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The Eastern Cape High Court Judgment that created seismic waves

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The much-anticipated judgment of *Sustaining the Wild Coast NPC and Others v The Minister of Mineral Resources and Energy and Others* under case number 3491/2021 was handed down by Judge President Mbenege in the High Court sitting in Makhanda, Eastern Cape (High Court) on 1 September 2022 (Judgment).

The High Court, *inter alia*, reviewed and set aside the decision of the Minister of Mineral Resources and Energy (Minister) to grant Impact Africa Limited (Impact) an exploration right (and two subsequent renewals thereof) for the exploration of Petroleum (defined below) in the Transkei and Algoa exploration areas, and which areas are also known as the "Wild Coast" (Exploration Right).

This article will explore the High Court's reasoning in reaching its decision and assess the impact that the Judgment will have on applicants for and holders of exploration rights, production rights, mining rights and prospecting rights going forward.

LEGAL PARAMETERS SURROUNDING THE GRANTING OF EXPLORATION RIGHTS

The grant of an exploration right is governed by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). An exploration right is a limited real right that allows the holder thereof to enter the land over which the right has been granted and conduct exploration activities to establish if petroleum is present under the land. "Petroleum" is defined in section 1 of the MPRDA as follows –

> *"any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit".*

The application to the Minister for the grant of an exploration right is dealt with in section 79(2) of the MPRDA, and the Minister must grant an exploration right if, *inter alia*, (i) no other person holds an exploration right for Petroleum over any part of that area, and (ii) no prior application for an exploration right has been accepted for the same mineral over the same land.

In terms of section 79(4) of the MPRDA, where a designated agency to which the application for an exploration right (Designated Agency) has been made accepts such application, the Designated Agency must inform the applicant that it is required to

(i) consult in the prescribed manner with the land owner, lawful occupier and any interested and affected party in the manner prescribed in Regulation 3 of the Mineral and Petroleum Resources Development Regulations (Regulations) and include the result of such consultation process in the environmental reports that are required under section 5 of the National Environmental Management Act 107 of 1998 (NEMA), and

(ii) submit the environmental reports to the Department of Mineral Resources and Energy (DMRE) within 120 days from the date of the relevant notice.

The processes and procedures relating to the application for and the grant of both prospecting rights and mining rights is analogous to the procedure outlined above and is set out in sections 17 and 23 of the MPRDA respectively.

It is against this legal backdrop that the scene for the dispute in the Judgment relates.

SUMMARY OF THE JUDGMENT

The salient facts of the Judgment are that Impact applied for the Exploration Right on or about 18 February 2013, and which application was accepted by the Minister (or his delegatee) on or about 1 March 2013. On acceptance of Impact's application, it was required to submit an environmental management programme (EMPr) to the Minister in respect of the proposed activities to be conducted on the Wild Coast.[1]

Impact embarked on a consultation process[2] in terms of which it, *inter alia*,

(i) identified potential interested and affected parties through an analysis of stakeholders from previous similar studies conducted in the Wild Coast area,

(ii) distributed a background information document setting out an overview of the proposed exploration activities and locations to the interested and affected parties,

(iii) published advertisements in two English and two Afrikaans national newspapers on or about 22 March 2013, wherein members of the public were notified of the proposed project to be undertaken on the Wild Coast, and included further information relating to how members of the public could provide input into and comment on the EMPr process,

(iv) compiled a report containing the issues and concerns received from the members of the public and which report formed part and parcel of the EMPr, (v) made the draft EMPr available to the interested and affected parties on the project website,

(vi) held group meetings as well as meetings with the monarchs of the Transkei and the Royal Monarchs Council, and

(vii) compiled the comments received from the meetings into the EMPr.

On paper, it could be said that Impact had substantially "ticked" all the regulatory "boxes" contained in Regulation 3 of the Regulations as duly then read.

