IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3865/2021
Date heard: 30 November 2021
Date delivered: 03 December 2021

In the matter between:

BORDER DEEP SEA ANGLING ASSOCIATION	**First Applicant**
KEI MOUTH SKI BOAT CLUB	**Second Applicant**
NATURAL JUSTICE	**Third Applicant**
GREENPEACE ENVIRONMENTAL ORGANISATION	**Fourth Applicant**

and

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

JUDGMENT

GOVINDJEE AJ:

Introduction

1. A seismic survey is 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). The Amazon Warrior is a seismic vessel en route to commence operations off the coast of South Africa. Unless interdicted, it will sail off the eastern coastline of the country, in the Transkei Exploration Area, between 20 and 80 km from shore, for approximately four months. The process of surveying will take place for approximately fifty percent of this time. The Amazon Warrior will discharge pressurised air from its airgun arrays to generate sound waves directed towards the seabed. Airguns are underwater pneumatic devices from which high-pressure air is released suddenly into the surrounding water. A collapsing air bubble will emit a high level, low-frequency acoustic, measured at 220 decibels and occurring at intervals of 10 to 20 seconds, directed towards the Earth's crust.

2. All seismic activity on the eastern coast is blocked during the environmentally sensitive window between June – November, due to the high numbers of whales that would be encountered. The applicants seek to interdict the third, fourth and fifth respondents (described for convenience as 'Shell') from undertaking seismic survey operations under Exploration Right 12/3/252 from 1 December 2021 onwards. This interdict is to operate pending the final determination of an application still to be launched for the review and setting aside of various decisions of the Minister of Mineral Resources and Energy ('the review'). Those decisions are the grant of Exploration Right 12/3/252 during 2014 and the renewals of the Exploration Right, firstly, on 20 December 2017 and, secondly, following application in May 2020. The notice of motion provides that should the review not be instituted by 10 January 2022, the interdict shall lapse.

Urgency

3. The application was launched on the tightest of timeframes. Once the applicants' papers had been filed, the respondents were afforded only a day to answer. The effect of this has been that the first and second respondents were unable to file opposing papers before the virtual hearing. Shell filed a

preliminary answering affidavit. They note, with some chagrin, that they have been unable to address various issues properly given the manner in which the matter proceeded.

4. The applicants justify this on the basis that the 3D seismic survey was scheduled to commence on 1 December 2021, or shortly thereafter, and that its commencement will result in substantial and irreversible harm. The applicants' representative ('Stone') explains what transpired from the time that notification of the commencement of the seismic survey was issued on 29 October 2021. He first became aware of the notice on 8 November 2021 and communicated with SLR Consulting from 10 November 2021. He received a copy of the detailed Environmental Management Programme (EMPr) later that day. A week later, he sought details of various officials associated with Shell, setting a timeframe for receipt of the information. SLR forwarded the request to Shell on an urgent basis, but the information had not been received by 21 November 2021. By that time, counsel had been briefed to prepare an opinion for the applicant. SLR were then informed that legal action to compel the release of the information would follow on 22 November if it was not forthcoming. Shell's legal representative responded on 23 November 2021. The applicants' received their counsel's opinion on 25 November 2021. Instructions to launch the application were received on 26 November 2021, once the first and second respondents failed to respond to correspondence requesting them to take measures to prevent the commencement of the seismic survey. A final letter was sent to Shell's legal representative on 27 November 2021, requesting copies of documents relating to the impugned administrative action and an undertaking that they would not commence with the seismic survey, failing which an urgent interdict would be launched. The stipulated deadline was 13h00 on 29 November 2021 and the application was launched soon thereafter following receipt of the Directive issued.

5. A judge may, in cases of urgency, dispense with the forms and service provided for in the Uniform Rules and dispose of the matter at a time and place and in such manner and in accordance with such procedure as seems

meet.[1] The degree of relaxation of the rules must be commensurate with the exigency of the case.[2] The procedure adopted must comply with the standard rules as far as is practicable. The major considerations in deciding whether or not to exercise the court's power to abridge the times prescribed and to accelerate the hearing of a matter are the following:[3]

- The prejudice that the applicants might suffer by having to wait for a hearing in the ordinary course;
- The prejudice that other litigants might suffer if the applicant is given preference; and
- The prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing.

