THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 58/2023

71/2023

351/2023

In the matter between:

MINISTER OF MINERAL RESOURCES AND ENERGY	**FIRST APPELLANT**
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B.V.	**SECOND APPELLANT**
IMPACT AFRICA LIMITED	**THIRD APPELLANT**
BG INTERNATIONAL LIMITED	**FOURTH APPELLANT**

and

SUSTAINING THE WILD COAST NPC	**FIRST RESPONDENT**
MASHONA WETU DLAMINI	**SECOND RESPONDENT**
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	**THIRD RESPONDENT**
NTSHINDISO NONGCAVU	**FOURTH RESPONDENT**
SAZISE MAXWELL PEKAYO	**FIFTH RESPONDENT**
CAMERON THORPE	**SIXTH RESPONDENT**
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	**SEVENTH RESPONDENT**

NATURAL JUSTICE **EIGHTH RESPONDENT**

GREENPEACE ENVIRONMENTAL ORGANISATION NPC **NINTH RESPONDENT**

Neutral citation: *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (Case no 58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024)

Coram: PONNAN, MOCUMIE and MATOJANE JJA and SMITH and SEEGOBIN AJJA

Heard: 17 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 3 June 2024 at 11h00.

Summary: Review – failure by court to consider question of just and equitable relief under s 172 of the Constitution when setting aside grant and renewals of exploration right – court on appeal – empowered to do so – suspending order setting aside decisions.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Mbenenge JP, Nhlangulela DJP and Norman J, sitting as court of first instance):

a Save to the extent set out hereunder, the appeal is dismissed with costs, including those of two counsel to be paid jointly and severally by the appellants.

b The order of the court below is amended by the addition of the following:

'5. Paragraphs 1, 2 and 3 hereof are suspended pending determination of the application submitted on 21 July 2023 pursuant to s 81 of the Mineral and Petroleum Resources Development Act 28 of 2002 for the renewal of exploration right 12/3/252.'

JUDGMENT

Ponnan JA (Mocumie and Matojane JJA and Smith and Seegobin AJJA concurring):

[1] This appeal has its genesis in the grant, on 29 April 2014, of an exploration right by the first appellant, the Minister of Mineral Resources and Energy (the Minister), to the third appellant, Impact Africa Limited (Impact), to be exercised by the second appellant, Shell Exploration and Production South Africa B.V. and the fourth appellant, BG International Limited (BG) (the second and fourth appellants are collectively referred to as Shell). On 17 May 2017, Impact applied for a renewal of the exploration right, which was granted on 20 December 2017. On 13 March 2020, Impact applied for a second renewal of the exploration right, which was granted on 30 July 2021.

[2] When Impact and Shell sought to exercise the exploration right by conducting seismic surveys off the Wild Coast of South Africa, the first to seventh respondents approached the Eastern Cape Division of the High Court, Makhanda for urgent interdictory relief on 2 December 2021. Relief was sought in two parts. Part A served before Bloem J, who, on 28 December 2021, interdicted Impact and Shell from

undertaking seismic survey operations under the exploration right, pending the finalisation of Part B. The eighth respondent, Natural Justice and the ninth respondent, Greenpeace Environmental Organisation NPC, thereafter sought and obtained leave to join as the eighth and ninth applicants in the proceedings.

[3] Part B was heard on 30 and 31 May 2022 by a specially constituted court of three judges consisting of Mbenenge JP, Nhlangulela DJP and Norman J (the high court). In a written judgment delivered on 1 September 2022 the high court held:

'1. The decision taken by the first respondent on 29 April 2014 granting exploration right 12/3/252 to the fourth respondent for the exploration of oil and gas in the Transkei and Algoa exploration areas is reviewed and set aside.

2. The decision taken by the first respondent on 20 December 2021 to grant a renewal of the exploration right is reviewed and set aside.

3. The decision taken by the first respondent on 26 August 2021 to grant a further renewal of the exploration right is reviewed and set aside.

