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
NTSINDISO NONGCAVU	Fourth Applicant
SAZISE MAXWELL PEKAYO	Fifth Applicant
CAMERON THORPE	Sixth Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

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

JUDGMENT

Bloem J.

[1] This is an application for an interim interdict. The application has two parts. In Part A the applicants seek an order interdicting the third, fourth and fifth respondents from proceeding with a seismic survey pending the finalisation of the relief sought under Part B. In Part B they seek an interdict prohibiting the same respondents from proceeding with the seismic survey unless and until an environmental authorisation has been granted under the National Environmental Management Act[1] (NEMA).

The parties

[2] The applicants are non-profit companies, natural persons and a communal property association. The first applicant, Sustaining the Wild Coast NPC, works to promote sustainable livelihoods that construct, rehabilitate and protect the natural environment on the Wild Coast. The second applicant is Mashona Dlamini, a traditional healer and a member of the iNkosana's (headwoman's) council, a body established in terms of customary law. He acts on his own behalf and on behalf of traditional healers along the Wild Coast and on behalf of the Umgungundlovu community. The third applicant is the Dwesa-Cwebe Communal Property Association. The fourth applicant is Ntsindiso Nongcavu, a fisher from Port St Johns who acts on his own behalf as well as on behalf of fellow Wild Coast fishers. The fifth and sixth applicants are Sazise Pekayo and Cameron Thorpe respectively, who are both fishers from Kei Mouth and members of a local cooperative, the Kei Mouth Fisheries. They act on their own behalf and on behalf of their community as well as on behalf of fellow Wild Coast fishers. The seventh applicant is All Rise Attorneys for Climate and Environmental Justice NPC, a law clinic representing communities fighting against and affected by climate change. It is not in dispute that all the applicants act in the public interest and in the interest of protecting the environment.

[3] The first respondent is the Minister of Mineral Resources and Energy. The second respondent is the Minister of Environment, Forestry and Fisheries. The third respondent is Shell Exploration and Production South Africa BV, the

[1] National Environmental Management Act, 1998 (Act 107 of 1998).

fourth respondent is Impact Africa Limited (Impact Africa) and the fifth respondent is BG International Limited. Hloniphizwe Mtolo, the deponent of the main answering affidavit that was filed on behalf of the third, fourth and fifth respondents, stated that the fifth respondent is the Shell entity which owns the project in question and that the third respondent has nothing to do with the project.

[4] The second respondent does not oppose the application insofar as the relief sought under Part A is concerned. Soon after the founding application papers were served on the respondents, a notice was delivered on behalf of the first respondent, the Minister of Mineral Resources and Energy (the Minister), indicating that he did not intend opposing Part A of the application. However, on 15 December 2021 a notice to oppose was delivered on behalf of the Minister. Later on that day an affidavit was delivered on his behalf wherein his stance to these proceedings was set out. The change of heart was not explained. The third, fourth and fifth respondents (to which I shall collectively refer as Shell) oppose the application.

Introduction

[5] In 2013 Impact Africa submitted an application to the Petroleum Agency of South Africa (PASA) for an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act[2] to explore for oil and gas in the Transkei and Algoa exploration areas. PASA accepted the application on 1 March 2013. A draft environmental management programme was made available for interested and affected parties to raise issues and concerns that they may have had with the proposed exploration activities. The issues and concerns were required to have been raised between 22 March and 12 April 2013. Advertisements were placed in The Times, Die Burger (Eastern Cape), The Herald and The Daily Dispatch newspapers, notifying the public of the proposed project and providing details of the consultation process and information on how members of the public could provide input into the environmental management programme process and inviting comment. A final environmental

[2] Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).

management programme was produced during June 2013. PASA approved it on 9 September 2013, with a few conditions. The Deputy Director-General of the Department of Mineral Resources and Energy approved the environmental management programme and on 29 April 2014 the exploration right was granted.

[6] Shell is currently conducting a seismic survey off the eastern coast of South Africa. The total survey area size is 6 011 square kms. It covers almost the entire Eastern Cape coastline. According to Shell the survey will take between 110 and 140 days, from December 2021 until April 2022, depending on the weather, currents and the sea conditions. The purpose of the seismic survey is to provide imaging of the subsurface to determine whether there might be energy reserves below the sea floor.[3] Shell will use the seismic vessel, the Amazon Warrior, from which it will conduct the seismic survey. It is not in dispute that during the survey the Amazon Warrior will discharge pressurised air from its airgun arrays to generate sound waves.

[7] I have to decide whether or not the applicants are entitled to an interim interdict. To secure such an interdict, they were required to satisfy the court that they have established: (i) at least a *prima facie* right even if it is open to some doubt; (ii) a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict is not granted; (iii) that the balance of convenience favours the granting of the interim interdict; and (iv) that they have no other satisfactory remedy.[4] Shell contended that the application should be dismissed because, so it contended, the applicants failed to establish any one of the above requirements.

Prima facie right?

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[3] In *Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others* (3865/2021) [2021] ZAECGHC 111 (3 December 2021) Govindjee AJ described a seismic survey as "*a study in which seismic waves generated through compressed air are used to image layers of rock below the seafloor in search of geological structures to determine the potential presence of naturally occurring hydrocarbons (that is, oil and gas)*."

[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691C-E.

[8] It was submitted on behalf of the applicants that they have established the following *prima facie* rights which require the protection of an interdict. Firstly, the applicant communities have a right to be meaningfully consulted about the seismic survey, because it impacts upon their customary rights, including customary fishing rights. Secondly, they claim that their (as well as the public's) statutory right under NEMA, which requires that prospectors must obtain an environmental authorisation under NEMA for exploration for oil and gas, has been breached, because, so it was contended, Shell does not have a NEMA environmental authorisation. It was submitted on behalf of the applicants that the NEMA obligations give effect to the rights of affected communities and the public in relation to the environment.

[9] The constitutional rights which the applicants claim are implicated are contained in sections 24, 30 and 31 of the Constitution. It was submitted on their behalf that the application was brought to protect the above rights.

9.1. Section 24 deals with the environment. It reads as follows:

> "Everyone has the right-
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> *(a)* to an environment that is not harmful to their health or well-being; and
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> *(b)* to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
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> (i) prevent pollution and ecological degradation;
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> (ii) promote conservation; and
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> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

9.2. Section 30 deals with language and culture. It reads as follows:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

9.3. Section 31 deals with cultural, religious and linguistic communities. It reads as follows:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
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> *(a)* to enjoy their culture, practise their religion and use their language; and
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> *(b)* to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[10] In *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*[5] Froneman J discussed the importance of consultation under the Mineral and Petroleum Resources Development Act.[6] For fear of doing an injustice to what has been said by the learned Judge, I quote hereunder in full what was said in paragraphs 62 to 68 thereof.

> "Consultation

[5] *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC).

[6] Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).

