IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE No: 3865/2021

In the matter between

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

and

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

THIRD TO FIFTH RESPONDENTS' HEADS OF ARGUMENT

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1 These heads of argument are filed on behalf of the third to fifth respondents (which, for convenience, we shall describe as "Shell" below). These heads of

argument have been prepared under extreme pressure, and without us having yet seen the replying affidavit. The intention is to assist the Court, as best as possible, by identifying the fundamental flaws in the applicants' case for interim relief.

THE CONTEXT IN WHICH THIS APPLICATION IS BROUGHT

2 It is important, at the outset to be very clear about the context in which this application is brought:[1]

2.1 There have been approximately 35 3-D seismic surveys conducted in South Africa, 11 of which have been in the last five years. There is no evidence that any of them has caused any harm.

2.2 The seismic survey that forms the subject of this application is to be conducted pursuant to a highly detailed mitigation strategy, explained fully in the answering affidavit, which will ensure that its impact is low.

2.3 Shell is authorised to conduct the survey pursuant to an EMPr approved by PASA and the Minister in 2014, and which has to date not been challenged. Shell has conducted a previous 2D survey in the same area pursuant to the same authorisation, which survey was not challenged.

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[1] The references in the papers to the factual propositions in this paragraph are provided in the more detailed discussion below.

2.4 The reason why administrative action, such as the authorisations relevant to this case, generally cannot be challenged after undue delay is because of the importance of legal certainty.[2] People who are subject to the law, are entitled to organise their affairs on the assumption that of legal authorisations are not challenged within a reasonable time, they should be taken to be valid.

2.5 Shell, labouring under the assumption that the time to challenge its authorisation had long-since expired, spent millions of dollars and made various logistical plans to be ready to start a seismic survey on 1 December 2021. Literally two days before, this urgent application was brought, when on their own version the applicants have known of the planned survey for a month (and indeed the evidence indicates that they knew or ought to have known long before this).

2.6 The certificate of urgency on which this Court's decision to set the matter down had to be based, says that the applicants believe that the Amazon Warrior, which is the ship from which the survey will be conducted, "may attempt to commence with the Seismic Survey to frustrate the urgent relief which the applicants seek".[3] However, this statement does not appear at all in the founding affidavit, because it is simply not true. The applicants know full well, or ought to know full well, that there is absolutely nothing irreparable about the commencement of

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2 See Opposition to Urban Tolling Alliance v South African National Roads Agency Limited [2013] All SA 639 (SCA) at para 25

3 Certificate of urgency para 11

the survey and they have pointed to no irreparable harm anywhere in the founding affidavit. How the positioning of the ship could "frustrate the urgent relief" is never explained.

2.7 Genuine risk of environmental harm, raised timeously and following the correct procedure, is something which this Court should take very seriously. But it is highly irresponsible of applicants to litigate in the way that the present applicants have done. As shown fully below, their entire case is based on speculative harm, which is belied by the actual evidence and experience of seismic surveys around the world.

2.8 The seismic survey is being conducted pursuant to an economic imperative, to the benefit of the entire country, of energy security. It is being conducted in terms of a lawful authorisation, and with multiple mitigation strategies in place to ensure that its environmental impact is low. Against the backdrop of the 11 other seismic surveys conducted without incident on South Africa's coastline in the recent past, and hundreds of such surveys conducted globally, it is impossible to discern how the applicants' abuse of the rules of this Court could possibly be justified.

2.9 There is, simply put, no lawful basis, emerging from anywhere in the founding papers, for this Court to be asked to interfere with a lawful exercise, supported by extensive local and international precedent, at the very last minute.

3 This context is discussed again, below.

THE STRUCTURE

4 In the time available to the respondents, it has not been possible to focus on the merits of the review to be brought in due course. For the same reason, we do not focus on that issue here. We make only brief remarks on the prima facie right, which is one of the elements of an interim interdict. For the rest, we focus mainly on issues of urgency, harm and the balance of convenience.

