an application to interdict certain mining operations. The case of the applicants in the High Court (appellants in the SCA) was that the mining operations were unlawful because, inter alia, the mine required (and did not have) an environmental authorisation under NEMA.

49 The majority of the SCA (four judges out of five) dismissed the appeal without entering the merits – ie, without considering whether an environmental authorisation under NEMA was necessary. In dismissing the appeal, it said the following:

49.1 In motion court, the founding affidavit stands as the evidence and the pleadings. A party seeking relief must set out clearly in its founding affidavit both the issues and the evidence on which it relies to discharge the onus resting on it.[59]

49.2 It is impermissible for an applicant to make out a case in reply.[60]

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58 Global Environmental Trust v Tendele Coal Mining (Pty) Ltd [2021] 2 All SA 1 (SCA) ("Tendele SCA")

59 Tendele SCA (supra) at para 95

60 Tendele SCA (supra) at para 96

49.3 The interdict sought by the applicants was far reaching – it would have the effect of closing the respondent mine. “More the reason, one would think, for a proper case to have been made out on the papers”.[61]

49.4 Pointing out that the appellants’ case was – relying on section 24F of NEMA – that the respondent mine should be interdicted from mining until it had obtained an environmental authorisation under NEMA, the SCA held that:

> “[107] The question of whether Tendele was required to obtain an environmental authorisation as required by section 24F(1)(a) of NEMA does not arise on the papers, because the appellants failed to allege that Tendele is conducting any of the listed activities at Somkhele. The appellants’ founding affidavit lacks the necessary allegations to sustain this ground of unlawfulness. Section 24F(1)(a) of NEMA prohibits the commencement of “listed activities” in the absence of environmental authorisation. Listed activities are those identified in terms of section 24(2).
>
> . . .
>
> [109] Any allegation that Tendele has breached section 24F(1)(a) of NEMA, at a bare minimum, had to identify: (a) the listed activity alleged to have been commenced without environmental authorisation; and (b) the date on which that activity commenced. The appellants did not plead these essential facts in their founding affidavit.”

49.5 The appellants’ allegations in their replying affidavit dealing with this issue were inadequate. The SCA held that, in any event, by the time of the replying affidavit it was already too late. The essential allegations (summarised in paragraph 49.4 above) had to be included in the founding

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61 Tendele SCA (supra) at para 101

affidavit to enable Tendele to answer them. The fact that they were not, was fatal to the appellants' case.[62]

50 It is respectfully submitted that we are, in the present case, in precisely the same position as in *Tendele*. There is no allegation, anywhere in the founding papers, as to the listed activity alleged to have been commenced without an environmental authorisation. For this reason alone, the application should be dismissed.

51 Should this Court consider it necessary to go further, we address the legal issues arising from this application in more detail below.

The High Court judgment in* Tendele *is dispositive

52 The effect of the SCA's judgment and order in *Tendele* is that the appeal against the judgment in the High Court[63] (described below as "*Tendele HC*") was dismissed. We do not for a moment suggest that the SCA endorsed the reasoning of the High Court on which we rely below – the SCA dismissed the appeal on the narrow basis summarised above. However, *Tendele HC* remains good law, which this Court will follow unless clearly wrong.

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62 Tendele SCA (supra) at para 113

63 Global Environmental Trust v Tendele Coal Mining (Pty) Ltd [2019] 1 All SA 176 (KZP) ("Tendele HC")

53 In *Tendele HC*, the court was concerned with the question of whether the respondent mine required an environmental authorisation under NEMA to conduct certain mining activities. As seen above in the discussion of *Tendele SCA*, there was, as in the present case, a lack of clarity on the question of what precise listed activity in which the respondent mine was said to be engaging (this was also an issue in the proceedings before the High Court[64]). But, in any event, the High Court confronted the same interpretive question which the applicants have raised in the present case.

54 In this regard, the High Court held as follows:

54.1 As a consequence of section 12(4) of Act 62 of 2008 (see paragraph 39 above), an EMPr approved in terms of the MPRDA before the coming into effect of the NEMA Amendment Act (ie on 8 December 2014) has the status of an environmental authorisation under NEMA.[65]

54.2 There is a presumption against the retrospective operation of statutes. On 7 December 2014, Tendele (ie, the mine) had a vested right to conduct mining operations in terms of its mining rights and the approved EMPr. If the One Environmental System intended to extinguish that right, it needed to give a clear indication to this effect. Instead of doing that, it gave the opposite indication by enacting section 12(4) of Act 62 of 2008.[66]

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64 See Tendele HC at para 69

65 Tendele HC (supra) at para 71.1

66 Tendele HC (supra) at para 71.2

54.3 Therefore, the mining right approved before 8 December 2014 had to be regarded as having been approved in terms of NEMA, as amended by Act 62 of 2008.[67]