4. The first, fourth and fifth respondents shall pay [the] costs of this application, jointly and severally, the one paying the other to be absolved, such costs to include, in the case of the first to seventh applicants, the costs of three counsel and, in the case of the eighth and ninth applicants, the costs of two counsel.'

[4] In arriving at that conclusion, the high court declined the invitation by the respondents to declare that Shell and Impact were not entitled to commence any exploration activity without first seeking and obtaining an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 (NEMA). The high court took the view that the success of the review would render the relief sought under NEMA, which had been raised in the alternative to the main relief, redundant. With the leave of the high court, the Minister, Shell and Impact appeal, as the first to third appellants respectively, against the judgment and order of the high court and the respondents challenge by way of a cross appeal the refusal of the high court to consider and determine the relief sought under NEMA. At the bar, it came to be accepted that the cross appeal was, in truth, in the nature of a conditional cross appeal, and that the need to enter into it would only arise were we to uphold the main appeal.

[5] The judgment of the high court has been reported *sub nom Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk), it is accordingly not necessary for the facts or litigation history, which has been set out therein, to be repeated here.

[6] Before turning to the substantive merits of the appeal, it is necessary to consider two preliminary issues raised by the appellants before the high court and persisted in on appeal. It is contended that: (i) the review application should have been dismissed on the ground that the respondents unreasonably delayed in launching their challenge, thus falling foul of the 180-day time limit under s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and, (ii) the appellants failed to exhaust their internal remedies, namely an appeal in terms of s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) against the grant of the exploration right and the renewals, prior to bringing their review application.

As to (i):

[7] The respondents maintain that they became aware of the grant of the exploration right in late October and early November 2021. The review application was initiated, by way of an amendment to the notice of motion in January 2022, after the grant of the interim interdict by Bloem J, well within the 180-day limit, according to the respondents.

[8] Shell asserts that it does not matter when the individual persons or communities became aware of the impugned decisions and their reasons, because, so the assertion proceeds, the decisions affected the public at large and (relying on the *OUTA* decision)[1] the clock started ticking when the public at large might reasonably have been expected to have become aware of the decisions and the reasons for them, regardless of when the concerned individuals had themselves become aware. Shell maintains that this occurred on 20 May 2020, when an Environmental Compliance Notice was sent to interested and affected persons [IA&Ps], and to the general public, allegedly alerting them to the grant of the exploration right.

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[1] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) para 27.

[9] Impact adopts a similar approach to Shell, claiming that the applicable test is when the public at large could reasonably be expected to have become aware of the decisions and their reasons. Impact maintains that this occurred in 2013, when it notified the public of its application for an exploration right. The Minister adopts the same stance as Impact, stating that the public at large would reasonably have been expected to have become aware of the grant of the exploration right around 29 April 2014, some seven years before the institution of the review.

[10] The appellants accordingly contend that the high court erred in applying the test under s 3 of PAJA (which relates to administrative action affecting a person) as opposed to s 4 (which relates to administrative action affecting the public). As a result, so the contention proceeds, the high court focused on the fact of when the individual applicants actually obtained knowledge of the decisions sought to be reviewed rather than the question of when the public at large might reasonably be expected to have knowledge of the administrative action. But, even if it is assumed in the appellants' favour that the high court should have applied s 4, instead of s 3, of PAJA, it makes no difference. There is no evidence that the Minister (or his delegate) gave the public notice of the decisions prior to October 2021.

[11] Under s 3(2)*(b)* of PAJA, an administrator is required to afford all persons whose rights are materially and adversely affected by administrative action:

'(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.'

[12] No evidence has been adduced that the Minister or his delegates gave the public notice that the exploration right had initially been granted or later renewed. The Minister does not point to any notice or publication. It is simply asserted that the public would have become aware of the grant of the exploration right around April 2014. Nor, does Impact specify how the public became aware of the relevant decisions prior to October 2021. Impact contends that the general public would have 'become aware of the exploration right in 2013, when there was public notification of the exploration right

application by means of: notices in four newspapers on 22 March 2013; emails to stakeholders on 22 March 2013 . . .; emails to all IA&Ps on 17 and 24 May 2013 notifying of the draft EMPr's [environmental management programme's] availability for review and comment; and three public meetings in Port Elizabeth, East London and Port St Johns on 3, 4 and 5 June 2013'.