5 There are, in our submission, two ways to approach this case:

5.1 First, it should be concluded that the applicants have not made out a case on urgency because they have failed to justify the timetable selected for their application with reference to tangible prejudice.

5.2 Secondly, it should be concluded that the applicants have not made out a case for an interim interdict because the balance of convenience overwhelmingly favours the respondents.

6 On either approach, the core issue at this stage of the proceedings is: what prejudice do the applicants claim to arise from the seismic survey?

7 So, in the discussion below, we adopt the following structure:

7.1 First, we set out the legal principles applicable to this matter.

7.2 Secondly, we deal with the issue of prejudice. In doing so, we show how the failure of the applicants to make out a case on prejudice is fatal both to their case on urgency and for an interim interdict.

7.3 Thirdly, we demonstrate that, on either approach (ie the approaches summarised in paragraph 5 above), the balance of convenience overwhelmingly favours the respondents and any urgency in this matter is entirely self-created.

7.4 Lastly, we deal briefly with the question of a prima facie right.

THE APPLICABLE LEGAL PRINCIPLES

8 In this section, we deal briefly with the principles applicable to urgent applications and interim interdicts.

The applicable principles on urgency

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

9.1 the circumstances which render the matter urgent; and

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

10 In the judgment of *In re Several Matters on the Urgent Court Roll*,[4] Wepener J took the opportunity to reiterate certain well-accepted principles on the question of urgency:

10.1 He reiterated what was said in paragraph 4 above about the requirements of rule 6(12)(b).[5]

10.2 He pointed out that the Uniform Rules are delegated legislation, have statutory force and are binding on the Court.[6]

10.3 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.[7]

11 In *Luna Meubel*,[8] 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.

12 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

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4 2013 (1) SA 549 (GSJ)

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

6 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

7 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

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

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

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

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

12.3 The prejudice that the respondents might suffer by the abridgment of the prescribed times and an early hearing.[9]

13 In *Marcow Caterers* (supra), the full court said the following:

> "The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them. The loss that applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public. Finally there is the question of prejudice to respondents. The respondents were required to prepare their answering affidavits and obtain the services of counsel for the hearing in great haste".[10]

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

10 Marcow Caterers (supra) at 113H-114B

14 In *Harvey v Niland*,[11] 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.'

15 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.[12]

16 When an applicant has failed to satisfy the requirements of urgency described above, the appropriate order is to strike the matter from the roll.[13]

The legal principles on interim interdicts

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

12 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

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

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

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

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

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

17.4 The applicant has no alternative remedy.[14]

18 As we mention again below, it is well-established that, the weaker the prima facie right, the higher the threshold of prejudice – ie, the weaker the case, the more prejudice that an applicant must be able to demonstrate before being granted an interim interdict.[15]

PREJUDICE TO THE APPLICANTS?

19 In the light of the principles discussed above, we now turn to discuss the applicants' case on prejudice. In doing so, we demonstrate that it is deeply flawed and cannot found a cause of action in these proceedings.

The applicants' case on prejudice

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

15 Eriksen Motors Ltd v Protea Motors 1973 (3) SA 85 (A) at 691F; Radio Islam v Chairperson, IBA 1999 (3) SA 897 (W) at 903G

20 When it comes to prejudice/balance of convenience, the applicants say the following:

20.1 Explosions or discharges are sufficiently strong to cause major disruption or damage to a “large range of animals”, including marine mammals (whales and dolphins), turtles, crustaceans and other creatures. And expected to kill the eggs of fish and squid.[16]

20.2 The seismic survey will take place near marine protected areas and critical biodiversity areas.[17]

20.3 If the seismic survey is allowed to continue, it will cause substantial irreversible harm.[18]

20.4 The EMPr envisages that no seismic surveys should be done in December, but that is exactly what the respondents intend to do.[19]

20.5 The applicants have been advised that the assessment of whether the decision of the respondents to commence in December is of high, medium or low significance requires expertise. The applicants do not have expertise on this issue, or on the question of what distance from

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16 FA para 16 p 12

17 FA para 17 p 13

18 FA para 40 p 20

19 FA para 80 p 31

an operating airgun should be treated as "within its immediate vicinity".[20]

20.6 The applicants say that they have retained experts who have not yet been able to provide reports of any kind (in fact, they have not even filed confirmatory affidavits). Two of the three categories of expert evidence are either inadmissible (the evidence apparently to be given by Mary Jane Morris[21] on the legal status of the EMPr) or irrelevant (the evidence apparently to be given by Professor Mark New[22] on climate change). That leaves one category of evidence – the evidence of Drs Elwen and Gridley on the supposed harms of the survey.