54.4 This conclusion was bolstered by the fact that the legislature, in enacting section 12(5) of Act 62 of 2008, made express provision for the Minister of Mineral Resources and Energy (who would, of course, also be the competent authority under NEMA) to take action against a licence holder in the event that there were any environmental deficiencies in the way that it was exercising its right – this took the form of the power of the Minister, if he or she were to form the opinion that the mining operations (or exploration operations, in our case) were likely to result in unacceptable pollution, ecological degradation or damage to the environment, to require the licence holder to upgrade its EMPr.[68] Although the court in *Tendele HC* did not say this, we would add to its analysis that, if a fresh environmental authorisation under NEMA were required from 9 December 2014 onwards, section 12(5) of Act 62 of 2008 would have been superfluous.

54.5 The High Court held that this conclusion was also bolstered by the fact that, in terms of section 24L of NEMA, the Minister of Mineral Resources and Energy had the power to regard an authorisation in terms of any other legislation to be an environmental authorisation under NEMA. The High

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67 Tendele HC (supra) at para 71.3

68 Tendele HC (supra) at para 71.5

Court held that, on a proper interpretation of section 24L(4), and read in context, Tendele's EMPr was an "authorisation in terms of any other legislation". In substance, this meant that the Minister of Mineral Resources and Energy, as the competent authority, was satisfied that the EMPr adequately addresses the environmental impacts of the exercise of the right.[69]

55 The implication of the High Court's judgment for our case is the following:

55.1 As of 7 December 2014 (the right having been issued in April 2014), Impact held a valid exploration right, which was issued on the strength of a valid EMPr.

55.2 It was thus in the same position as the mine in *Tendele* on 7 December 2014. On the basis of the reasoning of the High Court in *Tendele HC*, the effect of section 12(4) of Act 62 of 2008 was to render the EMPr described in paragraph 55.1 above an environmental authorisation under NEMA.

55.3 Both *Tendele HC* and the present case concern attempts to stop a respondent acting in terms of a right issued under the MPRDA (mining right in Tendele, exploration right in the present case) long after the right in question was issued. They are, in that sense, on all fours.

55.4 We respectfully endorse the finding of the High Court in *Tendele* to the effect that, properly interpreted, the decision of the Minister of Mineral

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69 Tendele HC (supra) at paras 71.6 to 71.8

Resources and Energy to issue the mining right constituted a decision under section 24L of NEMA that the EMPr was an environmental authorisation under NEMA. But we have an even clearer case in the present matter. The Minister of Mineral Resources and Energy has filed an affidavit in which he says that, in his view, the EMPr is an environmental authorisation under NEMA.[70] This is clear and incontrovertible evidence of the application of 24L of NEMA. It is the complete answer to the applicants' case.

56 The only issue that did not arise in *Tendele HC*, but which arises in the present case, is the implication of the fact that the exploration right was renewed in terms of section 81 of the MPRDA in August 2021. It is our submission that the reasoning in *Tendele HC* applies, and demonstrates that the renewal decision was correctly made:

56.1 As shown above (see paragraph 38 above), section 81 of the MPRDA does not envisage that an applicant for renewal should apply for a new environmental authorisation. Rather, it anticipates that, as part of the renewal application, the applicant should look backwards and demonstrate compliance with the existing environmental authorisation issued as part of the granting of the exploration right.

56.2 On the reasoning of the High Court in *Tendele*, the EMPr forming part of the exploration right granted in April 2014, *was* the environmental

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70 Minister's Answering Affidavit at para 4.1 p 1433.

authorisation as envisaged by section 81 (and, of course, chapter 5 of NEMA). Therefore, every reference to "environmental authorisation" in section 81 of the MPRDA, would be a reference to the EMPr. This flows inevitably from the findings of the Court in *Tendele HC*.

The EIA Regulations

57 It will be recalled from the discussion of *Tendele HC* above that one of the main themes of the court's reasoning was a consideration of the purpose of various transitional provisions to show that the legislature clearly intended an EMPr issued under the MPRDA to constitute an environmental authorisation under NEMA. There is additional support for the reasoning of the court in *Tendele HC*, which was not addressed in the court's judgment, arising from the transitional provisions in the EIA Regulations.

58 Section 54(2) of the EIA Regulations provides that:

> "An application submitted after the commencement of these Regulations for an amendment of an Environmental Management Programme or Environmental Management Plan, issued in terms of the Mineral and Petroleum Resources Development Act, 2002, must be dealt with in terms of Part 1 or Part 2 of Chapter 5 of these Regulations."