The High Court noted the following facts in the Judgment –

- the EMPr was approved by the Deputy Director General of the DMRE and Impact was granted the Exploration Right on 29 April 2014;[3]
- under section 81(4) of the MPRDA, an exploration right may only be renewed for a maximum of three periods not exceeding two years each. Impact thus timeously applied for the first renewal of the Exploration Right, and which application for renewal was granted on 20 December 2017;[4]
- in 2018, a 2D multi-client seismic survey (which was a precursor to the 3D survey that was the subject of the Judgment) took place in the area over which the Exploration Right (being the Wild Coast); and[5]
- on or about 13 March 2020, Impact applied for the second renewal of the Exploration Right and which renewal was granted on 30 July 2021.[6]

The Director-General of the DMRE furthermore gave consent on or about 4 June 2021 for Impact to assign and transfer 50% of its participating interest in the Exploration Right to BG International Limited (the Shell Exploration and Production South Africa BV entity that co-owns the project, both of which are collectively hereinafter referred to as "Shell").

On or about 29 October 2021, notice was given to members of the public of Shell's intention to commence with a 3D seismic survey along the Wild Coast (Survey).[7] Paragraph 23 of the Judgment states the following –

> *"The survey is conducted by a seismic vessel sailing off the coastline, towing a 6 kilometres-long array of airguns behind it. During the survey, the seismic vessel discharges pressurised air from its airgun arrays to generate sound waves that are directed*

> *downwards towards the seabed. The waves are reflected from geological layers below the seafloor and recorded by multiple receivers or hydrophones which are towed behind the seismic vessel by multiple streamers that are 6 kilometres long..."*

It is common cause that Impact and Shell did not have an environmental authorisation to undertake the Survey and the associated exploration activities under NEMA.[8]

An urgent application was hence made by various community members, non profit companies and communal property associations (collectively the "Applicants") to the High Court for an urgent order interdicting Shell and Impact from undertaking the Survey and the associated exploration activities.

The Applicants contended that

(i) it is necessary for the environmental authorisation in terms of NEMA to be obtained for the purposes of conducting exploration activities,

(ii) the consultation process which was undertaken with the interested and affected parties was materially flawed and inadequate as it did not take into account the decision-making procedures applicable within community structures and customary law,

(iii) seeing as the Applicants were not aware of the application for the Exploration Right and the subsequent renewals thereof, the decision to grant the Exploration Right failed to take into account important considerations such as the harm to be suffered by marine and bird life along the Wild Coast as well as the spiritual and cultural rights of the communities residing in the area,[9]

(iv) the area within which the Survey is to be conducted enjoys a special legal status that affords the environment a particularly high level of protection given the ecological value of the Wild Coast and the presence of endangered species that require protection, and

(v) the Minister, in granting the Exploration Right, failed to consider the implications of the Survey on climate change as well as South Africa's international commitments to climate change (Application).[10]

Shell, Impact and the Minister opposed the Application and, *inter alia*, alleged that

(i) no environmental authorisation in terms of NEMA was required in addition to the EMPr that was already granted under the MPRDA,

(ii) the consultation process undertaken by Impact at the time was adequate, and

(iii) the Survey would not result in harm to the marine and bird life and there would be no climate change impacts for South Africa.[11] Shell and Impact further alleged that the consultation process followed by Impact was adequate in that it complied with the provisions of the MPRDA and the Regulations and that Impact had no obligation to consult with the Applicants, specifically in circumstances where the applicants concerned took no steps to register themselves as interested and affected parties.[12]

THE CONSULTATION PROCESS

The High Court held that the consultation process undertaken by Impact was not adequate or meaningful (as statutorily required) and consequently, the decision by the Minister to grant the Exploration Right (and the subsequent renewals thereof) to Impact and Shell amounted to procedurally unfair administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and therefore stood to be reviewed and set aside.

In reaching its decision, the High Court reasoned that the consultation process undertaken by Impact was fatally flawed and inadequate in that the process used to identify the interested and affected parties was not a public process but rather one that was premised in analysing Impact's stakeholder database that was compiled from previous similar studies in the Wild Coast area and therefore the relevant communities were not adequately consulted.[13]

Further, the publication of notices in national (and not local) English and Afrikaans newspapers meant that the relevant communities (and members of the public) were not notified of the acceptance of the Exploration Right.