[62] The Act requires consultation in regard to prospecting rights at different levels. Within 14 days of accepting a prospecting right application the regional manager must make known that an application has been received and must call upon interested and affected persons to submit their comments within 30 days from the date of the notice.75 If a person objects to the granting of the right the objection must be referred to the Regional Mining Development and Environmental Committee to consider the objection and advise the minister on them. Also within 14 days of acceptance of the application, the regional manager must notify the applicant in writing that the landowner or lawful occupier must be notified and consulted. The result of the consultation must be submitted within 30 days from the date of the notice. Before the holder of a prospecting right actually starts prospecting the landowner or lawful occupier must again be notified and consulted.

[63] These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it 'in all the fullness that the common-law allows', or as use only of its surface, if what lies below does not belong to the landowner, but somehow resides in the custody of the State.

[64] The purpose of the notification and subsequent consultation must thus be related to the impact that the granting of a prospecting right will have on the landowner or lawful occupier. The community is the landowner of the farms at stake in this application and therefore I will restrict further discussion to the position of landowners.

[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.

[66] Another, more general, purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result are an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.

[67] The consultation process required by s 16(4)*(b)* of the Act thus requires that the applicant must: *(a)* inform the landowner in writing that his application

for prospecting rights on the owner's land has been accepted for consideration by the regional manager concerned; *(b)* inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; *(c)* consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and *(d)* submit the result of the consultation process to the regional manager within 30 days of receiving notification to consult.

[68] Genorah did not comply with these requirements for consultation in terms of the Act. Essentially its purported compliance with the consultation requirements of the Act consisted of notifying the Kgoshi of the community of its application before lodging it with the regional manager, and leaving a prescribed form for him to indicate, by ticking a box on the form, whether he on behalf of the community supported its application or not. The form was never signed by the Kgoshi. Genorah did nothing further, despite being notified of the requirements under s 16(4) of the Act by the department, and despite receiving a letter from the Kgoshi on 13 March 2006 inviting Genorah to get to know each other better. There was never any consultation in relation to Eerstegeluk. The review must thus succeed on this ground."

[11] It is against the above that I will consider whether the applicants have reason to complain about the consultation process that was followed before the seismic survey commenced. The consultation process is set out in the environmental management programme, which is the basis upon which the exploration right was granted. Fortunately, the history set out in the environmental management programme cannot be changed. I will deal with the individual complaints raised by the individual applicant communities.

[12] The deponent of the applicants' founding affidavit, Sinegugu Zukulu, is a resident of the Baleni village which forms part of the Amadiba traditional community. He said that

his family has been living in the area for more than a century, and perhaps two. That traditional community stretches from the Umtamvuna River, which is the border between the Eastern Cape and Kwa-Zulu Natal, to the Mtentu River. It runs 20 kms inland. The inland area is called Dangeni while the coastal area is called Umgundlovu. Members of the Amadiba community take pride in the land on which they live because their ancestors fought to protect it. They adopt the attitude that, not only does the land belong to them, they also belong to the land. That is so because the land is central to their identity. It sustains them.

[13] Mr Zukulu remembers how, in his earlier days, members of the Jama village (where he born and which is about 15 kms from the coastline) would walk to the sea to collect its healing waters and sacred sand, harvest mussels, catch fish and would sometimes camping on the coast. His mother's grandfather would go to the ocean every month to cleanse himself for healing purposes. Not only the land, but also the sea, plays an important role in the way of life of members of the Amadiba traditional community. They collect mussels, limpets, oysters and crayfish. They also fish for a range of species, including king fish, garrick, kob and shad. Seafood forms a vital part of their diet. It contributes to their community having some of the lowest rates of hunger in the country. They also sell their catches to generate an income. Their dependence on and the significance of the sea made training in conservation and sustainable harvesting on land and sea imperative. Mr Zukulu said that they "*are the conservationists of the sea in our area, using practices handed down to us over generations*".

[14] Members of the Amadiba traditional community also know the sea and the land to have healing properties. In some instances, traditional healers rely on the sea, for example to cleanse themselves and their patients. Some of the ancestors reside in the sea because they loved the sea in life and some of them died in the sea. It is considered very important by members of the Amadiba traditional community not to disturb these ancestors through pollution or other disturbances. That belief should not be difficult to comprehend by those who do not share the customs of the Amadiba traditional community if regard is had to the fact that graves on land are not easily disturbed or moved. Members of the Amadiba traditional community are concerned that

the seismic survey will upset their ancestors and impact on their cultural and spiritual relationship with the sea. They are concerned that Shell did not consult them in that regard.

[15] Members of the Amadiba traditional community are also concerned about the impact that the seismic survey will have on the climate. The ultimate aim of the project is the extraction of fossil fuels. They are concerned that exploration for the possibility of fossil fuels takes place without a climate impact assessment. They stated that they already observe signs of climate change in Amadiba, for example, they experience much more unpredictable weather patterns with more extreme weather events, such as more droughts and heavier downpours of rain and livestock become sick more often. They are very concerned about the prospect of rising sea levels. As indigenous peoples, they feel responsible for conserving the planet for themselves and humanity.

[16] The Dwesa-Cwebe Communal Property Association is the owner of the Dwesa-Cwebe Reserve. The Dwesa-Cwebe community is made up of seven villages which border the Dwesa-Cwebe Reserve. The reserve is situated along the coast in which the seismic survey will be performed. The villages which make up the Dwesa-Cwebe are historically fishing villages. Members of those villages have relied, and still rely, on the sea for sustenance mainly through fishing and harvesting mussels, which, for many inhabitants are the only source of protein. Like Amadiba, some members of the Dwesa-Cwebe community also sell their sea harvests as a means of making a living. They claim that, because the sea is integral to the community's cultural identity and customary system, in other words, the sea is integral to who they are, they have over time developed sustainable fishing practices which pose no great risk to marine life in the area. Members of the villages comprising the Dwesa-Cwebe community are very concerned that the seismic survey threatens great disruptions to the prevailing ecological, marine life and the socio-economic conditions in and around their community.

[17] Mr Nongcavu is a fisherman from Port St Johns. He has been fishing since the age of 12. He now makes a living from fishing. As with his forebears who are buried in

Sicambeni village where Mr Nongcavu now resides, he follows his community's customary sustainable fishing practices. In accordance with their customary practices and indigenous knowledge, they do not take too much from the sea. They only take fish of a certain size. They practise the customary practices which they have been taught, namely when they fish, they think of tomorrow. Some fishers sell their harvest for an income. Like the Amadiba, members of the Sicambeni village, regard the sea as important to them as a site where ancestors reside. Traditional healers use the sea for rituals, healings and ceremonies to perform their practices. For example, some traditional healers take sick people within their community to the sea to speak to their ancestors for healing. Mr Nongcavu regards the sea as a mystical place where their ancestors reside. It is a place where some churches congregate for worship and prayer. He stated that the Sicambeni community was not consulted about the exploration for oil and gas by Shell. He is also not aware that any member of his community, co-operatives, village headman or chief was consulted at any point about the seismic survey. Members of the community are concerned that the seismic survey may kill marine species or force them to migrate, with adverse consequences for the community. The fear is also that the seismic survey will negatively impact on the community's customary practices and spiritual relationship with the sea.

