



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 3491/2021

In the matter between:

SUSTAINING THE WILD COAST NPC	1st Applicant
MASHONA WETU DLAMINI	2nd Applicant
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	3rd Applicant
NTSINDISO NONGCAVU	4th Applicant
SAZISE MAXWELL PEKAYO	5th Applicant
CAMERON THORPE	6th Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	7th Applicant
NATURAL JUSTICE	8th Applicant
GREENPEACE ENVIRONMENTAL ORGANIZATION	9th Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	1st Respondent
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	2nd Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B V	3rd Respondent

**JUDGMENT ON APPLICATIONS FOR LEAVE TO APPEAL AND
CROSS-APPEAL**

MBENENGE JP AND NORMAN J:

[1] Before us are several applications instituted by the first, third, fourth and fifth respondents¹ for leave to appeal against the whole of the judgment of this court delivered on 01 September 2022. At the same time, the litigants who were the applicants² have launched applications for leave to cross-appeal against the judgment in so far as it did not grant the declaratory relief they sought.³

[2] Since the delivery of the judgment, a vacancy among the members of the court has arisen,⁴ hence this application is being heard in terms of section 14(5) (a) of the Superior Courts Act 10 of 2013⁵.

[3] The applications are founded on section 17(a)(i) and (ii) of the Superior Courts Act, the relevant part of which reads:

- ‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a)(i) the appeal would have a reasonable prospect of success;
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.’

¹ These litigants will bear the appellations by which they were cited in the application that culminated in the judgment that is the subject of these proceedings. For the sake of convenience, they will interchangeably be referred to as the Minister, Shell and Impact.

² Where appropriate, the communities that were the applicants will be referred to as the applicant communities.

³ They had sought an order declaring the decision to allow Shell to commence a seismic survey without having sought and obtained an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 (NEMA) is unlawful.

⁴ As at the time the instant applications were heard, the other member of the panel (Nhlangulela DJP) had been acting at the Supreme Court of Appeal of South Africa.

⁵ The section provides:

‘If, at any stage during the hearing of any matter by a full court, any judge of such court is absent to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must –

(a) if the remaining judges constitute a majority of the judges before whom it was heard, proceed before such remaining judges . . .’

- [4] The principal findings of this court in its judgment are that –
- (a) there was no delay in bringing the application, hence the court did not even have to enquire into whether any delay was condonable;
 - (b) the applicants made out a proper case for being exempted from the obligation to exhaust internal remedies; and
 - (c) the grant of the impugned exploration right was not preceded by meaningful consultations, so much so that the factors that the applicants would have placed before the Minister to inform the decision-making process were not considered.

[5] Mindful of the fact that it takes a single bad reason to render the entire decision reviewable and that the applicants had only to prove one ground of the review to succeed in assailing the grant of the exploration right, the court dealt with other review grounds, albeit in a truncated fashion.

[6] The review and setting aside of the decision granting the exploration right and its renewals, held the court, has rendered academic the question whether the applicants are entitled to an order declaring that Shell may not commence any exploration activities without seeking and obtaining an environmental authorisation in terms of NEMA.

[7] The applicants for leave to appeal contend that the delay beyond 180 days was *per se* unreasonable; the period between 29 April 2014 and 02 December 2021 when the review application was instituted constitutes an inordinate delay. The court, they further contend, erred in deviating from the trite and binding prescripts that, where administrative action affects the public at large, the enquiry is not when a particular applicant knew or ought to have known about the administrative action, but rather when the public at large might reasonably have been expected to have gained knowledge thereof.

[8] It is further contended that the court should have proceeded to the second stage of the enquiry under the undue delay rule and pronounced on whether the unreasonable delay ought to be condoned in terms of section 9 (1) of the Promotion of Administrative Justice Act, 2000⁶ and that the court erred in applying section 3 (and not section 4) of PAJA and finding that the Minister failed to comply with the provisions of section 3(2) (b) of PAJA.

[9] The contention is also made that, having regard to section 7(1) of PAJA, the court was prevented from embarking upon and pronouncing on the merits of the review application.

[10] Apropos lack of meaningful consultations, the applicants for leave to appeal submit that, there having been substantial compliance with regulation 3 of the Regulations made in terms of the Mineral and Petroleum Resources Development Act 28 of 2002,⁷ the court, in effect, found that regulation 3 was unconstitutional and thus invalid, whereas the applicant communities concerned had not challenged the constitutionality of the regulation.

[11] The instant proceedings also seek to assail the ancillary findings of the court in its main judgment. In the view we take of this matter, it is not necessary to deal with each and every contention raised against the ancillary findings.

[12] The applications for leave to cross-appeal implicate the judgment in the main on the basis that the court erred in finding that since it had reviewed and set aside the exploration right there was no longer a dispute between the parties in need of resolution by way of a declaratory order.