59 Parts 1 and 2 of chapter 5 of the EIA Regulations deal with amendments to an "environmental authorisation" (ie, as envisaged by chapter 5 of NEMA). Part 1 (regulations 29 and 30) deals with amendments to an "environmental authorisation" where the amendment will not change the scope of the "environmental authorisation" and part 2 (regulations 31 to 33) deals with

amendments to an "environmental authorisation" where the amendment will alter the scope. The point for present purposes is that parts 1 and 2 of chapter 5 of the EIA Regulations envisage changes to environmental authorisations. The fact that regulation 54(2) requires changes to EMPrs issued under the MPRDA to be dealt with under these provisions is further support for the correctness of the conclusion of *Tendele HC* that an EMPr issued under the MPRDA is an "environmental authorisation". What is crucially important to recognise is that the concept of an MPRDA EMPr was abolished with the introduction of the One Environmental System in December 2014 – this is because section 39 of the MPRDA (see paragraph 34 above) was repealed at that point. So, when section 54(2) of the EIA Regulations speaks of an EMPr issued under the MPRDA, it has to be speaking of an EMPr issued before 8 December 2014 – thus serving to reinforce the reasoning of the High Court in *Tendele*.

Summation on the supposed right

60 It is submitted for the reasons given above that the premise of the applicants' entire case – that Shell and Impact needed an environmental authorisation under NEMA in order to conduct the seismic survey – is flawed. Shell and Impact *did* have such an environmental authorisation (in the form of the EMPr) and for this reason the application must be dismissed.

BALANCE OF CONVENIENCE FAVOURS SHELL

61 When it comes to the balance of convenience, we need to be upfront about the position of the respective parties – recalling, again, that we are required to

balance the prejudice which the applicants will suffer if this urgent application for interim relief is not granted against the prejudice which Shell will suffer if the interim interdict is granted.

62 The evidence shows that, if this interim interdict is granted, it will be final in effect because it will result in it being impossible, to great prejudice to Shell and Impact, for the seismic survey to be completed. As against this, the case of the applicants is, in essence, that it is expensive and time-consuming to conduct research on the impact of seismic surveys and, because there is reason to believe that they may be harmful, this one should be stopped even before Part B is determined.

63 The simple position is that, given the extensive mitigation measures which Shell is implementing (see paragraph 16.2 above), if this seismic survey is to be stopped, then no seismic survey could be permitted in South Africa. It is clear that this is the outcome that the applicants seek. If one reads their founding papers as a whole, it is clear that they are concerned about climate change and believe that there should be a categorical moratorium on exploiting hydrocarbons for fuel. They therefore object to the seismic survey because they see it as giving rise to unnecessary risk of harm to some marine species in pursuit of a fuel source which should not be used at all.

64 If this their stance, it needs to be pursued at the level of policy with the members of the executive (most notably the Minister of Resources and Energy) responsible for developing energy policy. But concerns about the ultimate drilling for hydrocarbons (permission for which could in the future be sought as a result of

data arising from the seismic survey) cannot enter the equation in this matter, especially in the context of considerations of prejudice. It is the prejudice caused by the seismic survey which needs to be assessed, and not the prejudice caused by climate change or even by drilling activities which may be authorised sometime in the future.

65 Another important point to emphasise at the outset, is a point made by this Court in the BDSA judgment (which is binding on this court, unless clearly wrong). Govindjee AJ said the following:

> "In this case, it is accepted that the applicants act not only in their own interest and in the interest of their members, but in the interests of the broader community and public at large. Any likely harm to the environment must, therefore, weigh in their favour. The issue of the likelihood of harm cannot, however, be considered on a worst-case scenario basis and separate from the range of mitigation measures imposed by the EMPr and to be implemented by Shell. The evidence before me demonstrates a significantly reduced likelihood of environmental harm in those circumstances, without suggesting fool-proof elimination of all risk."[71]

66 On the evidence before this Court now, the prejudice to Shell and Impact if the interim relief is granted would be catastrophic. And this is to be weighed against speculative harm at best.

Prejudice to Shell and Impact

67 The granting of the interim interdict will mean that Shell and Impact ("the JV") will be unable to exploit the exploration right. Exploration rights are valid for a

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71 BDSA judgment (supra) at para 37

maximum period of three years.[72] They can be renewed three times only for a period not exceeding two years for each renewal.[73] Following the expiry of the third renewal period, the holder of an exploration right must either relinquish the right or apply for a production right under section 83 of the MPRDA.

68 The initial period of the exploration right ("ER252") expired on 19 August 2017.[74] It was then renewed and this first renewal period expired on 13 March 2020.[75] ER252 was renewed for a second time with effect from 11 August 2021.[76] This second renewal period expires on 10 August 2023.[77]

69 ER252 can therefore only be renewed one more time, after which the JV will need to relinquish ER252 or apply for a production right.[78] The third renewal of ER252 must be lodged prior to its expiry. Additionally, it will require the JV to commit to drilling and exploration, involving a substantial financial commitment of US$100 million (ZAR 1,5 billion).[79] The JV needs to begin the process of deciding whether or not to apply for a third renewal six months prior to the expiry of the second renewal period i.e. by the end of February 2023.[80]

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72 Section 80(5) of the MPRDA.