[18] Mr Pekayo and Mr Thorpe, who represent fishers at Kei Mouth, are members of the Kei Mouth Fisheries Co-Operative. They fish to sustain their families. Like other communities along the east coast, members of this community also rely on the sea for cultural and spiritual practices. Their complaint is also that they were not consulted in the environmental management programme process and were surprised to learn of the exploration right eight years after it had been granted.

[19] Thembelihle Mbokazi says that she has been a conservationist along the south coast from since she can remember. In her community's culture, the ocean is a precious and sacred place where everyone goes to perform rituals. She can remember how, in her early childhood, sangomas, "*trained under the ocean*", often became the most powerful sangomas in the community. In her affidavit Ms Mbokazi also dealt with the importance of meaningful public participation and mitigation measures.

[20] I now look at the applicants' criticism of the consultation conducted during the process leading up to the approval of the exploration right and the subsequent seismic survey. Shell's position is that it has not only followed, but exceeded, the requirements for the public participation of all relevant stakeholders.

[21] The environmental management programme identified the potential interested and affected parties "*through analysis of potential stakeholders and based on stakeholders engaged in previous similar studies in the area*". The list of the interested and affected parties consulted was attached to the final environmental management programme. It includes "*government authorities (local and regional), non-governmental organisations (NGO), community-based organisations (CBO) and industry groups (including the fishing industry). The list was further expanded through feedback and suggestions received following consultation and disclosure activities*". The applicants' complaint is that members of the villages, communities and traditional communities from where they come are not on that list. That, they allege, is proof that their communities were not consulted. Shell's response to the above complaint was that no one was precluded from registering as an interested and affected person pursuant to the newspaper advertisements. The simple answer to that is that a person who does not know of the process cannot be expected to register and participate in the process as an interested and affected person.

[22] Shell relies on the fact that the advertisements were placed in four newspapers to notify the public about the proposed project and providing details of the consultation process. The notifications were published in newspapers in English and Afrikaans. They were not published in isiZulu or isiXhosa, the languages spoken in the communities in question. The applicants criticised Shell for not having used radio and community newspapers which would have facilitated communication with them in the language used in their respective communities. The newspapers in which the advertisements were published were only accessible to literate persons with access to those newspapers. In my view, those who cannot read English or Afrikaans, were excluded from the consultation process. Given the nature of the communities in question, the notification provided by Shell was inadequate.

[23] After the proposed project was advertised in the newspapers, members of the public could provide comments. The comments were compiled after receipt. A draft environmental management programme was placed on the project website and interested and affected persons were given 30 days to comment. Notification was sent directly to all interested and affected persons. Thereafter a series of in-person group meetings and focused group meetings were held as part of the engagement process. All interested and affected persons on the stakeholder database were invited to these meetings.

[24] A further criticism was that group meetings were not held in the communities in question. Rather, they were held in Port Elizabeth, East London and Port St Johns on 3, 4 and 5 June 2013 respectively. The location of those meetings excluded the communities in question from attending.

[25] The consultation process described above was severely criticised by the applicants. The approach that was followed to consult was inconsistent with the communities' custom of seeking consensus. The approach was also invalid. Shell considered it adequate to speak only to the "Kings" of communities and to assume that those Kings spoke for their subjects. The applicants contended that Shell's way of engagement in this regard derives from the colonial and apartheid eras. Communities, such as the Amadiba community, have strict rules about consultation that emphasise the importance of seeking consensus. This is part of their customary law and avoids the imposition of top-down decision-making.

[26] Meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations.[7] The "King" cannot make representations on behalf of all of

[7] See *Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck) where the following was said at 491F-H: "However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the views so expressed and the validity of objections to the proposals and to generally conduct meaningful

the community members. The monarchs in question do not have jurisdiction over large communities who are affected by the seismic survey. Those monarchs do not have jurisdiction over amaMpondo aseQaukeni (Eastern Pondoland). None of them was accordingly empowered to speak on behalf of customary fishers anywhere along the Wild Coast.

[27] Shell did not follow through with the defective consultations proposed in its environmental management programme wherein its consultants state that "*two traditional monarchs and their senior advisors were met in Mthatha, as well as Richard Stephenson who is mandated to represent 4 of the Transkei Kingdoms regarding this project.*" In the environmental management programme Shell's consultants made reference to a request for five additional meetings to be held with the Kings. There is no suggestion that those meetings were held.

[28] Shell's consultants developed a "*stakeholder database*" through "*stakeholder analysis*" using previous studies in the area. Shell gave no detail about what the "*stakeholder analysis*" entailed. The list of interested and affected persons on the database was supplemented with reference to feedback received following consultation and the disclosure process. The bid information document, containing details regarding the proposed exploration activities, was then distributed to the interested and affected persons. Later, in 2020, Shell sent a notification of the 2020 audit to all interested and affected persons who registered in the 2013 process, inviting them to comment on the audit results. Shell maintains that persons who are part of the monarchies but were not consulted through the engagement with the Kings, were free to register as interested and affected persons pursuant to the newspaper notices.

[29] According to Shell such persons could have attended group meetings and engaged through that process. A person who does not know of the process or meeting

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and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he would be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them."

cannot be expected to participate in such a process or attend those meeting. In order to become interested and affected persons, community members had to have knowledge about the seismic survey and the contact details of Shell's consultants. I have already dealt with the fact that the advertisements were published in only English and Afrikaans and the difficulties with that mode of communication. The draft environmental management programme was subsequently published on the project website and notification was sent to registered interested and affected persons. It means that unless a person was already registered as an interested and affected persons, he or she would not know where to find the draft environmental management programme and how to comment. Thus, there was little prospect of community members registering as interested and affected persons or otherwise discovering the relevant documents.

[30] Shell did not provide an explanation of how its "*stakeholder analysis*" was conducted or why it considered the "*previous studies*" that it relied upon to be sufficient. This analysis and these studies were insufficient because they did not identify the numerous small scale and subsistence fishing communities along the coastline where the seismic survey will be performed. Regard being had to the above, the consultation process was, in my view, inadequate.

[31] The applicant communities are holders of customary fishing rights.[8] The\y allege

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[8] Customary fishing rights were recognised in *Gongqose and others v Minister of Agriculture, Forestry and Fisheries and others* 2018 (5) SA 104 (SCA) where the court had the following to say:

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

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

that the seismic survey will impact negatively upon those rights and as holders of such rights which are threatened by the seismic survey, the customary fishers of the Wild Coast had a right to consultation in respect of the seismic survey. The consultation process carried out by Shell in that regard was inadequate.