[13] In our view, the applications for leave to appeal and cross-appeal do not pass muster; the appeal sought has no reasonable prospects of success. The view we take of this matter renders it unnecessary for us to delve deeply into this because the impugned judgment traverses all the concerns raised by the

⁶ Act 3 of 2000 (PAJA).

⁷ The Regulations.

parties. We, however, point out a few aspects in further support of our conclusion that the applications for leave to appeal and cross-appeal lack reasonable prospects of success.

[14] It is convenient to deal first with the undue delay point. The court drew a distinction between the facts in the *OUTA* case and those in the instant matter. It should be highlighted that the court was not dealing with a member or certain members of the public, but with certain communities such as the Dwesa-Cwebe community. The difference between a community and a member of the public is not without significance. If one has regard to the EMPr in so far as it embodies comments and responses, it is apparent that Impact knew and appreciated that it was dealing with communities. The applicants for leave to appeal were mindful of the fact that there was no consultation with the communities but decided to rely on the Monarchs to inform their communities. This despite the fact that the Monarchs, themselves, had made it clear that the communities had to be consulted. Therefore, the contention based on the *OUTA* principle that this court should have adopted a broader view of the public at large might reasonably be expected to have had knowledge of the action does not meet the threshold.

[15] Something need be said about the interplay between sections 3 and 4 of PAJA. Section 4 of PAJA makes reference to ‘*administrative action affecting public.*’ However, in section 4 (1)(e) there is provision for following another appropriate procedure ‘*which gives effect to section 3.*’ If the interpretation to be given to section 3 relates exclusively to individuals, the question is – why would those provisions that specifically apply to the public incorporate reference to “*any person*”? Moreover, why would section 4 incorporate section 3, if the intention of the legislature was to apply the two sections in the manner contended for by the applicants for leave to appeal? In our view, following the interpretation contended for by Shell and Impact would be narrow and exclusionary. The public and the community are two different concepts. We

are all members of the public but not all of us are a community. In any event, the incorporation by reference of section 3 in section 4 makes the argument contended for between the two sections in the context of this case irrelevant.

[16] DJ Brynard⁸ explains the practical functioning of the notion of procedural fairness to the public as a group or class or persons by means of an interpretation and analysis of relevant legislation and judicial decisions and sheds light on the benefit of procedural fairness to the public as an instrument to enhance the culture of public involvement and participation, transparency and accountability in public administration. This thesis negates the contention that sections 3 and 4 of PAJA are watertight compartments, unrelated to each other.

[17] Criticism has also been levelled against the court's finding regarding the use of English and Afrikaans in the notices that purportedly notified the relevant communities of the seismic survey. It is contended that the regulation makes provision for certain languages that should be employed in the notices and once those languages were used there was substantial compliance with the regulation. The findings reached by the court are consistent with the constitutional imperatives contained in section 6 of the Constitution which make isiXhosa an official language. Nothing, whatsoever, prevented Shell and Impact from using isiXhosa instead of Afrikaans and, in any event, adopting a mode of communication that would guarantee access to all relevant communities.

[18] That is, however, not the end of the matter, for this court must still decide whether there is some other compelling reason why the appeal should be heard. The parties agree that this matter is of significant importance and requires ventilation by the Supreme Court of Appeal. We also agree. Moreover, and in any event, at the primary level, the matter hinges on the interpretation of regulation 3 of the Regulations and the interplay between sections 3 and 4 of

⁸ Procedural Fairness to the Public as an Instrument to Enhance Public Participation in Public Administration, *Administratio Publica* vol 19 no 4 December 2011, p 100.

PAJA. In matters involving statutory interpretation, courts have inclined towards granting leave, because statutory interpretation is not an exact science.

[19] It, therefore, behoves us to grant the parties the leave they are seeking.

[20] The following order is made:

- 1. Leave to appeal in respect of the applications for leave to appeal and the applications for leave to cross-appeal are granted to the Supreme Court of Appeal against the whole of this court's judgment delivered on 01 September 2022.**

- 2. Costs occasioned by the applications shall be costs in the appeal.**

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

T V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the 1st to 7th applicants : *E Webber* (with her, *N Stein*)

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Cape Town
C/o Huxtable Attorneys
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Counsel for the 8th and 9th applicants : *N Ferreira*

Instructed by : Cullinan & Associates
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Counsel for the 1st respondent : *A Beyleveld SC*
(with him, *A C Barnet*)

Instructed by : The State Attorney
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Counsel for the 4th respondent : *C Lockston SC*
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Instructed by : Cliffe Dekker Hofmeyer Inc
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Counsel for the 3rd and 5th respondents : *A Friedman*

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Heard on : **28 November 2022**

Delivered on

: **13 December 2022**