6. As indicated, the respondents certainly suffered some prejudice as a result of having to respond in such a short period of time. Shell did obtain leave to file a further affidavit on a limited point, but that only ameliorates their disadvantage to some extent. I am also mindful that the respondents were effectively forced to file heads of argument without sight of the applicants' replying affidavits.

7. Nevertheless, the quest to interdict the seismic survey before commencement pending a review of the grant and renewal of the exploration rights would be futile if the applicants were required to wait for a hearing at a later time. The applicants suggest that the seismic survey will have an extremely detrimental environmental impact, including major damage to a large range of animals, including various fish species and marine mammals, and destruction to the eggs of fish and squid in the intended survey area.[4] The seismic survey area lies in close proximity to several Marine Protected Areas (MPAs) and Critical Biodiversity Areas. This is the case made out in the founding affidavit to justify

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[1] Rule 6(12).
[2] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin Furniture Manufacturers*) 1977 (4) SA 135 (W) at 137E-G.
[3] *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & another; Aroma Inn (Pty) Ltd v Hypermarket (Pty) Ltd & another* 1981 (4) SA 108 (C) at 112H-113A.
[4] Para 16 of the founding affidavit.

the total departure from the norm in terms of the time this application was heard. It is this prejudice that the ultra-urgent application seeks to avoid.

8. There is also authority suggesting that the distinctiveness of an application might contribute to its prioritisation.[5] An application to interdict a seismic survey off the Wild Coast, following millions of dollars in expenditure, is not commonplace. In addition, in *I L & B Marcow Caterers (Pty) Ltd*,[6] the public interest in the outcome of the dispute weighed with the Court. The public interest in this particular dispute is palpable. While not the dominant factors, these additional considerations cannot be ignored.

9. The applicants' steps before launching this application have already been tracked. It is tempting, with hindsight, to identify periods where the applicants could have proceeded with greater haste in order to afford the respondents better time to respond. But litigation of this sort, tackling not only a major multinational corporation but also two government ministries, typically requires some pause.

10. I am satisfied that there has been no undue delay in bringing the application, following the applicants becoming aware of the likely commencement date of the seismic survey a few days after 29 October 2021. In my view the applicants have succeeded in showing sufficient and satisfactory grounds to permit the matter being heard on an urgent basis in terms of rule 6(12). The kind of harm alleged and the nature of the application justifies the disruption of the roll that it occasioned and outweighs the prejudice to the respondents.

Applications for interim relief

11. The applicants seek interim relief, and must therefore establish:[7]
    a) A clear right or, if not clear, that they have a *prima facie* right;

[5] *I L & B Marlow Caterers v Greatermans SA* 1981 (4) SA 108 (C) at 113E-F.
[6] 1981 (4) SA 108 (C) at 114D.
[7] *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267B-E.

b) That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
c) That the balance of convenience favours the grant of an interim interdict; and
d) That they have no other satisfactory remedy.

12. In cases where a clear right is not established, there is authority going back to Van der Linden's *Institutes*, and entering our law via *Setlogelo v Setlogelo* in 1914, that explains the correct approach.[8] Applicants for interim relief are required to establish at least a *prima facie* right to relief, even if open to some doubt. They need not establish that right on a balance of probabilities.

13. The oft-quoted passage from *Webster v Mitchell* explains the enquiry as follows:[9]

> 'In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court…is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. *Prima facie* that has to be shown. The use of the phrase "*prima facie* established though open to some doubt" indicates…that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach…is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief…The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief…But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief…the position

[8] 1914 AD 221.
[9] 1948 (1) SA 1186 (W) at 1189-1190.