[32] I accept that the customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the constitutional those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.

[33] Shell was under a duty to meaningfully consult with the communities and individuals who would be impacted by the seismic survey. Based on all the evidence, I am of the view that Shell failed to do so. The evidence shows that the consultation process in question was inadequate and substantially flawed.

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

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

[34] In all the circumstances, it seems to me that the exploration right, which was awarded on the basis of a substantially flawed consultation process, is thus unlawful and invalid. The applicants' right to meaningful consultation constitutes a *prima facie* right which deserves to be protected by way of an interim interdict. I am satisfied that the applicants have established that they have a *prima facie* right. In *National Treasury and others v Opposition to Urban Tolling Alliance and others*[9] Moseneke DCJ stated that if the right asserted in a claim for an interim interdict is sourced from the Constitution, it would be redundant to enquire whether that right exists. The applicants have established constitutional rights worthy of protection by an interim interdict.

[35] At the hearing, the applicants indicated that they might in due course amend the relief sought under Part B of the notice of motion to include a prayer reviewing and setting aside the exploration right. Both counsel for the Minister and Shell submitted that the applicants cannot be allowed to secure an interim interdict on the basis the Shell does not have an environmental authorisation granted under NEMA and at the subsequent hearing seek an order reviewing and setting aside the exploration right. In my view the objection is more about form than substance. What is presently important is that Shell is conducting a seismic survey which, as said above, is the result of a substantially flawed consultation process. The underlying grounds for the relief sought under the proposed amended notice of motion will include the grounds upon which the interim relief was granted. Since the applicants have established a *prima facie right*, they are entitled to have that right protected against such unlawfulness, provided that the other requirements of an interim interdict have been met. Failure to protect the applicants against unlawfulness will offend the rule of law.

[36] Whether or not Shell requires an environmental authorisation obtained under NEMA involves a difficult legal issue. The Minister caused an affidavit to be delivered wherein he adopted the stance that "*the environmental management programme used to support the application made by [Impact Africa] for the renewal of its exploration right*

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[9] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at par 46.

… constitutes an environmental authorisation, as envisaged by the National Environmental Management Act 107 of 1998 (NEMA)". Whether that is so, however, is a decision to be made by the court. Although I am of the view that the applicants have prospects of success in that regard, it is a matter that should rather be considered by the court which will determine the relief sought under Part B of the notice of motion.

Irreparable harm?

[37] The applicants were required to establish that they have a reasonable apprehension of irreparable harm if the interim interdict is not granted. What a reasonable apprehension of harm means has been dealt with in *Minister of Law and Order and Others v Nordien and Another*[10] wherein Hefer JA had the following to say:

> *"*What a 'reasonable apprehension' in this context means and how it is to be established, appears from a passage in the judgment of Berker JP in *Nestor and Others v Minister of Police and Others* 1984 (4) SA 230 (SWA) at 244, with which I respectfully agree. It reads as follows:
>
> > 'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts (*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 515). The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result (*Free State Gold Areas* case *supra* at 518). However, the test for apprehension is an objective one (*Ex parte Lipshitz* 1913 CPD 737; *Seligman Bros v Gordon* 1931 OPD 164; *Pickles v Pickles* 1947 (3) SA 175 (W)). This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.'"

[10] *Minister of Law and Order and Others v Nordien and Another* 1987 (2) 894 (AD) at 896F-I.

[38] The applicants rely on cultural and spiritual harm; the threatened harm to marine life; and the negative impact on the livelihood of small-scale fishers, arising from the harm to marine life. I have already dealt with the impact that the seismic survey will have on the applicant communities' cultural and spiritual beliefs. To conclude the discussion on this topic, reference is made to the evidence of Jacqueline Sunde, a senior researcher at the Department of Environmental and Geographical Science at the University of Cape Town. Dr Sunde is also a member of the One Hub research team and the Ocean Justice network. She stated the following in paragraphs 18, 21 and 24 of her affidavit which formed part of the applicants' founding papers:

> *"18. The material basis of Dwesa-Cwebe's ocean-coastal culture comprises three elements - sense of place linked to their coastline, a relational ontology connecting them to their ancestors and the way meaning is substantiated through socio-ecological interactions (performing rituals in the sea, the sea providing sustenance through fishing and harvesting activities), thus including both tangible and intangible culture. This is very evident in the Dwesa-Cwebe communities' coastal land-ocean culture today*.
>
> *19*. …
>
> *20*. …
>
> *21. Residents of the Hobeni community recognise specific rocks as belonging to specific clans. For example, amaDingatha have got their own rocks at the sea where they come for spiritual healing. They would come to that rock to talk to their ancestors*.
>
> *22*. …
>
> *23*. …
>
> *24. Many Nguni clans believe that the ancestors reside in the sea and in certain rivers and streams [...] This isiXhosa belief is confirmed in research*

conducted elsewhere along the Eastern Cape coast. The ancestors of these clans reside in the ocean. In addition, most Dwesa-Cwebe residents believe that there are ancestral spirits in the ocean and hence the ocean is sacred, with its significance increasing with depth. Disturbing these ancestors will cause them great distress."

[39] In its answering affidavit Shell elected not to deal with the aspect relating to the threat of harm to the applicant communities' cultural and spiritual beliefs. The applicants' allegations in that regard are accordingly undisputed. There is no reason not to accept the applicants' evidence in that regard.

[40] Before I deal with the applicants' contention that there is a threat to marine life and resultant economic harm, I must deal with Shell's contention that the applicants failed to establish harm or that the harm that might have been established is irreparable. It furthermore relies on the mitigation measures that are implemented to minimise harm to marine life.

[41] Implicit in Shell's contention is an acknowledgment of harm to marine life, hence the mitigation measures. Shell, through Mr Mtolo, says that those mitigation measures include:

41.1. seasonal restrictions, in that the humpback whale has a peak migration period between May and November;

41.2. the lowest volume airguns used in the survey, meaning that the sound at source level is low;

41.3. a survey area which has been carefully drawn to ensure that it is as small as possible and that no unnecessary or speculative exploration is carried out;

41.4. survey lines which are orientated in such a way that minimises the duration of the survey;

41.5. a 5km buffer zone around marine protected areas, despite the fact that the recommended buffer zone for a marine protected area is 2 km;

41.6. no survey activities will be undertaken in any declared marine protected area; and

41.7. the extension of the typical mitigation and exclusion zone from 500m to 800m to provide further protection to marine mammals, particularly low frequency cetaceans.

[42] Shell furthermore relies on the following operational measures:

42.1. Prior to any start, there will be a 60-minute pre-watch period. 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.

42.2. Passive Acoustic Monitoring will run for 24 hours a day for the full duration of the survey.

42.3. Independent Marine Mammal Observers will be on board the seismic vessel to observe and record responses of marina fauna to the survey. The observers are able to request that the start be delayed or the survey be suspended if required for the safety of marine life.