[13] However, these processes gave notice of Impact's application for an exploration right, not of the grant of the exploration right or the renewals thereof. In any event, the grant of Impact's exploration right occurred on 29 April 2014, after the above notices were given and meetings held. Both the Minister and Impact attempt to skirt around this problem by focusing on the applicability of ss 3 and 4 of PAJA. However, the argument misses the point. The point is that the Minister should have given clear notice of his decision to grant the exploration right and its renewals and informed all affected persons (being individuals and the public) of their right to appeal the decisions or request reasons. The Minister failed to do so. In the absence of a clear announcement of the decisions, the public could not reasonably have known of their existence. It was only after 29 October 2021, when SLR Consulting (at the instance of Shell) gave notice of Shell's intention to commence with the seismic survey and the issue was picked up in the media, that the public at large might reasonably have become aware of the decisions. It could thus never be that the general public could reasonably be expected to have knowledge that a right had been granted merely because the general public had knowledge that a right had been applied for.

[14] There is thus no basis for the appellants to claim that the public might reasonably have been expected to become aware of the decisions prior to late October 2021. As such, the 180-day time period only began running in October 2021 and there was no delay in launching the review proceedings.

As to (ii):

[15] According to the respondents, they did not pursue an internal appeal for four reasons: First, they only found out about the grant and the renewals in November 2021, almost seven years after the exploration right was granted. Second, the initial approach to the Court was for urgent interdictory relief, in circumstances where the commencement of the seismic survey was imminent and would likely have been

concluded prior to the resolution of any appeal thereby rendering nugatory any internal appeal process. Third, there existed a reasonable apprehension of bias against them on the part of the Minister, which was based on the Minister's opposition to part A of their application despite no relief being sought against him, as well as his application for leave to appeal the judgment and order granted under part A. The apprehension was fortified by several public statements made by the Minister, criticising public interest groups for challenging the seismic surveys and maintaining his refusal to review the exploration right. The Minister was quoted as saying: 'We consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection.' The Minister did not engage at all with the reasons advanced by the first to seventh respondents for not pursuing an internal appeal.

[16] It is suggested that the respondents cannot rely on the conduct and public statements of the Minister after the litigation commenced to justify their failure to exhaust internal remedies prior to applying for the review and the setting aside of the Minister's decisions. What this ignores, however, is that the grounds giving rise to the perception of bias all arose before the notice of motion was amended to include the review of the Minister's decisions. The obligation to exhaust internal remedies, and the realisation that this would be fruitless, was not an issue at the time of the launch of the application and the hearing of part A. This perception of bias only arose after part A of the application had been finalised, when the review relief was introduced by way of the amendment to the notice of motion.

[17] It is not in dispute that neither the public nor the IA&Ps was given notice of the decisions or informed of their right to appeal or to ask for reasons. The failure to do so, which is unexplained on the papers, is subversive of the procedural entitlements of the appellants. What is more, after learning of the existence of the exploration right, the Minister and the Petroleum Agency of South Africa (PASA) was approached on behalf of Natural Justice and Greenpeace Africa with a request for copies of the exploration right and the other impugned decisions as well as reasons for those decisions and for an extension of the period within which to bring an appeal. The request was ignored. Thus, details of the impugned decisions came to be seen for the first time when the rule 53 record in the review was furnished. In the circumstances,

the high court can hardly be faulted for its finding that: '[t]his is a classic case of an internal remedy that would not have been objectively implemented and which would have rendered nugatory the values of administrative justice enshrined in the Constitution and upheld by PAJA'.