73 Section 81(4) of the MPRDA.

74 Annexure HM12 to the AA, p 1409.

75 Annexure HM12 to the AA, p 1410.

76 Annexure HM12 to the AA, p 1412.

77 Annexure HM12 to the AA, p 1412.

78 AA para 123 p 586.

79 AA para 124 p 586.

80 AA para 128.1 p 588.

70 For the JV to be in a position to make a decision on whether to commit to a third renewal, the seismic survey needs to have been completed so that the JV can ascertain the prospectivity of the exploration area.[81] The data from the seismic survey will yield the required data to enable the JV to make this decision.

71 The completion of the survey is however subject to a number of constraints. It cannot be undertaken in the period from June to November owing to the migratory patterns of cetaceans.[82] After early April, wave height and wind speed make the survey a safety risk and the data quality poor.[83] The survey is estimated to take 110 to 140 days to complete, meaning that it will only be completed at the earliest end of March 2022, but any delays would push this estimate out further, compromising the survey.[84] Once the survey is complete, it will take approximately eight months to fully process all the data, after which it must be evaluated and interpreted.[85] From the first initiation of the airgun until the data can be interpreted, it is estimated to take 18 months.[86]

72 The upshot of all this information is that the granting of an interim interdict will make it impossible for the survey to be completed by the end of May 2022. Because of cetaceans' migratory patterns, the survey cannot be conducted after this period. The granting of the interim interdict would therefore mean that the JV

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81 AA para 126 p 587.

82 AA para 127.1 p 587.

83 AA para 127.2 p 587.

84 AA para 127.3 p 588.

85 AA para 127.4 p 588.

86 AA para 127.4 p 588.

cannot utilise ER252 as it will not be able to obtain the required information in order for it to decide whether or not to make the necessary capital commitments to renew the right a third time.[87] The JV cannot be expected to make a capital commitment of ZAR 1,5 billion without proper data and information available to it.

73 This will have the following knock-on effects:

73.1 The JV will be in breach of its contractual obligations under its guaranteed work programme commitments contained in the second renewal.[88]

73.2 If the survey cannot be completed by the end of April 2022, it will need to run into May. Owing to severe weather conditions at this time of year, data quality may be compromised. Additionally, if the survey is not able to run for the full 110 to 140 day period, the quantity of data will be reduced. The compromise in quality and quantity would render the JV unable to make a proper decision as to the third renewal of the exploration right. Thus, if the survey has to be postponed pending further legal proceedings in 2022, the JV will have no choice but to terminate the survey altogether.[89]

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87 AA para 128.4 p 589.

88 AA para 129.1 p 589; annexure HM12 to the AA, p 1420–1421.

89 AA para 129.2 p 590.

73.3 The JV will have to relinquish its exploration right if it does not acquire sufficient data to make a commitment to drill an exploration well during the third renewal period.[90]

73.4 Termination of the survey will result in an immediate cost of US$ 23 million (ZAR 350 million) to the JV, comprising internal partner costs and contract termination fees payable to the seismic contractor.[91]

73.5 The JV will lose its substantial investment to date. This amounts to more the US$ 45 million (ZAR 700 million).[92]

73.6 It is estimated that the total loss as a result of having to terminate the survey and subsequent loss of the exploration right would exceed ZAR 1 billion.[93]

74 If Part B is dismissed in due course, the JV would have suffered the catastrophic harm summarised in paragraph 73 above even though its rights would have been vindicated. By contrast, even if Part B is granted in due course, the applicants have failed to show that they need the protection of an interim interdict in the meantime.

The speculative harm on which the applicants rely

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90 AA para 129.3 p 590.

91 AA para 129.4 pp 590–591.

92 AA para 129.5 p 591.

93 AA para 130 p 591.

75 We have already referred above to the mitigation measures which Shell is implementing and the finding of this Court that there is no reason to believe that they will not be effective. The applicants' allegations of harm should be understood in this context, since many of the allegations in the founding papers do not adequately take the mitigation measures into account.

76 The harm relied upon by the applicants is divided into various categories.

Cetaceans

77 Dr Nowacek states noise from the seismic survey will adversely affect cetaceans in three ways: (i) by inducing a physiological stress response; (ii) by disrupting biologically essential behaviour such as vocalising, mating, or foraging; and (iii) by masking acoustic communication, including between mothers and calves.[94]

78 However:

78.1 One of the most common whale species, the South Right Whale, is not present during the survey window in the survey area. Humpback whales, the other most common species, have a peak migration period between May and November (outside of the survey window).[95] Moreover, migrating humpback whales all migrate a maximum of 16km from the

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94 Expert report of Dr Nowacek, paras 19–39 pp 380–391.