42.4. 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.

[43] Shell is of the view that all these measures, taken together, make for comprehensive mitigation of any of the adverse effects of the seismic survey.

[44] To prove irreparable harm, the applicants relied on the evidence of ten experts. Simon Elwen is a marine scientist, a Research Associate in the Department of Botany and Zoology at the University of Stellenbosch and a Director at Sea Search Africa (Pty) Ltd and Sea Search Research and Conservation NPO. Tess Gridley is also a marine scientist and a Director at Sea Search Africa (Pty) Ltd and Sea Search Research and Conservation NPO. Dr Gridley also founded the African Bioaccoustics Community, an international forum for the promotion of bioacoustics research and best practice in Africa. Drs Elwen and Gridley have been requested by the applicants to compile a report on new developments and information since the completion of the environmental management programme in 2013. In their report, which is dated 29 November 2021, they caution against Shell's reliance on the environmental management programme which is now eight years old for its denial of any significant harm. They argue that a more refined understanding of the ecological context requires that an up-to-date assessment be conducted to establish the true nature and extent of the potential harm that may arise from the seismic survey. Based on their expertise, they anticipate that the seismic survey would have an impact on individual animals, whole populations of animals and on the ecosystem as a whole. They point out that seismic airguns produce pulsed, high intensity, low frequency sounds typically every 10 seconds and with most energy below 200 Hz. In addition to the immediate potential harm from the high density sounds, low frequency sounds may extend over large distances (hundreds of thousands of kms, they say), especially in deeper waters. The pulsed sounds can change substantially in frequency and duration as they travel, essentially becoming a single continuous sound. They also point out that while no studies have directly linked seismic surveys to stranding or death of cetaceans, multiple studies have shown that cetaceans have a behavioural response to seismic surveys, including movement away, changes in movement/dive parameters and changes in vocalisation/singing behaviour and the reduction in the ability over which other animals can be heard, an important factor for breeding. They also point out that recent improvement of knowledge shows that humpback dolphins are impacted by multiple human activities and that fewer than 500 individuals remain in South Africa. They are now recognised as endangered. Although highly coastal in nature, humpback dolphins

are common in Algoa Bay and East London. Drs Elwen and Gridley point out that the extreme vulnerability of the humpback dolphin has not been recognised in the environmental development programme. They expressed the view that the seismic survey and any future extraction of hydrocarbons will impact a high number of endangered and/or endemic marine mammal, turtle, bird and fish species, as well as completely unstudied marine ecosystems. They fairly state that the immediate and cumulative impacts of seismic surveys, noise and hydrocarbon extraction in this environment remain unknown. For that reason, they suggest that a precautionary approach be followed. Drs Elwen and Gridley are of the view that the mitigation measures relied on by Shell are directed at the localised and short-term impacts, and do not adequately address the threat of harm.

[45] Douglas Nowacek is the Repass-Rodgers Chair of Marine Conservation Technology in the Nicolas School of the Environment and the Edmund T Pratt School of Engineering at Duke University in Durham, North Carolina, United States of America. He has studied the behavioural and acoustic ecology of marine animals throughout his professional career, with particular expertise in the subject of anthropogenic noise. He has authored or co-authored about 25 papers and reports specifically focused on ocean noise, from analyses of acoustic sources to impacts on marine animals to the mitigation of those impacts. Dr Nowacek emphasised the importance of sound in the biological activities of marine species, as well as the behavioural and physiological responses to unwanted sound. The exposure to the noise contemplated by Shell, and to the reverberating energy that would follow each blast, can aggregate into species-level consequences, which is of particular concern in the case of endangered populations. Dr Nowacek's opinion, that the seismic survey will likely cause significant harm to marine animals, is based on his finding that the 2013 environmental management programme did not use acoustic modelling, but rather relied upon outdated information regarding the presence and abundance of animals and outdated science regarding the acoustic impact on marine species. In particular, he stated that 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.

[46] Shell alleges that the south right whale is not present during the survey window in the survey area and that the humpback whale has a peak migration period between May and November (outside of the survey window). Migrating humpback cow-calf pairs migrate close to the coast, while non-calf groups may extend to at least 20 km from the coast, the argument being that if cow-calf pairs are passing by the area in the southern migration, they will likely be outside the potential behavioural disturbance threshold ranges of more than 10 kms from seismic source. Whales all migrate a maximum of 16 km from the shore, outside of the survey area which at the closest will only come within 20 km of the shoreline.

[47] Shell furthermore alleges that there is no well-established or acceptable threshold for behavioural disturbance in marine mammals. 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.

[48] It also contends that 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.

[49] Shell contends that the above considerations, in addition to the extensive mitigation measures undertaken by it, indicate that there can be no reasonable apprehension of harm to cetaceans.

[50] Shell's response to the evidence of Dr Nowacek and the evidence of the applicants' other expert witnesses is through the answering affidavit, which was deposed to by Mr Mtolo, the country chair of Shell Downstream (Pty) Ltd. Mr Mtolo did not allege or show that he has the requisite expertise to refute the expert evidence

relied upon by the applicants. I will place no value on Shell's attempted rebuttal of the expert evidence relied on by the applicants through the opinion evidence of Mr Mtolo.

[51] To revert to Dr Nowacek, he also expressed the opinion that the mitigation measures relied upon by Shell and which are eight years old will be ineffective.

[52] Jean Harris is a marine scientist, currently the Executive Director of WILDOCEANS, the marine programme of the Wildlands Trust, an NGO focused on biodiversity protection and building socio-ecological resilience in Southern Africa and the western Indian Ocean. Jennifer Olbers is employed as a senior marine scientist at WILDOCEANS. Kendyl Wright is employed as a marine protected area scientist at WILDOCEANS. The three of them compiled a report dated 6 December 2021 on the key findings in peer-reviewed literature on the physiological and ecological impacts of seismic survey activities on marine wildlife, with specific attention on the relevance of the information to the context of the survey in this case, as well as with regards to vulnerable and endangered species known to occur in the survey area during the present time. Drs Harris, Olbers and Wright have analysed the available information and established that there is plausible evidence to suggest that seismic survey activity is likely to affect the conservation status and recovery of populations of vulnerable and threatened species, including *inter alia* the humpback whale, because sound and the ability to hear and interpret sound is critical for many species to reproduce. They stated that it must therefore be assumed that interference in sound perception or utilisation for communication (temporary or permanent) had the potential to impact on an entire species.

[53] The three experts stated that the impacts of seismic activities are most well studied for marine mammals. Evidence suggests that there are distinct avoidance responses such as leaving the area of seismic activity or ceasing to undertake everyday activities, such as feeding in preferred areas. This, they say, is likely to negatively impact the fitness of an affected animal. The results of study in South Africa on the impacts of seismic activities in South African waters show clear evidence that the endangered and endemic African penguin avoided preferred feeding sites when a

seismic survey was active nearby. This is of particular concern for a species that is already stressed by prey depletion and the greater demand for them to forage further afield, and for which the prospect of extinction is significant.

