



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 3 June 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others
(58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (3 June 2024)

Today the Supreme Court of Appeal (SCA), save for suspending the orders setting aside the granting of the exploration right and each of the two renewals, dismissed with costs, including those of two counsel to be paid jointly and severally by the appellants, an appeal against a decision of the Eastern Cape Division of the High Court, Makhanda (the high court).

On 29 April 2014, an exploration right was granted 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 and 13 March 2020 respectively, Impact applied for a renewal of the exploration right, which was granted in both instances.

On 2 December 2021, the first to seventh respondents approached the high court for an urgent interdict because Impact and Shell sought to exercise the exploration right by conducting seismic surveys off the Wild Coast of South Africa. Relief was sought in two parts. Under Part A, on 28 December 2021, Bloem J interdicted Impact and Shell from undertaking seismic survey operations, pending the finalisation of Part B. Under Part B, on 1 September 2022, the high court held that the decisions to grant the exploration right as well as the renewals be reviewed and set aside. The first to third appellants appealed against the judgment and order of the high court.

The SCA agreed with the high court that there was a failure on the part of the decision-maker to take relevant considerations into account and as such the decision was reviewable. However, according to the SCA, the consequence of a declaration of unlawfulness is that the matter must then be dealt with under s 172(1)(b) of the Constitution, which the high court had failed to do. Seeing as the high court erred in not weighing up the relevant factors, the SCA held that it is empowered to do so. It took into account that there has been almost an eight-year delay between the granting of the exploration right and the review and there has been significant financial expenditure in the region of R1.1 billion by the appellants. There will be only be one more opportunity to renew the exploration right. A moratorium has since been placed on exploration rights over the entire South African coast, thus Shell and Impact may never get the opportunity to exercise the right.

The high court had also 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. According to the SCA, sight cannot 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. These could be mitigated by the possibility of directing that measures be implemented, including that a further public participation process be undertaken. In the circumstances, considerations of justice, equity and the principles of finality and certainty, dictated that the harshness of the exploration right being set aside, can and should be ameliorated.

The SCA was informed 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 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 such 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. The SCA thus took the view that it would be entirely within its power 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. Consequently, the SCA suspended 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, pending finalisation of the third renewal. The appeal was otherwise dismissed.

-----oOo-----