20.7 The evidence of Drs Elwen and Gridely has the following characteristics:

20.7.1 First, at this stage it is inadmissible hearsay because no confirmatory affidavits have been filed, let alone actual reports which the respondents (and this Court) may interrogate.

20.7.2 Secondly, the evidence will apparently show that "acoustic disturbance" can have multiple effects on the individual or population level, affecting multiple species. But the evidence is decidedly vague. It refers to breeding problems and physiological stress, but this is then linked to "human sound"

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20 FA para 81 p 31

21 FA para 84, p 33

22 FA para 85, p 33

caused by shipping. So it is not even clear how this relates to seismic surveys.[23] There is then evidence that there are multiple marine species which are threatened or protected which are "likely to occur within the seismic survey area"[24] and speculation that there might be coelacanths in the survey area.[25]

The fundamental flaws in the applicants' case

21 The case advanced by the applicants, as summarised above, is fatally deficient for at least the following five reasons.

22 First, on the applicants' own version, and without even considering the answering affidavit, there is no pleaded case on real prejudice:

22.1 The seismic survey is to be conducted in terms of an authorisation which is valid until set aside, and is contingent on the approval (which has happened) of detailed mitigation strategies.

22.2 In this context, it was incumbent on the applicants to make out a clear case in the founding affidavit that prejudice will be suffered if no urgent interim relief is granted. The authorities discussed above make it clear that the applicants bear a stringent onus in this regard.

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23 FA para 83.2 p 32

24 FA para 83.3 p 33

25 FA para 83.4 p 33

22.3 In attempting to discharge this onus, the applicants allege that irreversible harm will be suffered, without explaining what that means. In fact, their entire case on prejudice appears to be that there is doubt in their mind about the efficacy of Shell's mitigation strategies and so this Court must interdict the seismic survey while they gather expert evidence on this topic.

22.4 But this is not nearly a sufficient basis for a court to, in essence, tear up a valid government authorisation, and reject detailed mandated mitigation strategies as inadequate, at great prejudice to Shell and the country.

22.5 An applicant bearing an onus to make out a case for urgent intervention in its founding papers, cannot rely on speculation that, if given sufficient time, it will find some prejudice in the future. The prejudice has to be explained now.

23 Secondly, the applicants have gravely mischaracterised the nature of the seismic survey:

23.1 The respondents have explained that the seismic survey does not involve "explosions" or similar disruptive events underwater. Rather, it involves discharging pressurised air from airgun arrays to generate sound waves that are directed towards the seabed.[26] The seismic

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[26] AA para 28 p 163

sound is not an “explosion” but rather a collapsing air bubble that emits a low-frequency sound that travels through the earth’s crust.[27]

23.2 Shell has explained that the survey will not be conducted in “extremely close proximity” to a Marine Protected Area as alleged by the applicants. In fact, there is a buffer zone of 5km.[28]

23.3 Importantly, seismic surveys have been conducted around the world for more than 50 years and have been the subject of extensive peer-reviewed scientific research for 15 years. In all of this time, and with all of this research, there has been no evidence of any significant impact on marine populations.[29]

23.4 Even more importantly, there have been at least 35 3-D seismic surveys (ie, of the same type at issue in this application) conducted in South Africa, 11 of which have been conducted in the last 5 years. There is no evidence that any of these has caused any serious injury, death or stranding of marine life.[30] In 2020, 325 seismic surveys have been conducted globally without any reports of death or irreversible harm to marine life.[31]

23.5 The question has to be asked frankly: what is the urgency in the current attempt to stop this seismic survey, which did not apply to all of the

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27 AA para 29 p 163

28 AA para 56-7 p 171

29 AA para 33 p 164

30 AA para 35.1 p 165

31 AA para 35.3 p 165

others discussed above? None has been suggested because there is none.