[54] Drs Harris, Olbers and Wright expressed particular concern for the stress and avoidance that the humpback whales and their calves would encounter in the survey area. They are at risk of airgun noise affecting their behaviour or interfering with the communication between mother and calf. Any impact on their energy reserves could impact on their weight and physiological condition and affect survival of the animals during a vulnerable time, especially lactating mothers and their calves, on their long migration to feeding grounds in Antarctica.

[55] Turtle hatchlings which are carried in the Agulhas current through the survey area from the nesting beaches of iSimangaliso MPA, do not have the ability to avoid the airgun arrays. The three experts expressed the opinion that, when the turtle hatchlings pass through the survey area, they would not be detected by marine mammal observers and suffer extreme disturbance, especially during February and March when, according to them, the seismic survey should not continue.

[56] Zooplankton forms the base of many important food webs in the marine environment. Research in 2017 has shown significant mortality in zooplankton up to 1.2 km from the seismic survey array. Depletion of zooplankton could thus have an impact on food for their predators, such as fish, as well as impact fish eggs and larvae, with potential local impacts on species important in fisheries. Drs Harris, Olbers and Wright express the view that the mitigation measures relied upon by Shell do not adequately address the concerns regarding turtle hatchlings and zooplankton.

[57] Their report concluded that *"seismic surveys do cause harm to both species and the ecology, and that significant direct harm to individual animals and harm to populations of endangered species is the most likely scenario in the case of the seismic survey underway off the east coast of South Africa."*

[58] Lynton Burger is an impact investment specialist with 30 years' professional experience in environmental and sustainability management. He no longer works in the environmental management field. He presently works in the ocean impact and sustainable investment field. Mr Burger coordinated a group of 24 South African marine experts in drafting an open letter to the President of South Africa and the first and second respondents regarding the seismic survey in question. In that letter the experts point out, amongst others, that the country's marine ecosystems and the coastal communities' sustainable blue economies are being threatened by seismic surveys, that such surveys have immediate and long-term negative impacts on marine creatures and highlighting that the approval of the seismic surveys contradicts South Africa's agreement at the COP26 during October 2021, to move away from hydrocarbon-based energy towards renewables. They implored the South African government to *inter alia* halt all planned seismic surveys, including the one in question, until South Africa has a clear policy position on oil and gas exploration that is aligned with its climate change commitments.

[59] Mr Burger compiled a report dated 5 December 2021 wherein he commented on the exploration right that was granted to Shell as well as on the 2013 environmental management programme and the 2020 environmental compliance audit. He does not agree with the opinion contained in the 2020 environmental compliance audit to the effect that "*the measures contained in the [environmental management programme] sufficiently provide for the avoidance, management and mitigation of key potential environmental impacts identified and no recommendation for update of the [environmental management programme] is considered necessary*". In his view the 2013 environmental management programme is out of date and the 2020 environmental compliance audit does not address pertinent mitigation and management topics. He pointed out that neither report adequately considered "*the mounting peer-reviewed scientific studies and government reviews that are exposing the full impacts – many studies and expert reviews quote irreparable damage – to marine organisms and ecosystems from seismic testing. The Audit also makes no mention of the fact that a growing number of governments around the world have, as a result of this scientific*

concern, outlawed this practice. The fact that many of these studies and reviews have been published post the 2013 EMPr further invalidates ERM's Audit conclusion".

[60] Mr Burger is of the opinion that the authors of the environmental management programme are inadequately qualified. His investigation revealed that none of them has any listed professional marine science or marine environmental training. It appears to him that both reports have been compiled by consultants with land-based mining and generalised environmental impact experience. Mr Burger is also of the opinion that the mitigation measures, upon which Shell relies, are weak and inadequate as a management tool when one considers the full extent of ecological impacts that are now being understood. He says that those mitigation measures focus on an incomplete list of actual or potential negative impacts and are heavily reliant on marine mammal observers. The observers' ability to detect[11] cetaceans is severely limited to fleeting surface shows, like blows and fins. He is also concerned that there is effectively no mitigation during night-time surveying, which constitutes 50% of the surveying time. Most importantly, the full impacts to ecosystems components, like plankton, which occur as vast undetected biomass and which are the very building blocks of ocean ecosystems, as well as to the extensive unseen benthic reefs that the survey vessel passes over, cannot be monitored or mitigated by the monitors and are not adequately addressed by either of the reports. According to Mr Burger, the most material shortcoming of the 2020 Audit, as a compliance tool, is that it does not address the potential legal compliance conflicts and legislative framework questions that have arisen since the 2013 environmental management programme. Regard being had to the above, Mr Burger is of the opinion that neither the 2013 environmental management programme nor the 2020 environmental compliance audit represents a current and valid assessment of the full environmental impacts of seismic surveying off the Wild Coast.

[61] Michael Bruton is an aquatic marine scientist, a retired Professor of Ichthyology and currently a Director of Mike Bruton Engineering. He compiled a report on the

[11] Detection in this regard means scanning a vast and ever-changing 360-degree seascape with human eyes and binoculars.

presence of the coelacanth within the area impacted by the seismic survey in question. Prof Bruton highlighted the scarcity of the coelacanth and the difficulty in conducting research in relation to coelacanths. Coelacanth prefer a depth ranging from less than 100 metres to 800 metres, although they may occur at depths greater than 800 metres if suitable habitats and prey species are present. Prof Bruton points out that a colony of coelacanth was discovered at a depth of 104 metres by amateur divers off the iSimangaliso Wetland Park in northern Zululand. This population has been well studied and numbers over 26 individuals. Based on his own experience and available evidence, Prof Bruton expresses the opinion that coelacanth is likely to be off the Wild Coast as live specimens have been caught or seen on either side of the Wild Coast off Pumula and East London. In his knowledge and experience, the loss of even one coelacanth would have a significantly detrimental impact on the population as a whole, and particularly to the population occurring in the east coast of South Africa.

[62] Alexander Winkler is a marine scientist with expertise in fish behaviour and life-history assessment. He is attached to the Centre of Marine Science at the University of Algarve Faro, Portugal. He is also an honorary Research Associate at the Department of Ichthyology and Fisheries Science at Rhodes University. In a report dated 6 December 2021 he expresses an opinion on the likely effects of the seismic survey and the proposed mitigation measures contained in the 2013 environmental management programme. The first point that he makes is that the 2013 environmental management programme is out of date. Since then at least two in-depth scientific reviews on the effects of seismic surveys on fish have been published. The one study highlights the direct behavioural effects of seismic surveys on the rhythmic behavioural patterns of cod, albeit in the North Atlantic. Closer home, shallow-water hake and spiney dogfish, which are found in the survey area, have been found to show rhythmic diurnal foraging behaviour, such as that exhibited by cod in the North Sea. It is therefore likely that the effects of the seismic survey would be similar. He is of the view that the effects of the survey would affect the reproductive processes of fish that perform rhythmic foraging behavioural patterns. He criticises the 2013 environmental management programme for not identifying the fish species of conservation concern.

