

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

Case No: 3941/2021

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
MASHONA WETU DLAMINI	Second Applicant
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
NTSINDISO NONGCAVU	Fourth Applicant
SAZISE MAXWELL PEKAYO	Fifth Applicant
CAMERON THORPE	Sixth Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

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

NOTICE OF AMENDMENT IN TERMS OF RULE 28

BE PLEASED TO TAKE NOTICE that the respondents intend to amend Part B of their

Notice of Motion as follows:

1. By deleting the existing prayer 1.

2. By inserting, as prayer 1, the following:

“1. A holder of an exploration right under the Mineral and Petroleum Resources Development Act 28 of 2002 (“**the MPRDA**”) may not undertake any seismic survey if it has not been granted an environmental authorisation by the Department of Environment, Fisheries and Forestry in terms of the National Environmental Management Act 107 of 1998 (“**NEMA**”).”

3. By inserting, as prayer 2, the following:

“2. The decision taken by the First Respondent, on 29 April 2014, to grant an exploration right to the Fourth Respondent to explore for oil and gas in the Transkei and Algoa exploration areas (“**Exploration Right 12/3/252**”) is reviewed and set aside.”

4. By inserting, as prayer 3, the following:

“3. The decision taken by the First Respondent, on 20 December 2017, to grant a renewal of Exploration Right 12/3/252 is reviewed and set aside.”

5. By inserting, as prayer 4, the following:

“4. The decision taken by the First Respondent, on 26 August 2021, to grant a further renewal of Exploration Right 12/3/252 is reviewed and set aside.”

6. By inserting, as prayer 5, the following:

“5. The decision to allow the Third Respondent to commence the seismic survey without the environmental authorisation in terms of NEMA is declared to be invalid and is set aside.”

7. By inserting, as prayer 6, the following:

“6. The applicants’ failure to exhaust internal remedies in respect of the decisions in 2, 3, 4 and 5 is condoned.”

8. By inserting, as prayer 7, the following:

“7. The time period of 180 days in section 7(1) of PAJA is extended, in accordance with section 9 of PAJA, to the date that the review relief in Part B was instituted”.

9. By inserting, as prayer 8, the following:

“8.The Third, Fourth and Fifth Respondents are interdicted from undertaking seismic survey operations under Exploration Right 12/3/252.”

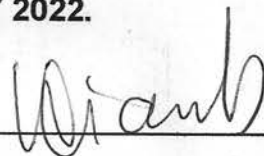
10. By inserting, as prayer 9, the following:

“9. The Applicants are granted leave to file the supplementary affidavit of Reinford Sinegugu Zukulu, together with all supporting affidavits annexed thereto.”

10. By renumbering the existing prayers 4 and 5 as prayers 10 and 11.

TAKE NOTICE FURTHER that unless written objection to the proposed amendment, compliant with rule 28(3), is delivered within 10 days of delivery of this notice, the amendment will be effected.

DATED at Cape Town ON THIS 24th DAY OF JANUARY 2022.



APPLICANT'S ATTORNEYS

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TO: THE REGISTRAR OF THE HIGH COURT

AND TO: Minister of Mineral Resources and Energy

First Respondent

c/o State Attorney

Email: barrow@whitesides.co.za; MicBotha@justice.gov.za

AND TO: Minister of Forestry, Fisheries and the Environment

First Respondent

c/o State Attorney

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AND TO: SHEPTONE WYLIE INC

Third, Fourth and Fifth Respondent's Attorneys

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

Case No: 3941/2021

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
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MASHONA WETU DLAMINI	Second Applicant
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DWESA-CWEBE ASSOCIATION	COMMUNAL	PROPERTY	Third Applicant
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and

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

I, the undersigned,

REINFORD SINEGUGU ZUKULU

do hereby make oath and say:

- 1 I am an adult male residing at Jama village which forms part of the Amadiba Traditional Community in Winnie Madikizela-Mandela Local Municipality in the Eastern Cape. I am the Programme Manager of Sustaining the Wild Coast. I am duly authorised to depose to this affidavit on behalf of Sustaining the Wild Coast, the First Applicant.
- 2 Save to the extent that the context indicates otherwise, the facts deposed to herein are within my personal knowledge and belief. To the extent that I make legal submissions in this affidavit, I do so on the advice of my legal representatives, whose advice I believe to be correct.