24 Thirdly, the applicants have been unable to demonstrate that Shell's detailed mitigation strategy is in any way inadequate:

24.1 On the applicants' own version, they have no evidence whatsoever to suggest that Shell's mitigation mechanisms will be deficient. The high watermark of their case is that they may, in the future, be able to acquire expert evidence which may establish that the mitigation mechanisms are inadequate.

24.2 The applicants have tried to suggest that there is some prima facie irregularity with the seismic survey being conducted in December. But Shell has demonstrated in detail that, in fact, commencing now is the most appropriate step to take, from an environmental perspective, to prevent interference with whales during July to November. In other words, the window now selected, with the mitigation measures adopted, is the safest window in which to conduct the survey.[32] In particular, the EMPr makes clear that the survey may be conducted in December, as long as passive acoustic monitoring is in place in December. Shell has demonstrated that it will, in fact, use passive acoustic monitoring for the duration of the survey (ie, not just December), 24 hours a day.[33]

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32 AA para 59 p 172

33 AA para 59 p 172

24.3 Shell has furthermore demonstrated that the survey will be conducted according to international best practice and will be constantly monitored by independent Marine Mammal Observers, who visually inspect for marine life, and Passive Acoustic Monitoring specialists who listen for marine mammals.[34]

24.4 Shell has demonstrated that there is a 500m exclusion zone, which means that if any marine mammals, turtles or diving seabirds enter the zone, operations will immediately shut down.[35] It will also use a soft-start procedure, which allows a gradual build-up of sound to enable wildlife to move away from the vessel gradually.[36] There is also a 60 minute pre-watch which is used to confirm that there is no wildlife in the exclusion zone before surveying may commence.[37]

24.5 Perhaps most importantly at all, Shell has worked with a seismic contractor to reduce the sound source output to as low as possible – ie, to one of the lowest used at these water depths in South Africa for seismic surveys.[38]

25 Fourthly, the applicants' case is based on speculative harm to marine life, which is simply inaccurate:

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34 AA paras 65-6 p 174

35 AA para 68 p 174

36 AA para 69 p 175

37 AA para 70 p 175

38 AA para 71 p 175

25.1 Shell has demonstrated that there will be no harm to spawning activity of squid and that there is no threat to plankton or ichthyoplankton.[39]

25.2 Shell has demonstrated that, with the various mitigation strategies which it will implement (discussed above), the impact on odontocetes cetaceans (which include whales and dolphins) will be low.[40]

25.3 Shell has demonstrated that the survey area is not an optimal habitat for coelacanths and so they will not be threatened by the survey.[41]

26 Fifth, as against the applicants' inadmissible expert evidence, is Shell's evidence that the impact of the survey will be low:

26.1 We have already explained the inadequate nature of the inadmissible hearsay expert evidence of the applicants' proposed experts.

26.2 Against that must be weighed that the EMPr, which is a detailed 600 page document, was undertaken by leading independent environmental specialists and that there is extensive expert confirmation that, with Shell's mitigation strategies, the impact on marine life will be low.[42]

NO CASE ON URGENCY/ BALANCE OF CONVENIENCE FAVOURS THE RESPONDENTS

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39 AA para 36.1 p 166

40 AA para 36.2 p 166

41 AA para 37 p 167

42 AA paras 60 and 61 p 173

27 The discussion above demonstrates that the applicants' case is fundamentally flawed because the applicants have failed to make out a case that there will be any prejudice arising from the survey. For that reason alone, they cannot discharge the onus of showing an entitlement to urgent relief. And, since the balance of convenience enquiry involves comparisons of prejudice, the applicants for not get out of the starting blocks on that element of an interim interdict either.