The most recent and in-depth South African national biodiversity assessment that was published in 2018 shows that 13% of the South African linefish fish species are threatened with extinction and most are found along the east coast. Of these fish more than 30% of the endemic seabream species are threatened and a further 27% are near threatened. Dr Winkler is of the view that the application of the precautionary approach on these species is imperative in the absence of evidence that the seismic survey in question will not directly or directly affect these species. He concludes by stating, as a fact, that the 2013 environmental management programme contains severe shortfalls that are the consequence of updated literature, technological advances and a growing global concern around the subtle indirect effects of noise pollution on marine ecosystems. In the light of the new body of information, he suggests that "*the effects of the survey will at least have lasting indirect energy budget effects on the Transkei and Algoa Bay's marine fish fauna, which will probably affect processes such as reproduction and migration of certain species*".

[63] David Russell is an independent fisheries consultant based in Namibia. He has 30 years' experience in the fishing industry, with expertise in *inter alia* environmental aspects of fisheries management. Mr Russell provides an account of the impact on tuna catches of the seismic survey activities conducted by Shell between 2012 and 2017, and the devastating impact that this had on the albacore tuna industry. He states that many seasonal fishermen lost their jobs as a result of this.

[64] As pointed out above, Shell has, despite the massive body of expert evidence on the threat of harm to marine life, not adduced any expert evidence to neutralise the applicants' evidence in that regard. The opinions expressed by the above experts are based on objective facts contained in their reports or affidavits. There is no reason not to accept their evidence. That evidence establishes that, without intervention by the court, there is a real threat that the marine life would be irreparably harmed by the seismic survey. Against the acceptance of the body of expert evidence, Shell's denial that its activities will have an adverse impact on marine life cannot be sustained.

[65] Shell also relies on the fact that on 3 December 2021 this court found in *Border*

Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others[12] 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*." The finding made by Govindjee AJ must be read and understood in its proper context. One of the reasons that the learned judge dismissed that application is because the evidence relating to the contention that the seismic survey would have a detrimental impact on the environment, and marine life in particular, was "*speculative at best*". Govindjee AJ found that there was limited material in support of the applicants' contention on this point. Unsurprisingly, the learned judge found that the applicants did not establish a reasonable apprehension of irreparable harm. That case is completely distinguishable from the present matter because, in the present application, the applicants adduced a sizable body of expert evidence which establishes a reasonable apprehension of irreparable harm to marine life; and secondly, that the mitigation measures upon which Shell relies are inadequate. In all the circumstances, I am satisfied that the applicants have established a reasonable apprehension of irreparable to marine life. In addition to the harm to marine life, the applicants have also established how the seismic survey will firstly, negatively impact on the livelihood of the fishers; and secondly, cause cultural and spiritual harm.

[66] I will now consider the balance of convenience. To make a finding in that regard the court must balance the harm that the applicants will suffer if the interim interdict is not granted, as against the harm that Shell will suffer if the interim interdict is granted. The balance of convenience is not evaluated in isolation. The stronger the prospects of success in the main proceedings, the less need for the balance to favour the applicants, and *vice versa*.[13]

[67] It was submitted on behalf of Shell that the prejudice to it would be real and

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[12] n 3 at par 35.

[13] *CIPLA Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 (4) SA 579 (SCA) at par 61.

devastating if the interim interdict against it would be granted, whereas the prejudice that the applicants would suffer if the interim interdict would not be granted is speculative.

[68] Shell's case is that, if the interim interdict is granted, it will be final in effect because it will make it impossible for the survey to be completed by the end of May 2022; that Shell and Impact Africa will be unable to exploit the exploration right and that the termination of the survey will result in an immediate cost of approximately R350 million to Shell and Impact Africa, with an estimated total loss as a result of having to terminate the survey and subsequent loss of the exploration right exceeding R1 billion. Shell's case is furthermore that if the applicants' case under Part B is ultimately dismissed, it and Impact Africa would have suffered severe prejudice in that the interim interdict would have caused them catastrophic harm even though its rights would have been vindicated. As I understand the applicants' case, they seek Shell to consult with all the stakeholders, including traditional communities, in accordance with the consultation procedure set out in the Mineral and Petroleum Resources Development Act. If that procedure was followed, Shell would have been made aware of the communities' cultural and spiritual beliefs and take appropriate measures to mitigate any harm that would have been highlighted during the consultation procedure. Shell failed to do so with the applicant communities. Shell should not now be allowed to use the consequences of its own failure to adequately consult with all interested and affected persons as a ground for why an interim interdict should not be granted against it. Constitutional rights are at stake. The financial loss that Shell and Impact Africa are likely to suffer cannot be weighed against the infringement of the constitutional rights in question. Put differently, the anticipated financial loss to Shell and Impact Africa cannot justify the infringement of the applicants' constitutional rights. The breach of those constitutional rights threaten the livelihoods and well-being of the applicant communities as well as their cultural practices and spiritual beliefs. Where constitutional rights are in issue, the balance of convenience favours the protection of those rights.[14] In my view,

[14] *Propshaft Master (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality and others* 2018 (2) SA 555 (GJ) at par 10.7.

the applicants have established that the balance of convenience favours them.

[69] It is pointed out that, despite the above expert evidence adduced by the applicants, Shell adopted the stance that the nature of harm of which the applicants complain is of a speculative nature, and because of the speculative nature of the harm, the balance of convenience favours the dismissal of the interim interdict. I do not agree. In my view the expert evidence establishes that there is a reasonable apprehension of real harm to marine life. But if there are any uncertainties about the harm that may be suffered, this is a case where the application of the precautionary principle is justified. In terms of that principle, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[15] In terms of the Principle 15 of the Rio Declaration the onus is to be discharged by the party arguing against the application of the precautionary principle.[16]

[70] Section 2(4)(a)(vii) of NEMA provides that sustainable development requires the consideration of all relevant factors, including *"that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions"*. The Constitutional Court[17] has had occasion to examine the duties arising from the proper interpretation of the precautionary principle. It emphasised that the approach adopted in NEMA is one of risk-aversion and caution, which entails *"taking into account the limitation on present knowledge about the consequences of an environmental decision*" and that the precautionary principle is applicable *"where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development."*[18]

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[15] Principle 15 of the Rio Declaration on Environmental and Development.

[16] *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and others* [2013] 4 All SA 624 (GSJ) at par 45.

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

[18] Id at paras 81 and 98.