I. OVERVIEW

- 3 This application was brought in two parts - Part A and Part B. Part A was decided in December 2021. At the hearing of Part A, the applicants noted our intention to amend the relief sought in Part B of the application. Our Notice of Amendment will be filed on 24 January 2022.
- 4 In the amended relief, the applicants seek:
 - 4.1 a declaratory order that a holder of an exploration right under the Mineral and Petroleum Resources Development Act 28 of 2002 (**“the MPRDA”**) may not undertake any seismic survey if it has not been granted an environmental authorisation by the Department of Environment, Fisheries and Forestry (**“DEFF”**) in terms of the National Environmental Management Act 107 of 1998 (**“NEMA”**).
 - 4.2 to review and set aside the Minister’s decision to grant Exploration Right 12/3/525 (**“the exploration right”**) to Impact Africa in April 2014 (which was later transferred to Shell) (**“the grant of the right”**);
 - 4.3 to the extent necessary, to review and set aside the Minister’s decisions to renew the exploration right (taken on 20 December 2017 and on 26 August 2021, respectively)(**“the renewal decisions”**);

- 4.4 to review and set aside the decision to allow Shell to commence the Seismic survey without having obtained an environmental authorisation in terms of NEMA (“**the commencement decision**”); and
- 4.5 to finally interdict Shell from undertaking seismic survey operations under the exploration right.
- 5 In making the above decisions, the Minister exercised a public power under the MPRDA. The decisions have had a direct legal impact and have adversely affected (and continue to adversely affect) the rights of the applicants, similarly-placed communities and the public at large. As such, the decisions constitute administrative action that falls to be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”). Alternatively, the decisions are reviewable under the principle of legality.
- 6 This supplementary affidavit sets out the grounds upon which the decision to grant the right, the renewal decisions, and the commencement decision, ought to be reviewed and set aside.
- 7 In the remainder of the affidavit, I deal with the following in turn:
- 7.1 First, I explain why this Court should declare that a holder of an exploration right under the MPRDA may not undertake any seismic survey if it has not been granted an environmental authorisation under NEMA.

- 7.2 Second, I set out the specific grounds for the review in relation to each of the impugned decisions;
 - 7.3 Third, I address the preliminary requirements for a PAJA review, being the 180-day time limit for the launch of a review application and the duty to exhaust internal remedies; and
 - 7.4 Fourth, I lay the basis for the grant of a final interdict; and
 - 7.5 Finally, I demonstrate why this supplementary affidavit should be admitted.
- 8 In what follows, I refer to the Third and Fourth Respondents collectively as “**Shell**”, unless the context clearly indicates otherwise.

II. DECLARATORY ORDER: AN ENVIRONMENTAL AUTHORISATION IS REQUIRED

9 Shell has not obtained environmental authorisation for its seismic survey, despite its obligation to do so in terms of section 5A(a) of the MPRDA and section 24F of NEMA. Its argument before this Court in the application for an interim interdict was that it has never been required to obtain environmental authorisation.

10 At the time that Shell applied for its exploration right, it was required to submit an EMPr, which it did.

11 After the Minister granted Shell an exploration right, the statutory framework was amended to require environmental authorisation before the commencement of certain listed activities:

11.1 Section 5A(a) of the MPRDA provides that no person may, inter alia, explore for and produce any mineral or petroleum or commence any with any work incidental thereto on any area without an environmental authorisation; and

11.2 Section 24F(1)(a) of NEMA provides that no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) of NEMA unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted environmental authorisation

for the activity. Item 18 of EIA Regulations Listing Notice 2 of 2014 lists as one of the activities that requires environmental authorisation before commencement *“any activity including the operation of that activity which requires an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act”*.

- 12 I note that these provisions apply to the commencement of exploration activities, and contain no qualification as to the date of issue of the relevant licence or right.
- 13 Despite these clear provisions, Shell argued in the application for interim relief that it is permitted to conduct its seismic survey on the strength of its EMPr and without obtaining environmental authorisation. It relied on section 12(4) of the National Environmental Management Amendment Act 62 of 2008, which provides that an EMP or EMPr approved in terms of the MPRDA immediately before the amendments referred to above must be regarded as having been approved in terms of NEMA.
- 14 I am advised that Shell’s contention is incorrect, on the basis that it erroneously conflates an EMPr and an environmental authorisation. These are two distinct processes which are applicable at two distinct stages: while an EMPr is required for the granting of an exploration right, an environmental authorisation is required before the specified activities in terms of that exploration right commence.