> of the respondent is protected because…the test whether or not temporary relief is to be granted is the harm which will be done…'

14. That enquiry has subsequently been refined, so that the test is now whether the applicant *should* (not could) obtain final relief on those facts.[10]

15. Irreparable harm is an element in cases where the right asserted by the applicants, though *prima facie* established, is open to some doubt. In such cases, the accepted test to be applied is whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief, but only if the discontinuance of the act complained of would not involve irreparable injury to the respondent.[11] As to the balance of convenience, *Webster v Mitchell* goes as far as to state that if there is greater possible prejudice to the respondent an interim interdict will be refused.[12]

The evidence and argument

16. There is very little dispute of fact on the papers. The first applicant was a party to a public participation process in respect of the EMPr during 2013. The Exploration Right was granted to the fifth respondent during 2014 and the EMPr was simultaneously approved. The first applicant never received notification of this until after 29 October 2021. The first renewal of the Exploration Right was granted on 20 December 2017 and the renewal period commenced on 14 March 2018 and expired on 13 March 2020. The fifth respondent applied for a second renewal of the Exploration Right during May 2020. Environmental Resources Management Southern Africa (Pty) Ltd ('ERM'), the appointed Environmental Assessment Practitioner that had prepared the EMPr, undertook an Environmental Compliance Audit of the EMPr.

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[10] *Gool v Minister of Justice and Another* [1955] 3 All SA 115 (C).
[11] *Setlogelo supra* at 227.
[12] *Webster supra* at 1192.

17. The fifth respondent issued a media release on 31 August 2021 detailing a farm-out transaction with the third respondent, and simultaneously announcing that the Petroleum Agency of South Africa ('PASA') had granted the second renewal of the ER, in terms of the Mineral and Petroleum Resources Development Act, 2002[13] ('MPRDA'), for a two-year period.

18. The granting of the Exploration Right occurred prior to the introduction of the so-called 'one environmental system', in terms of which the environmental aspects of mining and oil and gas activities are regulated under the National Environmental Management Act, 1998 ('NEMA').[14] The EMPr approved in terms of the MPRDA can be regarded as an environmental management plan ('EMP') approved under NEMA. According to the applicant, the consequence is that Shell was required to obtain environmental authorisation before exploration activities, including the seismic survey, commences.

19. The detrimental environmental impact of seismic surveys was acknowledged in the EMPr, so that implementation of various mitigation measures was necessitated. This includes, prior to the commencement of the survey, consultation with 'the fishing industry, DAFF (Branch: Fisheries) and other IAPs'.[15] A communication plan dealing with the timing of the exploration activities and potential impact was also to be implemented. The applicants have never received copies of the Exploration Right, its renewals or the approval of the EMPr and only became aware of their history subsequent to receiving the 29 October 2021 notification.

20. Various grounds of review have been briefly cited, based on procedurally fair administrative action, including adequate notice of any right of review or internal appeal, where applicable, and the right to request reasons. The applicants aver that they never received any such notification. Had notification been received, they would have taken steps either on appeal under the MPRDA, or under the Promotion of Administrative Justice Act, 2000

[13] Act 28 of 2002.
[14] Act 107 of 1998.
[15] Various IAPS were also listed: p 17 of the index.

('PAJA')[16] or via the common law. They also claim that no notice of the audit report contemplated by s 81(2)*(c)* of the MPRDA was given to potential and registered interested and affected parties as required by regulation 34(6) of the Environmental Impact Assessment Regulations, 2014.[17] In addition, the environmental audit report was not prepared by an independent person. ERM should not have undertaken both the EMPr and the audit report. As such, the second renewal should not have been granted.

21. The applicants rely on the EMPr in dealing with the aspects of harm and the balance of convenience. The focus of the argument was on the interpretation of the EMPr's mitigation measures. In particular:

> 'The impact of potential physiological injury to both mysticete and odontocete cetaceans as a result of high-amplitude seismic sounds is deemed to be of high intensity, but would be limited to the immediate vicinity of operating airguns within the survey area…Significance would reduce to LOW with mitigation…avoid surveying during December when humpback whales may still be moving through the area on their return migrations. If surveying during this time cannot be avoided all other mitigation measures must be stringently enforced, and PAM technology, which detects cetaceans through their vocalisations, must be implemented 24-hours a day'.

22. Shell accepts that all stipulations set out in the EMPr remain legally binding and require evidence-based compliance and an audit. It submits that the survey is fully compliant with the requirements of the EMPr and international standards. It relies on the EMPr compliance audit circulation for public comment on 20 May 2020. This audit was significant, its purpose being to confirm whether the EMPr requirements were still sufficient and valid for the project. It was provided to Interested and Affected Parties, including the first applicant, and to the general public for comment within 30 days. Shell also consulted with fisheries and tourism / recreational operators, relying on a specialist consultant to identify stakeholders for the greatest outreach. A

[16] Act 3 of 2000.
[17] Issued terms of NEMA.

response from FishSA (an overarching organisation) indicated that the fishing sector and its associated companies had been informed. Focused meetings were held telephonically with selected vessel operators identified by the specialist consultant. The importance of circulation for public comment eighteen months ago is that it would present an additional obstacle to be overcome in the anticipated review application.