In addition, the High Court noted that the relevant notices were also written in a language that the community members could barely understand as they are predominately Xhosa speaking communities.[14]

In the meetings held by Impact during the consultation process, Impact only consulted with the monarchs of the relevant communities that were identified by Impact as being interested and affected parties and not all of the members of the community who would be affected by

the grant of the Exploration Right.

The High Court held that this 'top down approach' adopted by Impact does not find application in the South African constitutional dispensation.[15]

Lastly, the consultation process was fatally flawed in that the draft EMPr was only made available to members of the public online via the project website.

This rendered the draft EMPr inaccessible to the majority of the members of the relevant communities in that they did not have access to any smart devices that were required to access the internet and were thus unable to comment on the draft EMPr.[16] In a nutshell, the 'consultation process' undertaken by Impact was not meaningful in that it was not geared towards the proper identification of the interested and affected communities and further it did not adequately consider the communities' ability to meaningfully participate and engage in the consultation process.

A meaningful consultation process is not merely a 'tick-box' function, and all applicants (whether it be for prospecting rights, mining rights, exploration rights or production rights) must engage in a *"genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof".[17]*

THE LEGAL IMPLICATIONS OF THE JUDGMENT ON APPLICANTS FOR AND HOLDERS OF EXPLORATION, PRODUCTION, PROSPECTING AND MINING RIGHTS AND CONCLUSION

The impact of the Judgment is such that applicants for prospecting rights, mining rights, exploration rights or production rights under the MPRDA would need to ensure that they have entered into and undertaken a **meaningful** consultation process in terms of section 80(1) of the MPRDA, read together with Regulation 3 of the Regulations.

A meaningful consultation process as enunciated in the judgment of *Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Limited and Others***[18]** (Bengwenyama), which dealt with a prospecting right, is one which provides the land owners and occupiers with the information necessary to enable them to make informed decisions and sufficient representations in relation to the application being made.

A consultation process in terms of the MPRDA and the Regulations thereto enjoins the applicant to

(i) inform the land owner in writing that its application for a right in terms of the MPRDA on the land owner's land has been accepted for consideration by the relevant Regional Manager (defined in section 1 of the MPRDA),

(ii) inform the land owner in sufficient detail of the activities which are to be conducted on the land owner's land so as to enable that land owner to assess how the proposed activities will impact his/her/its use of the land,

(iii) consult with the land owner so as to reach a consensus on the impact of the proposed activities, and

(iv) submit the conclusions of the consultation process to the relevant Regional Manager.[19]

The High Court held that although the principles laid out in the Benwenyama judgment related to prospecting rights, these principles could equally extend to exploration rights. Similarly, we are of the view that the principles set out in the Judgment (such as those relating to what 'meaningful consultation' entails) will most likely extend to applicants for both prospecting rights and mining rights. Consequently, applicants for and holders of prospecting and mining rights should equally be cognisant of the far-reaching implications of the Judgment.[20]

Based on the views expressed in the Judgment, it is our view that a meaningful consultation process would require an applicant for an exploration right, production right, prospecting right and/or mining right (Mineral Right) to understand the area in which that applicant seeks to conduct mineral activities in order to ascertain and properly identify all of the parties and communities that will be interested in and affected by the applicant's mineral activities.

Thereafter, the applicant should provide the identified parties and communities with proper and adequate notice (in a form that will actually reach the relevant interested and affected parties, and in a language that the relevant interested and affected parties will understand) as to the nature and purpose of the proposed mineral activities, as well as provide sufficient information so as to allow those interested and affected parties an opportunity to make meaningful comments and representations to the applicant.

For example, (and in accordance with Regulation 3A of the MPRDA which was published on 27 March 2020 and which refers to Regulation 41 of the Environmental Impact Assessment Regulations published under NEMA) the relevant applicant must

(a) attach a copy of the notice of the accepted Mineral Right (Notice) to a notice board at the site where the mineral activities will take place,

(b) give copies of the Notice to owners, persons in control of, and occupiers of the land that is adjacent to the land where the mineral activities will take place,

(c) give a copy of the Notice to the municipality, and the municipal ward councillor of the ward in which the land (where the mineral activities will take place) is situated and

(d) using reasonable alternative methods (as agreed by the competent authority) in those instances where a person is desirous of but unable to participate in the process due to, *inter alia,* illiteracy or disability.