- 15 There is simply no merit to the argument that an EMPr and an environmental authorisation are the same thing, and that they can be relied upon interchangeably. Where section 5A(a) of the MPRDA and section 24F of NEMA require environmental authorisation, this requirement is not met by the prior submission, in 2013, of an EMPr.
- 16 Despite this clear obligation arising from both the MPRDA and NEMA, Shell has taken no steps to obtain the necessary environmental authorisation and insists that it bears no obligation to do so.
- 17 Moreover, there are other entities that have adopted the same approach. I am advised that on 21 January 2022, an urgent application was launched to interdict a seismic survey off the west and south-west coasts of South Africa. The seismic survey is to be conducted by Searcher Seismic (Australia), the holder of a reconnaissance permit granted in 2021. Searcher Seismic (Australia) does not have environmental authorisation for its seismic survey and insists that no such authorisation is required. The applicants in that case have therefore applied for an urgent interdict pending final relief to protect them from the irreparable harm that they allege would arise in the event of a seismic survey being conducted without the necessary environmental authorisation. A copy of the notice of motion in that application is attached as **“RSZ4”**.

- 18 I am further advised that the question of whether environmental authorisation is required in these circumstances has not been definitively resolved by the Constitutional Court or the Supreme Court of Appeal. In the application for interim relief, Shell relied on this in support of its contention that no environmental authorisation is required for its activities. While Shell's position has not been endorsed in the decisions it relies on, this perceived lack of clarity in the interpretation and application of the obligation to obtain environmental authorisation has been and may in future be exploited by entities who seek to circumvent their legal obligations.
- 19 I am advised that declaratory relief is a discretionary remedy. I submit that the circumstances of this matter warrant a declarator so as to provide clarity on an issue that implicates several fundamental rights. The question as to whether environmental authorisation is required for an entity seeking to conduct exploration activities, including a seismic survey, is one that affects the rights to the protection of their environment, to food security, to hold and express their cultural and spiritual beliefs and to lawful, reasonable and procedurally fair administrative action. There is substantial public interest in providing clarity and certainty on this issue.
- 20 Finally, I submit that declaratory relief is warranted where the Minister appears to have adopted a stance that is inconsistent with the applicable statutory regime.

The Minister's failure (or refusal) to insist on environmental authorisation poses a real threat to the Constitution and the rule of law.

III. GROUNDS OF REVIEW: GRANT OF EXPLORATION RIGHT

i) Failure to consult on the original exploration application

21 Shell failed to consult with Wild Coast communities in relation to the application for an exploration right. The duty to consult with such communities flows from four sources:

21.1 First, the obligation of the applicant for an exploration right to consult with the landowner and any interested and affected person, in terms of section 79 of the MPRDA;

21.2 Second, the communities' right to procedural fairness under PAJA;

21.3 Third, the right of fishing communities to be heard, by virtue of the fact that the grant of the exploration right adversely affects their customary fishing rights; and

21.4 Fourth, the rule of the customary law practised by our communities, which requires that there be community consultation in respect of any proposed use of the commons, which includes the ocean.

22 The failure by Shell to consult with communities is addressed in the founding affidavit. I expand upon it below.

Consultation under the MPRDA

- 23 Section 79(4) of the MPRDA requires that an applicant for an exploration right must consult in the prescribed manner with the landowner and any interested and affected party, and include the result of the consultation in the relevant environmental report.
- 24 I am advised that the purpose of such consultation is to provide landowners and interested and affected parties (“IAPs”) with the necessary information on everything that is to be done, so that they can make an informed decision regarding the representations that they will make, and regarding whether they will use internal appeal mechanisms or judicial review proceedings if the decision goes against them. Therefore, the applicant for an exploration right must provide the landowner and IAPs with (a) written notice that the application for an exploration right has been accepted by the Department; and (b) adequate detail of what the exploration operation will entail, in order for the landowner and IAPs to assess what impact the exploration will have.
- 25 Shell and Impact Africa did not satisfy these requirements. This is evident from the EMPr that was submitted as part of the application for the exploration right. The EMPr is attached to Shell’s answering affidavit in Part A as annexure “**HM1**”. The EMPr explains that the consultation process consisted of the following steps:

25.1 First, a stakeholder database was developed through stakeholder analysis and using previous studies in the area. Thereafter, a Background Information Document was compiled and distributed to all identified IAPs (p 651). It was distributed by email (p 769). Project information was also made available on the project information website at <http://www.erm.com/TranskeiAlgoa-EMPR> (p 769). These measures were flawed for the following reasons:

