

DEVELOPMENTS IN THE FIELD

Defending the Rights of Local Communities against Box-Ticking Exercises: An Analysis of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*

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Abstract

This piece analyses the recent judgment from the Makhanda High Court in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* setting aside the decision to grant Shell and Impact Africa an exploratory right. Shell and Impact Africa intended to conduct a seismic survey along South Africa's Wild Coast. Such a survey stood to have a substantial impact on the rights and interests of several local communities residing along the coastline. Because Shell, Impact Africa and the Director-General of the Department of Mineral Resources and Energy failed to consider these rights and interests, the court decided to overturn the decision granting the companies their exploratory right. To this end, the judgment provides a powerful vindication of the rights of local communities, illustrating what is possible when regulatory schemes are applied purposively and not as a mere box-ticking exercise.

Keywords: Consultation; Local communities; Mineral and Petroleum Resources Development Act of 2002; Seismic survey; South Africa

1. Introduction

The recent judgment of the Eastern Cape High Court of South Africa in the case of *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*¹ (Shell Case) is significant for multiple reasons. The unanimous judgment penned by Mbenenge JP reads like a modern-day retelling of David and Goliath, in which the interests of local communities are enforced against a multi-billion-dollar foreign company. In a country that still bears the scars of foreign interests sailing in from sea to secure their own economic prosperity at the expense of local communities, this judgment is both ground-breaking, and an example of justice in action. Moreover, it is indicative of the powerful potential communities hold, and the accountability that they can ensure. Ultimately, the judgment facilitates the procedural enforcement of communities' spiritual and cultural rights in a manner that has the potential to facilitate the substantive application thereof in the future.

The regulatory scheme created by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires consideration of the interests of communities directly

¹ *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (3491/2021) [2022] ZAECMKHC 55.

affected by the impact of proposed activity relating to the use of South Africa's mineral and petroleum resources. After all, section 3(1) of the MPRDA states that these resources are the common heritage of all the people of South Africa, and that the State is required to act as custodian over these resources in a manner that is of benefit to all South Africans. However, the regulatory framework under the MPRDA is often not implemented in a manner that effectively considers the rights and interests of all South Africans. Instead, as illustrated in the facts of the *Shell Case*, both government and commercial actors can often overlook the communities that stand to be affected by the extraction of mineral and petroleum resources. However, the court in the *Shell Case* is clear that the rights and interests of local communities must be considered. This piece first provides a basic outline of the facts of the case and the decision reached by the court. It then analyses how the court's reasoning provides significant protection to the rights of local communities who stood to be affected by the proposed seismic survey.

The *Shell Case* also considered the potential effect of the proposed seismic survey on the environment, focusing on the importance of considering the survey's potential impact on bird and marine life in the area and its contribution to climate change. However, this piece focuses on the aspect of the judgment concerning communities' rights.

II. A Brief Summary of the *Shell Case's* Factual Scenario and Decision

The *Shell Case* related to a proposed seismic survey that Shell Exploration and Production South Africa BV (Shell) wished to undertake off the Wild Coast, a part of the coastline in the Eastern Cape province. Shell held an exploration right² that had been granted to Impact Africa in 2014 by the Deputy Director-General of the Department of Mineral Resources and Energy and subsequently renewed in 2017 and 2021.³ Shell and Impact Africa each held a 50% participating interest in the exploration right in question.⁴

Shell and Impact Africa had applied on 18 February 2013 for an exploration right in terms of section 79 of the MPRDA.⁵ This exploration right would allow Shell and Impact Africa to conduct a seismic survey off the Eastern Cape coast, aimed at detecting the presence of oil and gas reserves.⁶ This would involve dragging a six-kilometre-long array of airguns behind a seismic vessel.⁷ These airguns would blast high-pressured air blasts into the ocean at between 10- to 20-second intervals.⁸ The application was accepted on 1 March 2013 and Shell and Impact Africa were required to submit an environmental management program (EMPr) explaining their proposed activities to the Petroleum Agency of South Africa (PASA) for consideration and approval by the Minister of Mineral Resources and Energy.⁹ Once Shell and Impact Africa's EMPr was submitted, PASA recommended its approval and the Deputy Director-General approved the EMPr on 17 April 2014; the exploratory right was granted to Shell and Impact Africa on 29 April 2014.¹⁰

However, the proposed seismic survey would take place off a part of the coastline that was in close proximity to numerous small local communities. These communities all had strong spiritual ties to the ocean and were also dependent on the ocean for sustenance and

² Ibid, para 22.