28 Should this Court consider it necessary to go further, we demonstrate below that, in addition to these insurmountable hurdles, there are two further flaws in the applicants' case:

28.1 First, as against the applicants' failure to show any prejudice, Shell and the country will suffer prejudice if the interim relief is not granted.

28.2 Secondly, any urgency that there may be in this matter is entirely self-created.

Balance of convenience favours Shell

29 Shell has pointed to the following prejudice that it will suffer if the interim relief is granted:

29.1 First, the vessel is already on its way to the location and the granting of an interim interdict now will cause irreparable harm to Shell and its partners arising from the wasted expenditure and planning.[43]

29.2 Secondly, and of extreme importance, delay now will be likely to cause Shell to terminate its interest in the licence because it would have lost the opportunity to acquire the data which it needs to decide whether to enter the next renewal phase.[44]

29.3 Thirdly, failure to acquire necessary 3D seismic information in the current window could cause Shell to breach its obligations under the exploration right.[45]

29.4 Fourthly, labouring under the impression that it held a valid authorisation, Shell has spent millions of dollars and entered into contractual obligations to be ready to commence the survey. This will all be sunk, if the interim interdict is granted now.[46]

29.5 Fifthly, the exploration that the survey hopefully will facilitate is intended to ensure South Africa's energy security. It will also diversify South Africa's energy portfolio to enable it to comply better with low carbon

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43 AA para 75 and para 79 p 176-7

44 AA para 76 p 176

45 AA para 76 p 176

46 AA para 77 p 176

emission targets. Stopping it now will obviously prevent this benefit from materialising.[47]

30 So, as against the lack of prejudice identified in the founding affidavit, Shell has explained that it, and the country, will suffer real prejudice if the interim interdict is granted. This is a further basis on which the interdict should be refused.

Self-created urgency/abuse of process

31 The following timeline is relevant:

31.1 On the applicants' own version, they became aware of the intended commencement of the Seismic Survey on 29 October 2021.[48]

31.2 They waited, however, until 25 November 2021 to issue the respondents with a letter of demand.[49] The letter was sent at 18h25 and a response was demanded by 12h00 the next day.[50]

31.3 Shell made clear on 26 November 2021 that it would not give the requested undertaking.[51] Despite this, the applicants still did not launch their urgent application. Instead, they sent yet another letter of demand,[52] presumably to buy more time to launch the urgent

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47 AA para 79 p 177

48 FA para 23.3 p 15

49 FA para 22 p 14

50 See annexure FA13 p 80

51 FA para 23 p 14

52 FA para 38 p 20

application. They ultimately launched this application more than 72 hours after their demand had been refused by Shell.

32 The reason why it is necessary to pay granular attention to this timetable is the following:

32.1 The authorities summarised above make it clear that an applicant is obliged to justify the extent of its proposed truncation of the normal timetables applicable to litigation.

32.2 The present application has been launched on a hyper-urgent basis – ie, with an expectation that the entire matter commence and be finalised within 2 days. In such an application, there is a clear duty on the applicant to justify his or her selection of such an unusual and prejudicial procedure.

32.3 Even leaving aside the delay of one month in launching this application – which in itself is a fatal example of self-created urgency – even the delay between 26 and 29 November is material. Why should the respondents have been placed under such severe prejudice to file an answering affidavit in less than 24 hours, when the prompt launching of this application after the demand was rejected would have bought everyone an extra three days?

32.4 The prejudice in this case is not merely speculative or hypothetical. Shell has explained that, in the time available to it, it has been unable to

file as comprehensive an answer as it would have liked.[53] This is therefore a classic example of an applicant abusing process to gain a tactical advantage.

33 But the fundamental flaw on urgency is that this is a classic case of self-created urgency. Courts often, sometime frankly unfairly, penalise applicants for waiting weeks to launch litigation and characterise it as self-created urgency. We readily accept that delay, in and of itself, does not mean that urgency is self-created. For delay to cause urgency to be self-created, there has to be a link between the delay and the need for the type of urgent relief sought in the notice of motion. This is precisely such a case. Had the applicants launched their urgent application reasonably soon after 29 October 2021, it would not have been necessary for them to prejudice the respondents by preventing them from filing proper answering papers. It would have been possible for Shell to file a comprehensive answer dealing with all elements of the applicants' case, including the supposed expert evidence.