23. Shell was at pains to point out that a seismic survey is standard practice, and that its timing was supported by the EMPr, with onerous mitigation measures to be undertaken, accompanied by constant independent monitoring by experts on board the vessel. Shell denies that the seismic survey will have significant detrimental impacts. It points to numerous seismic surveys conducted worldwide, without any evidence showing serious injury, death or stranding of marine mammals from exposure to sound when the appropriate mitigation measures are implemented. There have been approximately 325 seismic surveys conducted globally during 2020, without evidence of death or irreversible harm to marine life. At least 35 3D surveys have been conducted offshore of South Africa to date, 11 taking place in the past five years. Shell would adopt all necessary mitigation measures and, with mitigation, the effect of the seismic survey would be of very low significance to marine life, as confirmed by the detailed EMPr assessment and by the latest position paper issued in 2017 by the Joint Nature Conservation Committee. A conservative approach would be taken in adopting five-kilometre buffer zones around MPAs, with current regulations requiring only a two-kilometre buffer. Passive acoustic monitoring would occur 24-hours a day for the duration of the survey, with specialists listening for any marine mammals. Independent Marine Mammal Observers are to constantly monitor the operations, visually inspecting proceedings. A monitored 500 metre exclusion zone is to operate from the sound source, with the survey suspended immediately if noise is indicated within this space. The sound source output is to be reduced to the lowest possible level. A ‘soft start’ procedure results in sound being ramped slowly from very low to full between a period of a minimum of 20 minutes to a maximum of 40 minutes, allowing marine wildlife time to move away from the

vessel. This procedure commences only if no cetacean activity is observed for a period of at least 60 minutes.

24. Shell indicated that an interdict would result in it missing the opportunity to complete the survey within the current seismic window. Failure to do so could result in termination of its interest in the licence, and could result in breach of obligations under the Exploration Right. Millions of dollars had been spent in preparation and Shell has operated for a considerable period of time on the basis that it enjoyed permission to proceed.

Analysis

25. In *Eriksen Ltd v Protea Motors and Another*,[18] Holmes JA stated as follows:

> 'The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo v Setlogelo*, 1914 AD 221 at p. 227. In general, the requisites are –
>
> a) A right which, "though *prima facie* established, is open to some doubt";
> b) A well-grounded apprehension of irreparable injury;
> c) The absence of ordinary remedy.
>
> In exercising its discretion, the Court weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities…Viewed in that light, the reference to a right which,

[18] 1973 (3) SA 685 (A) at 691C-G.

> "though *prima facie* established, is open to some doubt" is apt, flexible and practical, and needs no further elaboration.'

26. As an aside, there appears to me to be a subtle, yet significant, distinction between the gloss of *Setlogelo* contained in *Eriksen* and the judgment in *Setlogelo* itself. The remarks of Holmes JA focus specifically on the interrelated nature of the *prima facie* right and prejudice or the balance of convenience. The element of 'a well-grounded apprehension of irreparable injury' is seemingly not the focus, although the extract makes it clear that all the considerations are interrelated. Irreparable harm in the manner dealt with by *Setlogelo*, and referenced in paragraph 15, above, is evidently a self-standing requirement in cases where the right asserted, though *prima facie* established, is open to some doubt. And this despite *Eriksen's* obvious support for the *Setlogelo* approach. The majority of the SCA in the more recent decision in *National Council of Societies for the Prevention of Cruelty to Animals*[19] clearly considers a well-grounded apprehension of irreparable harm to be a requirement on its own. Interesting as this apparent nuance in approach might be, the outcome in this case is the same either way.