³ Ibid, paras 20–21.

⁴ Ibid, para 16.

⁵ Ibid, para 18.

⁶ Ibid, para 18.

⁷ Ibid, para 23.

⁸ Ibid, para 23.

⁹ Ibid, para 18.

¹⁰ Ibid, paras 20–21.

income. The proposed seismic survey could thus potentially have drastic repercussions for these communities' way of life. None of these communities was consulted during the consultation process followed by Shell and Impact Africa, and were unaware of the companies' plan to conduct seismic surveys along the Wild Coast until they published notice of their proposed survey on 29 October 2021. This was just over seven years after the exploratory right was granted to Shell and Impact Africa, and around eight years since Shell and Impact Africa had completed their public consultations.

Represented by the Applicants, these communities brought a two-part application before the High Court in the Eastern Cape to fight the survey. Part A of the application concerned an application for an urgent interim interdict that would prevent Shell and Impact Africa from undertaking the proposed seismic survey.¹¹ The interim interdict was granted in a judgment handed down on 28 December 2021, preventing the continuation of the seismic survey pending the determination of Part B of the application.¹² Part B of the application sought to have the decision to grant Shell and Impact Africa an exploratory right, and the subsequent renewals thereof, reviewed and set aside. It also sought other declaratory relief relating to the need to obtain environmental authorization under the National Environmental Management Act 107 of 1998 (NEMA) prior to the undertaking of seismic surveys, and a final interdict preventing the continuation of the seismic surveys along the Wild Coast.

The Respondents challenged the Applicants' failure to exhaust internal remedies available to them under the MPRDA and to bring their application within 180 days of the companies obtaining their exploratory right. However, the court dismissed both these arguments on the basis that it was clear that the Respondents had failed to notify the Applicants of the decision to grant Shell and Impact Africa an exploratory right to facilitate the undertaking of a seismic survey and the internal remedies available to the Applicants.¹³ Moreover, the court accepted the Applicants' argument that any internal appeal to the Director-General of the Department of Mineral Resources and Energy under MPRDA would be unlikely to be successful owing to his clear demonstration of bias against individuals challenging the proposed seismic survey.¹⁴

When considering the merits of the application, the court focused largely on the Applicants' arguments pertaining to the need to review and set aside the decision to grant Shell and Impact Africa an exploratory right to conduct a seismic survey.¹⁵ The court focused on the alleged procedural unfairness, failure to take into account certain relevant considerations, and lack of compliance with relevant legal prescripts.¹⁶ Ultimately, the court concluded that the decision to grant Shell and Impact Africa an exploratory right was tainted by procedural irregularities and set it aside.¹⁷

III. The Recognition and Protection of Cultural and Spiritual Rights in the Court's Decision

On 1 September 2022, the Makhanda High Court set aside the administrative decision granting Shell and Impact Africa an exploratory right. The court held that the Minister of Mineral Resources and Energy was required to consider the rights and interests of local

¹¹ *Ibid*, para 27.

¹² *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (3491/2021) [2021] ZAECHC 118.

¹³ See *note 1*, paras 69–73.

¹⁴ *Ibid*, para 81.

¹⁵ Consequently, the court paid little attention to the arguments pertaining to the need for Shell and Impact Africa to obtain environmental authorization from NEMA prior to commencement of the seismic survey.

¹⁶ See *note 1*, para 84.

¹⁷ *Ibid*, para 103.

communities when evaluating whether to grant an application for any mining, retention, technical cooperation or reconnaissance permit, as well as any exploration or production right in terms of the MPRDA. The court broadened the conceptualization of whose interests need to be considered when assessing applications under the MPRDA. It recognized the importance of taking into account the interests of communities living adjacent to the ocean where the proposed activity would take place. The importance of this decision cannot be understated. It provided a powerful vindication of the rights of the communities who had been neglected and overlooked by foreign corporate interests and their own government, tasked with ensuring their vitality and well-being. On a broader level, it also breathed life into a regulatory framework that, as evidenced by the very facts that gave rise to the case, has the potential to be interpreted and applied rigidly as a mere box-ticking exercise.