95 AA para 136.4.1 p 594.

shore, outside of the survey area which at the closest will only come within 20km of the shoreline.[96]

78.2 In addition, there is no well-established or acceptable threshold for behavioural disturbance in marine mammals.[97] Moreover, the lower the frequency, the further the sound can travel. The ocean is also full of noises, both high and low frequency, natural and man-made. Not all of these sounds or frequencies are audible to all animals and not all of these sounds are necessarily disturbing to marine life.[98]

78.3 Seismic surveys have been shown not to cause injury or any biologically significant level of disturbance when appropriate mitigation measures (such as those employed by Shell in this survey) are utilised.[99]

78.4 These considerations in addition to the extensive mitigation measures undertaken by Shell, detailed in above, indicate that there can be no reasonable apprehension of harm to cetaceans.

79 Drs Harris, Olbers and Wright state that the mitigation strategy of a soft-start designed to encourage cetaceans and turtles to swim away from the sound source has been contested and that animals are unable to avoid or out-swim the airgun arrays.[100] Physical responses have been observed to these acoustic

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96 AA para 136.4.2 p 594.

97 AA para 114.6.1 pp 580–581.

98 AA para 114.6.2 p 581.

99 AA para 114.7.1 p 581.

100 Expert report of Drs Harris, Olbers and Wright p 428.

disturbances, including soft tissue damage, embolisms, concussion in penguins, haemorrhaging, decompression sickness, and hearing impairments.[101] Stress caused by the disturbance has implications for body chemistry, sexual maturation, growth, reproduction and general survival ability.[102] In the Gulf of Mexico, male fin whales appeared to stop singing for weeks during a seismic survey, but resumed singing within a few hours after the survey ended.[103]

80 However:

80.1 Shell disputes the objectivity of these experts and, while their expertise and experience is respected, none of these experts is a cetacean or turtle expert.[104]

80.2 Be that as it may, the majority of the studies used to support the opinions of these experts were conducted in captive animals and were not from observational studies conducted in the wild.[105] Captive animals are unable to swim away from sound; wild animals are.[106]

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101 Expert report of Drs Harris, Olbers and Wright p 429.

102 Expert report of Drs Harris, Olbers and Wright p 429.

103 Expert report of Drs Harris, Olbers and Wright p 430.

104 AA paras 137.1–137.4 pp 601–602.

105 AA para 137.2 p 601.

106 AA para 137.3 pp 601–602.

Plankton

81 In respect of plankton, the applicants state that a 2017 study by McCauley et al found that a single airgun blast kills over 50% of zooplankton within a 1km radius of the seismic survey.[107] The study found decreased zooplankton abundance and noted that the "blasts" killed larval krill.[108] Drs Harris, Olbers and Wright state that depletion of zooplankton impacts food for predators and has an effect on fish eggs and larvae.[109] Furthermore, the full effects on plankton cannot be monitored or mitigated because plankton occur as vast undetected biomasses over the ocean.[110]

82 However:

82.1 There have been numerous studies on the effects of seismic surveys on plankton. These studies have shown that physiological injuries only occur fewer than 10 metres away from the airgun.[111]

82.2 Furthermore, any decline in zooplankton populations saw recovery within three days following survey completion.[112] This indicates first that harm is minimal and second that any harm is not irreparable or long lasting.

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107 Expert report of Dr Nowacek, para 16 p 349; expert report of Drs Harris, Olbers and Wright pp 431–432.

108 AA para 101 p 569.

109 Expert report of Drs Harris, Olbers and Wright p 432.

110 Expert report of Burger para 4, p 473.

111 AA para 114.2.2 pp 575–576.

112 AA para 114.2.4 p 576.

Invertebrates

83 The applicants allude to potential harm to invertebrates arising from the seismic surveys. However:

83.1 With regard to invertebrates, owing to the location of the survey and the water depths at which it is conducted, the potential impact on invertebrates is considered to be negligible.[113]

83.2 With regard to rock lobster, these animals are found at depths of 90–170m, inshore and south of the survey area. Squid occur in waters more than 100m out to the shelf edge at a 500m depth. The survey is conducted at depths in excess of 700m and offshore. Therefore the sound received by the seabed is within far-field range and will occur outside of distances at which physiological injury may occur in these animals.[114] The mitigation measures put in place coupled with the offshore location of the survey and the water depths indicate that the impact on invertebrates is negligible.[115]

Fish

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113 AA para 114.4.3 p 578.