[18] Moreover, the test for interference with the exercise of a discretion of this nature has not been satisfied. The high court had a wide discretion to exempt the respondents from the relevant internal remedy provisions. This was a permissible option available to it in terms of s 7(2)*(c)* of PAJA.[2] When it did so, it exercised a true discretion. The test for interference with such a discretion on appeal is that this Court would have to be satisfied that the discretion was not exercised judicially or was influenced by wrong principles or wrong facts.[3] The appellants have not come close to satisfying this test.

[19] Turning to the merits: The right to procedurally fair administrative action is entrenched in s 33 of the Bill of Rights. The grant of an exploration right constitutes administrative action.[4] When administrative action materially and adversely affects the rights of any person, their right to procedural fairness is triggered. It can hardly be in dispute that Impact was required to meaningfully consult with the communities and individuals that would be affected by the seismic blasting. The duty to do so derives from: (i) the obligations imposed upon it, as an applicant for an exploration right, by the MPRDA; and, (ii) the self-standing duty under PAJA to consult with the communities as holders of existing customary rights (particularly customary fishing rights) that would be adversely affected by the seismic blasting.

[20] Section 3 of PAJA sets out the requirements for procedural fairness. These include that persons, whose rights are impacted, must be given adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations.[5] In the context of exploration and mining, PAJA

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[2] S 7(2)*(c)* of PAJA provides: 'A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice'.
[3] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) paras 83 and 88.
[4] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*).
[5] S 3(2)*(b)*(*i*) and (*ii*) of PAJA.

must be read together with the MPRDA. When an application for an exploration right is made, the MPRDA imposes obligations on an applicant to consult with any affected party.[6]

[21] The general principles that are applicable to consultation of communities in relation to applications under the MPRDA were set out by the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (*Bengwenyama*). Two bear emphasis: First, interested and affected persons must be informed in sufficient detail of the proposed mining activities and what those will entail, so that they can properly assess its impact. The provision of the necessary information will allow such persons to make an informed decision in relation to the representations that they will submit to the decision-maker.[7] Second, a meaningful consultation process is integral to ensuring procedural fairness. The Constitutional Court stated that 'any administrative process conducted or decision taken in terms of the [MPRDA] must be taken in accordance with the principles of lawfulness, reasonableness and procedural fairness. The prescripts of the [MPRDA] in this regard are subject to the provisions of PAJA'.[8] Although *Bengwenyama* dealt with consultation in relation to prospecting right applications, the reasoning applies with equal force to the applications encountered here.

[22] The adequacy of the consultation process adopted in this case has been subjected to wide-ranging criticism by the respondents, including that:
(i) the language used is technical and inaccessible – by way of example, the work programme is described as including the following steps: 'Phase 1: Airborne geophysics acquisition (gravity and magnetics) to define existing structural trends, identify additional features and to address depth to basement/magnetic source. Phase 2: 2D and 3D seismic surveys followed by processing and interpretation . . .'; and,

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[6] These are derived from s 79(4) of the MPRDA, which deals with applications for exploration rights. At the time that the exploration right was granted, this section provided that:
'(4) If the designated agency accepts the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing –
(a) to notify and consult with any affected party; and
(b) to submit an environmental management programme in terms of section 39 within a period of 120 days from the date of the notice.'
[7] *Bengwenyama* paras 66–67.
[8] *Bengwenyama* para 61.

(ii) the geographic location that will be affected is described in vague and overbroad terms as the 'Transkei/Algoa area off the Eastern Cape Coast of South Africa' and 'the proposed Exploration area (45 838km^2) extends from the coast out to a maximum water depth of approximately 4000m', making it impossible for communities to know if the notice was applicable to them.

[23] However, by far the most trenchant criticism – one from which there appears to be no escape for the appellants – is that the notices that were published in the four newspapers were inaccessible to many members of the respondent communities. Three of the newspapers are in the English language and one in Afrikaans. Few people in the respondent communities (particularly the Amadiba community) read English, and virtually nobody speaks Afrikaans. The majority of residents along the Wild Coast speak isiXhosa or isiMpondo. If Impact wanted to meaningfully engage with them, it should have prepared notices in their language. In addition, there is no newspaper circulating in Amadiba or in the communities of Dwesa-Cwebe. Newspapers are not delivered to these communities. Newspaper advertisements would simply not reach them, even if in a language of their choice.