Enforcing Communal Rights Through Procedural Fairness

The court's decision focused mostly on the enforcement of the represented communities' procedural rights as parties interested in and affected by the administrative granting of an exploratory right. Pursuant to this, it established that to ensure the consideration of these rights, Shell and Impact Africa were obliged to enable these communities to participate in the consultation process they facilitated.

The court understood the duty placed on Shell and Impact Africa to consult with interested and affected parties purposively. The court reasoned that consultation with affected and interested parties needed to consist of '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'.¹⁸

Despite the technical requirements enunciated in regulation 3 of the MPRDA Regulations pertaining to consultations with affected and interested parties, the court emphasized that these consultations should not be understood as 'the mere ticking of a checklist'.¹⁹ Thus, Shell and Impact Africa's compliance with the technical requirements for consultation set out in the MPRDA Regulations did not necessarily result in meaningful consultation with affected and interested parties, as required by the spirit of the regulatory framework.²⁰ The MPRDA and its Regulations needed to be interpreted and applied in conjunction with the rights and values enshrined in the Constitution.²¹ This meant that it was insufficient for the respondents to argue that their consultation process was sufficient based on its compliance with the relevant technical specifications alone. The consultation process would only be sufficient if it adequately catered for the ability of individuals and communities affected by and interested in the proposed seismic survey to meaningfully participate therein. The court went on to scrutinize the consultation process followed by Shell and Impact Africa, concluding that it had failed to adequately include the Applicants.

First, for Shell and Impact Africa's consultation process to have been adequate, the court reasoned that they needed to have provided local communities with information pertaining to their application for an exploratory right and how they intended to make use of such a right.²² The court concluded that Shell and Impact Africa had failed to do so. They relied on using newspapers not commonly in circulation in the Applicants' communities to publish

¹⁸ *Ibid*, para 95.

¹⁹ *Ibid*, para 95.

²⁰ *Ibid*, para 94.

²¹ *Ibid*, para 95.

²² Here the court endorsed the approach adopted in respect of an application for a prospecting right in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC). See the discussion thereof at *ibid*, paras 97–98.

notice of their application.²³ These newspapers were also published either in English or Afrikaans, which were not languages commonly used in the Eastern Cape where mostly isiXhosa is spoken.²⁴ Moreover, they relied on the internet to distribute their EMPr, despite the fact that the communities in question did not have easy access to computers and other similar devices to access the internet.²⁵ Consequently, the consultation process did not include an effective mechanism through which the represented communities could have obtained information regarding the application by Shell and Impact Africa to obtain an exploratory right to conduct a seismic survey in the area.²⁶

Second, where Shell and Impact Africa did consult with local communities, they had relied on using vaguely defined ‘stakeholder analysis’ to identify affected and interested parties to notify of their application.²⁷ This resulted in Shell and Impact Africa making no effort to specifically identify other affected communities, such as those represented in the case, even though they stood to be affected by the seismic survey.²⁸ Furthermore, the court criticized the fact that Shell and Impact Africa elected to meet alone with only the monarchs of certain communities, despite having been urged by traditional leaders to consult with the affected communities directly.²⁹ This meant that Shell and Impact Africa did not ever consult with these communities broadly. Instead, they consulted only with certain monarchs, allowing these individuals to purport to speak on behalf of all members of the community.³⁰ The court found that this did not facilitate adequate consultation with the actual communities represented by these monarchs.

The court’s decision signals a rejection of top-down consultation with communities via their leadership structure. For consultations with communities to pass muster under the regulatory framework, it becomes clear that what is required of the consultation process is the ability for community members to be consulted directly, or at least ensure that community members’ interests are meaningfully represented.

Ultimately, the court’s application of the regulatory framework under the MPRDA was context sensitive. A context-sensitive application of the regulatory framework ensures that it adequately aligns with core principles that are meant to underpin the MPRDA. This allows for proper consideration of the impact of proposed developments on the economic and social welfare of affected communities when deciding on an application by ensuring the meaningful inclusion of all these communities.