A *prima facie* right

27. A *prima facie* right may be established by demonstrating prospects of success in the intended review.[20] One of the applicants' main submissions relates to s 3 of PAJA and procedural fairness when administrative action materially and adversely affects a person's rights or legitimate expectations. Adequate notice of any right of review or internal appeal, and to request reasons, must be given. Given the time that has elapsed, I have serious doubt as to the prospects of reviewing the process that led to the Exploration Right being granted in 2014. The purpose and function of the delay rule under PAJA and its common law predecessor has been fully explained in *OUTA* and need not

[19] *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA) at paras 20, 21.
[20] *SA Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8 at para 25.

be repeated.[21] *OUTA* confirms that where a decision affects the public at large, it would be anomalous if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each.[22] A court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack thereof, of the particular member or members of the public who have chosen to challenge the act.[23]

28. As far as the first renewal is concerned, the prospects are affected by mootness, given that the renewal terminated on 13 March 2020 without challenge, and considering that this renewal was overtaken by a second renewal. It is review of this second renewal, following application in May 2020 and announced by media release on 31 August 2021, that holds the best prospects of success for the applicants.

29. It must be noted that ERM sent a notification of its environmental audit report to the entire interested and affected parties' database from the 2013 process. This database included a few hundred people, including Stone and Mr JC Rance, the environmental office for the first applicant and now chair of the second applicant. That notification, sent on 20 May 2020, is headed 'Notification to Stakeholders: Environmental Compliance Audit related to Exploration Right 12/3/252, in substantial compliance with regulation 34(6) of the EIA Regulations GNR 326 of April 2017'. It references the Exploration Right and that there was an approved EMPr, and afforded interested and affected parties a 30-day period for comment. No comments were received.

30. In response to the further affidavit filed by Shell, and after the hearing of the matter, the applicants for the first time focus on the requirement of effective public participation required by NEMA. In those circumstances, Shell has not

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[21] *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2013] All SA 639 (SCA) ('*OUTA*') at para 25.
[22] *OUTA supra* at para 27.
[23] *Ibid*.

been afforded the opportunity to answer those submissions and I have not had the benefit of full argument on the point. I nevertheless accept, based on a consideration of the papers as a whole, that the applicants hold *prima facie* prospects of success of review of the second renewal. This is based on my sense of the extent of actual public participation and the need for effective consultation, which require more than notice alone. As the PASA Guidelines for Consultation with Interested and Affected Parties makes clear, 'consultation cannot be a mere formal process. It has to be a genuine and effective engagement of minds between the consulting and consulted parties. A mere formalistic attempt to consult does not constitute consultation.' This is supported by s 2(4)(*f*) of NEMA: the participation of all interested and affected parties in environmental governance must be promoted.

31. The prospects of success are, *prima facie*, enhanced based on the provisions of Regulation 34(2)(*a*) of the EIA Regulations: the environmental audit report must be prepared by an independent person. ERM was appointed by the fifth respondent to prepare the EMPr and to undertake the requisite public participation process on its behalf, suggesting a lack of independence for this purpose.

A well-grounded apprehension of irreparable injury

32. As the right is only *prima facie* established, in my view, consideration must be given to whether the applicants have established a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted.

33. A reasonable apprehension of injury has been held to be one which a reasonable person might entertain when faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow. The test for apprehension is objective; the applicants must show that it is reasonable to apprehend that injury will result. This means that a judge must decide, on the

facts presented to her, whether there is any basis for the entertainment of a reasonable apprehension by the applicants of irreparable harm.[24]

34. The applicants' submissions in this regard, related to the detrimental impact of the seismic survey on the environment, and marine life in particular, are speculative at best.[25] Counsel for the applicants was reduced to reliance on the 'low significance' of harm mentioned in the EMPr in support of his submission. The affidavit of Dr Tess Gridley, a Director at Sea Search Africa (Pty) Ltd and Sea Search Research and Conservation NPO, and the founder of the African Bioacoustics Community, promises further expert testimony in due course, but says no more than the following:

> ''I am of the view that the assertion that…"there remains no evidence that sound from properly mitigated seismic surveys has any significant impact on any marine populations" is misleading.
>
> Acoustic disturbance in the ocean can have serious effects at multiple levels from the individual, to the population, and even ecosystem-effects if multiple species are affected.'