[24] As is the case with many communities along the Wild Coast, the people of Amadiba mostly get their news from the radio. They mainly listen to Ukhozi FM and Umhlobo Wenene. The respondents say that had there been notice or discussion of Shell's proposed seismic blasting on the radio, they would certainly have commented. The adverts in the four newspapers were intended to notify the public about the proposed project and provide details of the consultation process and information as to how members of the public could provide input in respect of the forthcoming survey. In the circumstances, the choice of print media was plainly ill-advised. This was exacerbated by the choice of English and Afrikaans language newspapers. The process, which was more illusory than real, was thus manifestly inadequate.

[25] It follows, and this is the logical corollary to the inadequacy of the consultation process, that when assessing (and ultimately granting) Impact's application for an exploration right, a number of relevant factors were not considered, including but not limited to: the detrimental impact that the surveying activities would have on the spiritual and cultural practices of the affected communities; the livelihood of the

members of the communities along the Wild Coast, inasmuch as the sea is the primary – and in many cases the only – source of nutrition and income for them; and, the requirements of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ICMA), which creates specific measures for the protection of the coastal zone.

[26] It is thus clear that there was a failure to take relevant considerations into account and as such the decision is reviewable under s 6(2)*(e)*(*iii*) of PAJA.[9] Once a ground of review under PAJA has been established, s 172(1)*(a)* of the Constitution requires the decision to be declared unlawful, but that is not the end of the matter. The consequence of a declaration of unlawfulness is that it must then be dealt with under s 172(1)*(b)* of the Constitution.[10] Not only did the high court fail to consider the question of just and equitable relief under section 172 of the Constitution, but it went so far as to hold that: '[a]uthorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.' On any reckoning such a far-reaching finding, which has a sterilising effect and for which there can be no warrant, cannot be endorsed.

[27] In exercising powers under s 172(1)*(b)*, courts have the widest possible remedial discretion.[11] The appellants submit that our courts have been cognisant of ensuring that innocent parties are not unduly prejudiced,[12] and that it is thus necessary for this Court to revisit the aspect of remedy. The Constitutional Court in *Electoral Commission v Mhlope & others*,[13] emphasised the need for courts to be pragmatic in crafting just and equitable remedies in the exercise of its wide remedial powers. A just

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[9] In terms of s 6(2)*(e)*(iii) of PAJA, a court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.

[10] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 25.

[11] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 132.

[12] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) para 23.

[13] *Electoral Commission v Mhlope & others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) para 132.

and equitable remedy must be: proportionate (the Constitutional Court has found that it is disproportionate to set aside an entire project as a consequence of an imperfect process);[14] fair and just in the context of the particular dispute;[15] ample and flexible and should place substance above form.[16]

[28] Seeing as the high court ered in not weighing up the relevant factors, this Court is empowered to do so. There has been an almost eight-year delay between the granting of the exploration right and the review and, acting in reliance on the validity of the decisions, there has been significant financial expenditure in the region of R1.1 billion, dating back to 2012 when Impact applied for its technical co-operation permit (which preceded the exploration right). Two renewals of the exploration right have been granted, accordingly there will be only one more opportunity to renew the exploration right. A moratorium has since been placed on exploration rights over the entire South African coast,[17] thus Shell and Impact may never get the opportunity to exercise the right.