114 AA para 114.4.1–114.4.2 p 587.

115 AA para 114.4.3 p 587.

84 In respect of fish, the applicants accept that there have been limited studies, and that, what studies have been done, have been done on fish in captivity. These studies showed transient stunning and damage to hearing organs.[116] Dr Winkler notes that there are studies which were done after the EMPr was approved that highlight the direct effects of seismic surveys on the rhythmic diurnal foraging patterns of cod in the North Sea.[117] And at least two fish species found within the survey area showed the same rhythmic diurnal foraging behaviour as the cod in the North Sea.[118] Further, although there is little evidence as to the effects on reproduction, effects on foraging patterns are likely to affect fish energy budgets and therefore their reproductive capacity.[119]

85 However,

85.1 On Winkler's own version, there is an absence of evidence as to whether the survey will or will not directly or indirectly affect certain fish species.[120] This in itself cannot amount to irreparable harm or prejudice.

85.2 Other studies have found relatively low behavioural risks for fish at far field distances (thousands of meters) from the source location.

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116 FA para 104 pp 40–41.

117 Expert report of Dr Winkler, paras 11–12 p 500.

118 Expert report of Dr Winkler, para 13 p 500.

119 Expert report of Dr Winkler, para 14 p 500.

120 Expert report of Dr Winkler, para 16 501.

Additionally, behavioural responses observed are generally of short duration.[121]

85.3 Fish are highly mobile and the soft-start mitigation mechanism would allow for them to swim away from the sound source. It is unlikely that fish would therefore be within the threshold range for injury or death and the likely impact on fish is therefore negligible.[122]

85.4 There have in fact been no conclusive studies demonstrating the cause and effect of seismic surveys on fish availability.[123]

86 Mr Russell, another of the applicants' experts, notes that when Shell's seismic surveys commenced off the coast of Namibia, there was a "sudden drop in catches" which had a "devastating economic impact on the albacore tuna industry".[124] Following this, Mr Russell notes Shell's engagement with the tuna fishing sector to design its seismic surveys to manage impacts better.[125]

87 Mr Russell's evidence does not establish prejudice:

87.1 Mr Russel's contention as to a drop in catches cannot be verified and is unsubstantiated by evidence.

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121 AA para 114.5.2 pp 579–580.

122 AA para 114.5.3 p 580.

123 AA para 141.3 pp 624–625.

124 Expert report of Mr Russell, p 514.

125 Expert report of Mr Russell, p 514.

87.2 Additionally, tuna is variable and highly dependent on environmental conditions. There is, simply put, no evidence to show that the relationship between the drop in tuna availability and the seismic surveys was causal. The variability could be attributed to any number of factors.[126]

88 Particularly with regard to Coelacanths, Dr Burton, the applicants' expert on this topic, states that there is little known, "if anything", about the impacts of a seismic survey on Coelacanths.[127] He further states that, owing to their late sexual maturity and long gestation period, the loss of even one Coelacanth would have a detrimental effect on their population as a whole.[128]

89 However:

89.1 On Dr Burton's own evidence, there have been no Coelacanths found at a depth of 400m off the coasts of East London and Port Elizabeth.[129] Dr Winkler also confirms that few Coelacanths have been found in the area of the survey since the initial first discovery of one in East London in 1938.[130]

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126 AA paras 139.2.2–139.2.3 pp 613–614.

127 Expert report of Dr Burton, para 28 p 485.

128 Expert report of Dr Burton, para 29 p 485.

129 Expert report of Dr Burton, para 11 p 480.

130 Expert report of Dr Winkler, para 17 p 501.

89.2 Although little is known about Coelacanths' ideal habitat, various technical studies of the survey area indicate that it is unlikely to be an optimal habitat for Coelacanths.[131]

89.3 It is therefore inconclusive as to whether Coelacanths even exist in the survey area, let alone that they will be harmed.

Reptiles

90 Drs Harris, Olbers and Wright note concern for turtles as a result of the survey, but note that they are less vulnerable to sound than cetaceans.[132] Turtles have exhibited some responses to seismic surveys, but their behaviour is difficult to interpret.[133]

91 Drs Harris, Olbers and Wright do say that there is a significant risk to hatchlings of loggerhead and leatherback turtles as their peak hatchling seasons are February and March, respectively. Moreover, they say that hatchlings cannot be observed by observers.[134]

92 However:

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131 AA paras 140.5–140.19 pp 616–624.