[71] In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others*[19] the Court analysed the approaches in international and comparative law to the precautionary principle, particularly the development of and reliance on the principle in Australia.[20] In doing so the Court had the following to say at paragraph 104:

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

[72] In that case the court set aside the decision under review on the basis that the decision-maker had not established that the risks were absent or negligible.

[73] In all the circumstances, the balance of convenience favours the granting of an interim interdict.

Alternative remedy?

[74] Shell pointed out that the applicants could have approached the Minister, in terms of section 90 as read with 47 of the MPRDA, to cancel or suspend its right to explore. Section 90 gives the Minister the power to cancel or suspend a permit or right in accordance with the procedure contemplated in section 47. Section 47 of the MPRDA reads as follows:

> "(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof-

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[19] *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others* 2019 (2) SA 403 (WCC) at par 104.

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

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;

(b) breaches any material term or condition of such right, permit or permission;

(c) is contravening any condition in the environmental authorisation; or

(d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act.

(2) Before acting under subsection (1), the Minister must-

(a) give written notice to the holder indicating the intention to suspend or cancel the right;

(b) set out the reasons why he or she is considering suspending or cancelling the right;

(c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and

(d) notify the mortgagee, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

(3) The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.

(4) If the holder does not comply with the direction given under subsection (3), the Minister may act under subsection (1) against the holder after having-

(a) given the holder a reasonable opportunity to make representations; and

(b) considered any such representations.

(5) The Minister may by written notice to the holder lift a suspension if the holder-

(a) complies with a directive contemplated in subsection (3); or

(b) furnishes compelling reasons for the lifting of the suspension."

[75] It is obvious that the section envisages a time-consuming procedure, which, if followed, would allow the continuous threat of infringement of the applicants' rights. Although the above section does provide a remedy, it is in the circumstances of this case not a satisfactory remedy.

[76] I have my doubts whether the process in terms of section 47 would have been fair. In terms of that section the applicants were required to approach the Minister to suspend or cancel Shell's rights. It is the same Minister who is said to have tweeted that the South African government considers the objections to the seismic survey "*as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection*." Given the emotive language used by the Minister, it is not unreasonable to believe that he would not have suspended or cancelled any of Shell's rights, particularly the exploration right, especially since the Minister has delivered an answering affidavit wherein he "*nailed his colours to Shell's mast*", as was submitted on behalf of the applicants. It appears that the Minister had made up his mind and the procedure to which Shell refers would, quite frankly, have been a waste of time.

[77] I have not been persuaded that the applicants have a satisfactory alternative remedy available to them, other than the grant of an interim interdict.

<u>Urgency</u>

[78] In its main answering affidavit Shell adopted the attitude that the applicants failed to show why they will not obtain redress at a hearing in due course. It also alleged that the applicants could quite easily have intervened as parties in *Border Deep Sea Angling Association and others v Minister of Mineral Resources and Energy and others* but deliberately chose to stay out of that application, forcing Shell to defend itself twice in one month in applications arising from the seismic survey. The applicants alleged that the application is urgent because they will not obtain redress in the ordinary course. They contended that, without urgent interim relief, the seismic survey will cause ongoing harm to marine life, with the associated harm to their economic, cultural and social rights. They contended that if this matter was heard in the ordinary course in terms of the rules of court, it is likely that it would have been heard only towards the end of or after the completion of the seismic survey. The applicants alleged that they became aware of the commencement of the intended seismic survey through the media during the early part of November 2021 and briefed attorneys on 22 November 2021 after protest action and other forms of activism had failed to convince the government to intervene. The application was launched on 2 December 2021 and argued on 17 December 2021.

[79] On 8 December 2021 Shell requested a case flow meeting for a more reasonable timetable than the one contained in the notice of motion. On that same day I presided over that meeting. The parties agreed on the date of the hearing as well as the dates for the delivery of their respective affidavits and heads of argument. It is correct that the application must have caused severe inconvenience to Shell and its legal representatives, particularly this time of the year. However, when regard is had to the steps taken by the applicants after they had become aware of the commencement of the seismic survey, the issues raised in this application,[21] that Shell had, under the circumstances, sufficient time to put its case before the court, as well as the public interest in the outcome of this application, I have decided to exercise my discretion in

[21] The applicants allege unlawfulness of the seismic survey and the threat of infringement of constitutional rights. The courts should investigate the allegations of unlawfulness and infringement of constitutional rights as soon as reasonably possible because, to allow the continuation of the unlawfulness and the infringement of constitutional rights (if established), would offend the rule of law.

favour of the applicants and dispense with the rules insofar as they regulate the periods when documents should be delivered.

Costs

[80] The applicants have been successful. They are entitled to their costs. Although the Minister has opposed the application on a limited basis and although the real litigation at this stage was between the applicants and Shell, the fact of the matter is that the Minister has decided, belatedly so, to oppose the application. The Minister and Shell should accordingly be ordered to pay the applicants' costs.

[81] A further aspect relevant to costs that was raised, was whether Shell should pay the costs of two or three counsel employed by the applicants. It was submitted on behalf of Shell that the matter was not such that it required the services of three counsel. It appears to me that all along the applicants employed the services of two counsel. However, when the timetable for the delivery of affidavits was adjusted, it resulted in the applicants having to deliver their replying affidavits and heads of argument in one day after the delivery of Shell's answering affidavits. They employed a third counsel because they had to deal with the contents of a lengthy answering affidavit and draft heads of argument in one day. In my view, given the factual allegations and legal issues that had to be dealt with, the applicants took the necessary precautionary measure to employ a third counsel. In the circumstances, the Minister and Shell should be ordered to pay the applicants' costs of the application, such costs to include the costs attendant upon the employment of three counsel, where so employed.

Order

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

> 82.1. The third, fourth and fifth respondents be and are hereby interdicted from undertaking seismic survey operations under Exploration Right 12/3/252 pending the finalisation of Part B of the notice of motion.

82.2. The first and fifth respondents shall pay the costs of the application for an interim interdict, jointly and severally the one paying the other to be absolved, such costs to include the costs attendant upon the employment of three counsel, where so employed.

82.3. The application is postponed *sine die* for the determination of the relief sought under Part B of the notice of motion.

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G H BLOEM
Judge of the High Court

For the applicants:	Mr T Ngcukaitobi SC with Ms E Webber and Ms N Stein, instructed by Legal Resources Centre and Richard Spoor Inc Attorneys, Cape Town and Huxtable Attorneys, Grahamstown.
For the first respondent:	Mr O H Ronassen SC, instructed by the State Attorney, Port Elizabeth and Whitesides Attorneys, Grahamstown.

For the third, fourth and fifth respondents:	Mr A Friedman and Ms L Crow, instructed by Shepstone & Wiley, Umhlanga Rocks and Netteltons Attorneys, Grahamstown.
Date of hearing:	17 December 2021.
Date of delivery of judgement:	28 December 2021.