Enforcing Communal Rights as Relevant Considerations

The court also ensured the protection of the represented communities’ spiritual and cultural rights through its insistence that the effect the proposed seismic survey would have on these rights ought to have been considered when deciding whether to grant Shell and Impact Africa an exploratory right. The final EMPr along with the record detailing the Director-General’s decision to grant Shell and Impact Africa an exploratory right and their reasons in support thereof revealed that the effect this decision would have on the cultural and spiritual rights of the represented communities was not considered.³¹

²³ See note 1, para 99.

²⁴ *Ibid*, para 99.

²⁵ *Ibid*, para 101.

²⁶ *Ibid*, para 101.

²⁷ *Ibid*, para 90.

²⁸ *Ibid*, paras 90, 92.

²⁹ *Ibid*, para 92.

³⁰ *Ibid*, para 92.

³¹ *Ibid*, paras 106–107.

In terms of the cultural and spiritual beliefs held by some of the communities represented in the case, these communities were obligated to protect the ocean, as the sacred site where their ancestors resided.³² The proposed seismic survey would have devastating consequences for their cultural and spiritual ties to the ocean, stripping their ancestors of the tranquillity that these communities had been entrusted to safeguard. Furthermore, the seismic survey stood to endanger these communities' way of life given their reliance on the ocean for their income and sustenance.³³

The court reasoned that even if the beliefs held by these communities appeared foreign to the companies, Shell and Impact Africa were still required to respect these beliefs and the communities' constitutional right to practise them.³⁴

The court's judgment makes it clear that the cultural and spiritual rights were enforceable against Shell and Impact Africa and that the Director-General was required to consider the interplay between these rights and the proposed development. The need to consider these beliefs was not dependent on Shell, Impact Africa, the Director-General, or even the court understanding the practicalities associated with how the ancestors of the communities residing in the ocean would be affected by the seismic survey.³⁵ The fact that the represented communities held the belief that their ancestors resided in the ocean and would be disrupted by the seismic survey was sufficient to place the obligation on Shell, Impact Africa and the Director-General to consider this effect.³⁶

IV. Conclusion

The *Shell Case* is an interesting piece in South Africa's jurisprudence, in part because of its novelty. It is a case that runs contrary to the neoliberal narratives that often permeate the interactions between large multi-national companies and the local communities in the countries these companies come to for resource extraction, countries that most often are to be found in the Global South. This alone makes the case ground-breaking. But what makes the *Shell Case* an important part of South Africa's jurisprudence is that it is a case in which the rights of local communities are meaningfully given effect to within a regulatory framework that, more often than not, provides only superficial protection.

It is a case that, firstly, recognizes the importance of the rights of these communities. In a factual context where this case began, because the Respondents collectively failed to recognize the importance of these rights, this is important. But more importantly, this case recognizes that the rights of the affected communities had to be considered in the decision to grant Shell and Impact Africa an exploratory right. Because of this, these communities had to be involved in the process leading up to that decision being taken.

Because of this, the *Shell Case* creates an important precedent. It sets the foundation for ensuring the regulatory framework created by the MPRDA is implemented in a manner that ensures meaningful consultation with everyone affected by a development application. This is what the regulatory framework was intended to do, but it is unfortunately not what it has historically done. The *Shell Case* ensures that that will no longer be the case in South Africa. It will also, hopefully, be an inspiration for other local communities and courts around the globe.

However, the matter has since been brought on appeal, with the Makhanda High Court granting the Minister, Shell and Impact Africa leave to appeal the judgment in full to the

³² Ibid, para 115.

³³ Ibid, para 116.

³⁴ Ibid, para 113.

³⁵ Ibid, para 113.

³⁶ Ibid, paras 113–114.

Supreme Court of Appeal.³⁷ The court also granted the Applicants leave to cross-appeal the judgment before the Supreme Court of Appeal owing to the court's failure to grant the precise declaratory relief they had requested.³⁸ Thus, there is still further opportunity for developments on the matter.

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Competing interest. The author was working at the Legal Resources Centre, the public interest law firm representing the First to Seventh Applicants in the case, at the time of writing this article.

³⁷ *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 114, paras 1–20.

³⁸ *Ibid*, paras 1–20.