132 Expert report of Drs Harris, Olbers and Wright pp 433.

133 Expert report of Drs Harris, Olbers and Wright pp 433.

134 Expert report of Drs Harris, Olbers and Wright pp 434.

92.1 Hatchlings are born on the beaches of iSimnagaliso Wetland Park, 550km away from the survey area. They then enter the sea and move southward. There is an absence of turtles sized between 10 and 60cm where the survey is located and strandings indicate that juvenile turtles occur between Algoa Bay and Mossel Bay (230 and 635km away from the survey area, respectively).[135]

92.2 Sea turtles lack an otolith-based accelerometer system in their ears, suggesting that sea turtles are sensitive to acoustic pressure, rather than acoustic intensity or particle motion.[136]

Summation – the balance of convenience favours Shell

93 If the applicants are successful in Part B, then the seismic survey will be declared unlawful. In those circumstances, there would have been a final decision that the seismic survey which the respondents would have to accept (subject to any right of appeal). However, the applicants elected to seek an interim interdict in this case. And the discussion above demonstrates that they have pointed to absolutely no cognisable harm, irreparable or otherwise, which has to be alleviated now to preserve their rights in Part B. By contrast, Shell and Impact

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135 AA para 137.6.1 p 603.

136 AA para 137.6.3.1 p 604.

have pointed to catastrophic harm if Part A is granted and Part B is dismissed. In the circumstances, the interim interdict cannot be granted.

THE APPLICANTS HAD AN ALTERNATIVE REMEDY

94 It is important, with respect, for us not to lose sight of all of the requirements which must be satisfied before a court may grant interim relief. One of these requirements is, of course, that the applicant has no alternative remedy. Indeed, this is a requirement for a final interdict too.

95 Section 90 of the MPRDA empowers the Minister to cancel, amongst others, an exploration right in terms of section 47.

96 Section 47(1)(a) empowers the Minister to cancel an exploration right if the holder of that right is conducting its operations in contravention of the MPRDA.

97 The applicants in this case advance the argument that, by virtue of section 5A of the MPRDA, the conducting of the seismic survey contravenes the MPRDA. On the basis of this argument, the applicants could have applied to the Minister for the cancellation of the exploration right on the basis of sections 90 and 47, read with section 5A.

98 Furthermore, in *Tendele HC*, the court pointed to the fact that, in terms of section 12(5) of Act 62 of 2008, the Minister of Mineral Resources and Energy has the power to order a licence holder such as Shell to upgrade its EMPr if he held the

view that they were likely to result in unacceptable pollution, ecological degradation or damage to the environment (see paragraph 54.4 above). The Court held that, on the facts of that case, there was no evidence that a complaint had been made directly to the Minister in terms of section 12(5).[137] This would have been another remedy available to the applicants on the facts of this case.

99 The alternative remedies discussed above are not simply speculative or technical. From the perspective of the separation of powers, it is important to leave the proper enforcement of the MPRDA first, and foremost, in the hands of the executive. Intervention by the courts should be as a last resort. In this context, the availability of alternative remedies is a further important reason why this application should be dismissed. (And, by the way, a further reason why the applicants do not have reasonable prospects of succeeding in Part B; the availability of alternative remedies is an obstacle to final interdictory relief too.)

100 Respect for the separation of powers is also the reason why the contention of the applicants in their replying affidavit that they have no alternative remedies, is of no assistance. In their replying affidavit, the applicants state that recourse under the MPRDA is not a viable alternative remedy because “the Minister’s mind is not open to it”.[138] This does not in itself render the remedy not viable. It simply means that, on an application for that remedy, the applicants might not have been

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137 Tendele HC (supra) at para 71.5

138 RA para 59, p 1450.

successful. But this, in any event, is highly speculative. There is no reason to assume that the Minister is not open to persuasion.

URGENCY

101 We are mindful that Govindjee AJ, in the BDSA judgment, found the matter to be urgent, despite also finding that there was prejudice to the respondents in the way in which the litigation was conducted. However, there is one crucial difference in this case: these applicants deliberately chose to stay out of the BDSA application, even though they knew about it, thus compounding the prejudice to the respondents. Furthermore, the applicants have failed to show why they will not get redress at a hearing in due course. We address these issues briefly below.

The applicable principles on urgency

102 Rule 6(12)(b) of the Uniform Rules requires applicants, in all affidavits filed in support of urgent applications, to "set forth explicitly":

102.1 the circumstances which render the matter urgent; and

102.2 the reasons why they claim that they cannot be afforded substantial redress at a hearing in due course.

103 In the judgment of *In re Several Matters on the Urgent Court Roll*,[139] Wepener J took the opportunity to reiterate certain well-accepted principles on the question of urgency:

103.1 He reiterated what was said in paragraph 102 above about the requirements of rule 6(12)(b).[140]

103.2 He pointed out that the Uniform Rules are delegated legislation, with statutory force and are binding on the Court.[141]

103.3 He held that the procedure envisaged by rule 6(12)(b) is not there for the taking. It is for the applicant to show that he or she will not obtain substantial redress at a hearing in due course.[142]

104 In *Luna Meubel*,[143] Coetzee J held that mere lip service to the requirements of Rule 6(12)(b) is insufficient and that an applicant must make out a case in the founding affidavit to justify the extent of the departure from the norm.