[29] The appellants also argue that the high court failed to consider the adverse consequences for the public in whose interests the decision-maker purportedly acts. Shell and Impact provided evidence of the economic and social benefits that will fail to materialise without the exploration being undertaken. Sight cannot also be lost of the public interest in the finality of administrative decision-making and the degree or materiality of the irregularity or that the long delay and lack of legal certainty may well have a chilling effect on foreign investment. The appellants contend that all of these can be mitigated by the possibility of directing that measures be implemented, including that a further public participation process be undertaken. In the circumstances, so the contention goes, considerations of justice, equity and the

[14] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 134.
[15] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 96.
[16] Ibid para 97.
[17] See GN 657 in GG 41743 of 28 June 2918; GN 1664 of GG 42915 of 20 December 2019. See further GN 71 in GG 37294 of 3 February 2014; and GN 932 in GG 35866 of 16 November 2012.

principles of finality and certainty, dictate that the harshness of the exploration right being set aside, can and should be ameliorated.[18]

[30] In *Joubert Galpin Searle Inc*, Plasket J thought it necessary 'to temper the setting aside . . . in a way that minimises the negative effects'. He accordingly decided to 'suspend the order reviewing and setting aside . . . so that something remains in place, imperfect as it may be'.[19] There is much to commend that approach in a matter such as this, particularly in the light of what follows. Shortly before the hearing of the appeal, we raised the following with the parties:

'Inasmuch as each of the first and second renewal of the exploration right, which issued on 20 December 2017 and 26 August 2021 respectively, was not to exceed two years, the parties will be required at the hearing of the matter to address whether the decision sought in the appeal will have any practical effect or result within the meaning of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013.'

[31] We were informed, in response, that prior to the end of the second renewal period of the exploration right and, pursuant to exercising their exclusive right to do so in accordance with s 82(1)*(b)* of the MPRDA, Impact and BG timeously submitted an application to PASA on 21 July 2023, to enter into a third renewal period as permitted by s 81(4) of the MPRDA. In terms of s 81(5) of the MPRDA, an exploration right in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as the application has been granted or refused. Thus, despite the current expiration date of 26 August 2023, the exploration right remains in force until the third renewal application has been granted or refused. It would thus be entirely within the power of this Court to direct that as part and parcel of a proper consideration of the third renewal application, a further public participation process be conducted to cure the identified defects in the process already undertaken, especially as the parties who claim to have an interest in the matter have now been identified and the matters warranting consideration have been fully canvassed in a 19-volume record consisting of some 4000 pages. Consequently, save for suspending

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[18] See: *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) at para 53. And more specifically in relation to the MPRDA and/or NEMA;

[19] *Joubert Galpin Searle Inc and Others v Road Accident Fund* [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP) 2014 (4) SA 148 (ECP) paras 105 and 106.

the orders setting aside the granting of exploration right 12/3/252 and each of the two renewals dated 20 December 2017 and 26 August 2021 respectively, the appeal is otherwise dismissed.

[32] In the result:

a. Save to the extent set out hereunder, the appeal is dismissed with costs, including those of two counsel to be paid jointly and severally by the appellants.

b. The order of the court below is amended by the addition of the following:

‘5. Paragraphs 1, 2 and 3 hereof are suspended pending determination of the application submitted on 21 July 2023 pursuant to s 81 of the Mineral and Petroleum Resources Development Act 28 of 2002 for the renewal of exploration right 12/3/252.’

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V M PONNAN

JUDGE OF APPEAL

Appearances

For the first appellant:	A Beyleveld SC and AC Barnett
Instructed by:	The State Attorney, Gqeberha
	The State Attorney, Bloemfontein
For the second appellant:	A Friedman
Instructed by:	Shepstone & Wylie, Durban
	McIntyre van der Post, Bloemfontein
For the third appellant:	C Loxton SC, A Nacerodien and P Schoeman
Instructed by:	Cliffe Dekker Hofmeyr Inc., Cape Town
	Honey Attorneys, Bloemfontein
For the first to seventh respondents:	E Webber and N Stein
Instructed by:	Richard Spoor Inc., Cape Town
	Matsepes Inc., Bloemfontein
For the eighth & ninth respondents:	N Ferreira and L Moela
Instructed by:	Cullinan and Associates Inc., Cape Town
	CWA Attorneys, Bloemfontein.