35. I accept that the applicants are of the firm view that the seismic survey will cause irreparable harm. Objectively speaking, however, and considering the limited material in support of the applicants' contentions on this point, a reasonable apprehension of irreparable harm has not been established. There is, in addition, 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.

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[24] *Minister of Law and Order v Nordien* 1987 (2) SA 894 (A) at 896, cited with approval in *NCSPCA supra* at para 21.

[25] See *Vukani Gaming Eastern Cape v Chairperson, Eastern Cape Gambling and Betting Board and other* [2018] ZAECGHC 29 at para 72.

36. There is also no merit in the suggestion that the EMPr must be read to prohibit seismic surveying in the month of December. The EMPr provides that all other mitigation measures must be stringently enforced in the event that surveying during December takes place. This is consistent with the part of the EMPr dealing with physiological injury to cetaceans, which were the focus of much of the argument: the available information suggests that the animal would need to be in close proximity to operating airguns to suffer actual physiological injury. Being highly mobile the EMPr assumes that they would avoid sound sources at distances well beyond those at which injury is likely to occur. This does not suggest that there is no risk to marine species at all, but that is not the test.

The balance of convenience

37. In assessing the balance of convenience, a court must weigh the prejudice to the applicants if the interim interdict is refused against the prejudice the respondent will suffer if it is granted. In this case, it is accepted that the applicants act not only in their own interest and in the interest of their members, but in the interests of the broader community and public at large. Any likely harm to the environment must, therefore, weigh in their favour. The issue of the likelihood of harm cannot, however, be considered on a worst-case scenario basis and separate from the range of mitigation measures imposed by the EMPr and to be implemented by Shell. The evidence before me demonstrates a significantly reduced likelihood of environmental harm in those circumstances, without suggesting fool-proof elimination of all risk.

38. By contrast, granting an interdict pending the review would result in Shell missing the opportunity to complete the survey within the current seismic window. This could have a range of consequences, including compromising its interest in the Exploration Right and resulting in breach of its contractual obligations. This all contributes to its concerns relating to the millions of dollars of expenditure that has been incurred in preparation for the survey.

39. Weighing massive financial consequences against any potential environmental harm, even at the likely lowest of levels, is an invidious task. The Constitution[26] promises everyone the right to an environment that is not harmful to their health or wellbeing, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

    a) Prevent pollution and ecological degradation;
    b) Promote conservation; and
    c) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[27]

    Shell seeks to exercise an Exploration Right granted a number of years ago and renewed by the responsible authorities. Details have been provided explaining their compliance with the approved EMPr mitigation measures. Given the paucity of information as to the likely environmental harm, the balance of convenience favours Shell.

Conclusion

40. The applicants have demonstrated that, if interim protection is given, they have a *prima facie* right to only part of the relief sought in the review, and that there is no alternative remedy available. They fail to convince me that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, or that the balance of convenience favours them. Whether the factors are considered individually or in an interrelated manner and upon consideration of the affidavits as a whole, according to the facts and probabilities, the outcome is the same and I must exercise a discretion to reject the application.

41. There is increasing global concern about the environment in which we live, and for all creatures, small and great.[28] This case was not about the full

[26] Constitution of the Republic of South Africa, 1996.
[27] S 24 of the Constitution.

exercise of the Exploration Right and the implications of that for the environment. The question was whether the seismic survey to be undertaken should be interdicted pending the final determination of a separate review application. That question has been answered in the negative. This raises various broader issues to the surface. These issues include the interplay between law and science, the manner and extent to which scientific proof is sourced and canvassed, and the mode of judicial assessment in urgent environmental-related matters brought in the public interest.

Order

42. The following order will issue:

1. The application is dismissed with costs, to include the costs of two counsel where employed.

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A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCE:

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[28] See, in general, PHG Vrancken 'Life below water' in K De Feyter *et al* (eds) *Encyclopedia of Law and Development* (Edward Elgar) (2021) 184-186.

For the Applicant(s):	Adv W R E Dumming SC with Adv D Welgmoed, instructed by Huxtable Attorneys, Grahamstown.
For the first respondent:	Adv A Beyleveld SC, instructed by The State Attorney, Port Elizabeth.
For the 3rd, 4th and 5th respondents:	Adv A Friedman with Adv S Pudifin – Jones, instructed by Nettletons Attorneys