105 The Court's power to condone non-compliance with the rules and to accelerate the hearing of a matter should be exercised with judicial discretion and in the light

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139 2013 (1) SA 549 (GSJ)

140 In re Several Matters on the Urgent Court Roll (supra) at para 6

141 In re Several Matters on the Urgent Court Roll (supra) at para 6; Western Bank Ltd v Packery 1977 (3) SA 137 (T) at 141B

142 In re Several Matters on the Urgent Court Roll (supra) at para 7; East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others [2011] ZAGPJHC 196 at paras 6-7

143 Luna Meubel Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 (W) at 137E

of sufficient and satisfactory grounds being shown by the applicant. There are three major considerations:

105.1 The prejudice that the applicant may suffer by having to wait for a hearing in the ordinary course.

105.2 The prejudice that other litigants might suffer if the application were to be given preference.

105.3 The prejudice that the respondents might suffer by the abridgment of the prescribed times and an early hearing.[144]

106 In *Harvey v Niland*,[145] Plasket J explained that the starting point is that the applicant "has the right to determine time periods in urgent applications, and the respondent must simply do the best he or she can to comply with them". Referring to *Luna Meubel*, he pointed out, however, that the applicant must give proper consideration to those time periods. As the Court said in *Luna Meubel*:

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.'

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144 IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another 1981 (4) SA 108 (C) at 112H-113A

145 Harvey v Niland 2016 (2) SA 436 (ECG) at para 19

107 Even if the applicant can show that there is, on its founding papers, an urgent need for the court's intervention (which is not the case here, as shown below), that is not the end of the enquiry. A delay in bringing the application, or self-created urgency, is a basis for a court to refuse to hear a matter on an urgent basis.[146]

108 When an applicant has failed to satisfy the requirements of urgency described above, the appropriate order is to strike the matter from the roll.[147]

Urgency inadequately pleaded

109 The only allegation in the founding affidavit on urgency is the following:

> "This matter is urgent. Shell is about to start firing incredibly loud air guns in our sea every ten seconds, or has started already. This conduct is harmful and plainly unlawful."[148]

110 Let us leave aside for a moment that the factual premise of these allegations is wrong. They do not remotely satisfy the test for urgency established by the authorities above. They do not, in particular, explain why redress cannot be obtained in a month or so's time, when Part B is heard on the ordinary roll. For this reason alone, the applicants cannot be granted urgent relief.

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146 Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586A-C; Zulu and others v Van Rensburg and others 1996 (4) SA 1236 (LCC) at 1243D

147 CSARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA) at 299H-300A

148 FA para 178 p 62

Discretion

111 The question whether to accommodate an urgent application is within the discretion of the presiding Judge, to be exercised with due regard to prejudice to the respondents (see paragraph 105 above). It is respectfully submitted that a major consideration relevant to the discretion in this case is that the applicants deliberately refrained from participating in the BDSA application. Their reasons for doing so have been shown to be entirely spurious.[149] They effectively waited to see how the first application went, and then decided to make a second attempt to stop the survey. They did this roughly a month after first learning about the survey, giving the respondents less than a week to prepare a response to this application (which is substantial). This Court should with respect see this as the abuse which it is and decline to exercise its discretion in favour of hearing this matter urgently.

COSTS

112 The question of costs is not a major issue that ought, in our view, to detain the court for too long. Shell's brief submissions in this regard are:

112.1 The *Biowatch* principle was established in the context of litigation between a private party and the state.[150]

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149 AA paras 50 to 52 pp 551 to 552

150 See, for example, Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd 2021 (3) SA 1 (CC) at paras 57-60

112.2 The principle has long-since been held not to apply in cases where the applicant has litigated unreasonably.[151] For the reasons given above, this is such a case.

112.3 But in any event, and should this Court be disinclined to make a positive finding that the applicants have behaved unreasonably, the Constitutional Court has very recently confirmed that the *Biowatch* principle does not ordinarily apply between private parties.[152] The SCA has recently done so too.[153] For this simple reason, Shell should be awarded its costs if the application is dismissed or struck from the roll. Shell accepts, of course, that if any relief is granted, costs should follow the result.

Adrian Friedman
Lauren Crow

Counsel for the Third to Fifth Respondents
16 December 2021

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151 Hotz v University of Cape Town 2018 (1) SA 369 (CC) at paras 34-7

152 Mkhatshwa v Mkhatshwa 2021 (5) SA 447 (CC) at paras 16-18

153 Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd 2019 (1) SA 154 (SCA) at paras 79-80