The contents of the applicable notice must, *inter alia*, include

(i) an invitation to all members of the public to submit comments and representations in writing by the date specified in the notice, and

(ii) the name and official title of the person to whom the comments and representations are to be submitted.

A failure by an applicant for Mineral Rights to undertake a proper and meaningful consultation process (as envisioned by the High Court in the Judgment) may result in that applicant's application for a Mineral Right being refused, or where it is found that a Mineral Right has been granted by the Minister in circumstances where no proper and meaningful consultation process took place, being reviewed and set aside.

APPLICATIONS FOR LEAVE TO APPEAL THE JUDGMENT

On 20 September 2022 and 22 September 2022 respectively, Impact and the Minister both applied to the High Court for leave to appeal the entire Judgment to the Supreme Court of Appeal in Bloemfontein on the basis that, *inter alia,*

1. the High Court incorrectly applied section 3 of PAJA as section 3 of PAJA deals with administrative action that affects individuals instead of applying section 4 of PAJA which deals with administrative action that affects the public at large;[21]
2. the Judgment was procedurally unfair as the High Court erroneously conflated the notice given to the general public in 2021 relating to the Survey (which it alleges does not constitute administrative action) with the granting of the exploration right in 2014 (which does constitute administrative action);[22]
3. the exploration process and the production process are separate processes under the MPRDA and accordingly the Minister is only required consider the impacts of climate change when considering an application for a production right. The Minister may thus not grant an application for a **production right** (under section 84(1)(c) of the MPRDA) if it would result in unacceptable pollution, ecological degradation or damage to the environment;[23]
4. two 2D seismic surveys were conducted along the Wild Coast in 2013/2014 and 2018 respectively without any of the material environmental harm (that was previously alleged) having materialised, and that a 2D seismic survey is in all material respects similar to the Survey;[24]
5. Impact itself was prejudiced by the Judgment *"by being effectively deprived of a vested interest and limited real right, after R 1.1* ***billion*** *has been invested, over a period of almost* ***eight*** *years (since April 2014), in reliance on this right"* **[25]**; and
6. the High Court has created a degree of uncertainty for applicants for rights under the MPRDA as well as those with existing rights as the High Court, whilst it determined that the consultation process conducted by Impact was fatally flawed, did not clearly indicate the kind of consultative process the law requires.

At the time of publication, both applications for leave to appeal the Judgment had not yet been heard by the High Court.

Footnotes

[1] the Judgment, paragraph 18

[2] the Judgment, paragraph 19

[3] the Judgment, paragraph 21

[4] the Judgment, paragraph 21(a)

[5] the Judgment, paragraph 21(b)

[6] the Judgment, paragraphs 21(c) and 21(e)

[7] the Judgment, paragraph 22

[8] the Judgment, paragraph 24

[9] the Judgment, paragraph 31

[10] the Judgment, paragraph 32

[11] the Judgment, paragraph 33

[12] the Judgment, paragraph 33

[13] the Judgment, paragraph 90

[14] the Judgment, paragraph 91

[15] the Judgment, paragraph 92

[16] the Judgment, paragraph 101

[17] the Judgment, paragraph 95

[18] 2005 (3) SA 589 (CC).

[19] Judgment, paragraph 97.

[20] Judgment, paragraph 98.

[21] paragraph 2 of Impact's Leave to Appeal Application dated 20 September 2022 (Impact's Leave to Appeal Application) and paragraph 1 of the Minister's leave to appeal application dated 22 September 2022 (Minister's Leave to Appeal Application);

[22] paragraph 13.3 of Impact's Leave to Appeal Application

[23] paragraphs 13 and 14 of the Minister's Leave to Appeal Application

[24] paragraph 20.5 of Impact's Leave to Appeal Application

[25] paragraph 8.2.2 of Impact's Leave to Appeal Application



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