34 There is a further reason why this application is an abuse of this Court's process, and rules on urgency. The applicants seek an interim interdict to apply pending the finalisation of a review to be instituted in due course. We show below that the applicants face a significant hurdle to overcome the principle in our law that reviews must be instituted without unreasonable delay. Despite

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53 AA para 9 p 156

this, they seek an order that the interim interdict should apply pending a review to be instituted by no later than 10 January 2022.

35 This is a strategy designed to ensure that the interim interdict is, in fact, final in effect. This is because there is no reasonable prospect of the review being finalised before the window (ie, July to November 2022) in which the survey cannot be done for environmental reasons. They applicants know that, if the interim interdict is granted on the terms sought, the seismic survey will simply have to be cancelled.

36 If this application was bona fide, and not simply an abuse, the applicants would have launched their review already or would have undertaken to do so shortly after the hearing of this urgent application. They would also have launched the review on an urgent basis. Instead, they want a leisurely six weeks, to go with the leisurely month they took to draw up the papers in this urgent application, to prepare their founding papers in the review. This Court, with respect, should see this for what it is: an unconscionable abuse.

37 Therefore, if this Court is not minded to dismiss the application for failure to show prejudice, it should be struck from the roll because any urgency is self-created.

WEAK CASE ON THE MERITS – NO PRIMA FACIE RIGHT

38 Shell has explained that it has not, in the time available to it, been able to file a comprehensive response to the legal submissions in the founding affidavit on the merits of the proposed review, which apparently will be instituted in due course.

39 Shell has, however, demonstrated in its answering affidavit that:

39.1 The EMPr, which is the source of the authorisation of the seismic survey, was granted on 17 April 2014.[54]

39.2 The EMPr Compliance Audit went out for public comment on 20 May 2020.[55]

39.3 Crucially, the first and second applicants were registered Interested and Affected Parties, and submitted objections to the EMPr, during the public consultation process in 2013. The EMPr was authorised in April 2014, notwithstanding the objections of the applicants.[56]

39.4 In 2020, an EMPr compliance audit was commissioned to determine whether the EMPr requirements are still valid. The first and second applicants were Interested and Affected Parties in this process, and declined to make any representations.[57]

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54 AA para 16.2 p 160

55 AA para 16.2 p 160

56 AA para 41 p 168

57 AA paras 46-7 pp 168-9

39.5 In the lead-up to this survey, extensive consultation was conducted with operators in the fishing and tourism sectors.[58]

40 All of these facts demonstrate two legal propositions:

40.1 First, that the applicants are unlikely to be able to overcome the hurdle of unreasonable delay in instituting the review application.

40.2 Secondly, the applicants are unlikely to demonstrate one of their core complaints in the merits of the review – ie, their complaint of procedural unfairness.

41 It is therefore submitted that this Court should approach this case from the perspective that the applicants' have, at best, demonstrated a weak prima right to relief. It is well-established that, the weaker the prima facie right, the higher the threshold of prejudice – ie, the weaker the case, the more prejudice that an applicant must be able to demonstrate before being granted an interim interdict.[59] In this case, the weak case on the merits combined with the very weak case on prejudice, demonstrates that interim relief cannot be granted.

CONCLUSION

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58 AA paras 48 to 52 pp 169-170

59 Eriksen Motors Ltd v Protea Motors 1973 (3) SA 85 (A) at 691F; Radio Islam v Chairperson, IBA 1999 (3) SA 897 (W) at 903G

42 For all of the reasons given above, it is submitted that the application should be dismissed, alternatively struck from the roll, with the costs of two counsel.

Adrian Friedman
Sarah Pudifin-Jones

Counsel for Shell
Chambers, Sandton and Durban
1 December 2021