25.1.1 The EMPr provides no detail of what the “*stakeholder analysis*” entailed. Nor does it explain what the “*previous studies in the area*” consisted of. The applicant communities were not involved in any previous studies. Nor is there any evidence that Shell or Impact Africa attempted to investigate and discover the identity of affected communities. They failed to do so, despite the fact that Shell was aware that there were numerous fishing communities in the affected area. This is evident from the EMPr (p 746 - 748): Under the heading “*Subsistence fishers*”, the EMPr states, *inter alia*, that “*the East Coast is home to a large poor rural population many of whom are directly reliant on the coast for their livelihoods (Clark et al., 2002). These subsistence fisher communities include predominantly low income Xhosa or Pondo people who live in the eastern part of the country...*”.

25.1.2 As a consequence of Shell's failure to seek out and identify these communities, the applicant communities were not included on the stakeholder database;

25.1.3 The Background Information Document was distributed to all identified IAPs. However, if a community had not been identified as a IAPs (as is the case with the applicant communities), they did not receive this information.

25.1.4 In any event, the majority of members of the Amadiba community do not have access to email or to the internet. Most cannot read English. Therefore, the distribution of the Background Information Document by email and on the website would be neither accessible nor effective as a consultation tool with the Amadiba community.

25.2 Second, the EMPr states that adverts were placed on Friday 22 March 2013 in the following newspapers: *The Times*, *Die Burger* (Eastern Cape), *the Herald* and the *Daily Dispatch* (p 651). These adverts notified the public about the proposed project, and provided details of the consultation process and information on how members of the public could provide input on the forthcoming survey. Copies of the adverts are at p 895 - 898. This measure was inadequate for the following reasons:

- 25.2.1 Three of these newspapers are English and one is Afrikaans. Few people in our community read English, and virtually nobody speaks Afrikaans. The majority of residents along the Wild Coast speak isiXhosa or isiMpondo. If Shell wanted to engage with us, it should have prepared notices in our languages.
- 25.2.2 In addition, we have no newspaper circulation in Amadiba or in the communities of Dwesa-Cwebe. Newspapers are not delivered to our communities. Newspaper advertisements simply do not reach us, even if they are in a language the community understands.
- 25.2.3 As is the case with many communities along the Wild Coast, the people of Amadiba mostly get our news from the radio. We mainly listen to Ukhozi FM and Umhlobo Wenene. If there had been any notice or discussion of the Shell's proposed seismic blasting on the radio, we would certainly have commented.
- 25.3 Third, a period of 21 calendar days (22 March 2013 to 12 April 2013) was allowed for IAPs to submit issues or concerns for consideration in the compilation of the EMPr (p651). This period also allowed for members of the public to register as IAPs and to submit issues or concerns. All issues raised in this process were compiled into a short Comments and

Responses Report that formed part of the draft EMPr. This measure was insufficient for the following reasons:

25.3.1 The Wild Coast communities had not received notification of the comment process. As such, they did not know to submit comments or concerns, or how to do so.

25.3.2 In addition, they were not aware that they could register as interested and affected parties. The result was that their views and interests were absent from the EMPr Report.

25.4 Fourth, the EMPr draft was made available to IAPs for a period of 30 calendar days (24 May - 24 June 2013) on the project website (p 652). Notification was sent directly to all IAPs. This did not amount to consultation with the applicant communities for the following reasons:

25.4.1 Due to inadequate notification, the applicant communities were not registered as IAPs. As a consequence, they did not receive notice that the draft EMPr had been published on the project website;

25.4.2 In any event, the majority of Amadiba community members would not be able to read and critically consider the EMPr. The reason

is that internet access and user knowledge is limited in the community. In addition, as explained above, few people in the community can read English. In order to properly consult the Amadiba community on the plan, it was necessary for Shell to convey the plan (or its key points) orally to the community - be it via radio broadcasts or in-person meetings that were physically accessible to the community.

25.5 Fifth, Shell conducted a series of face-to-face engagements including group meetings (in an open house format) and focused group meetings (in a standard format) as part of its stakeholder engagement process (p 652). All IAPs on the stakeholder database were notified of and invited to the group meetings. Three group meetings were held in Port Elizabeth, East London and Port St Johns. In addition, two focused group meetings were held. One of the focused meetings was with the Provincial Environment Authorities. The other focused meeting was with *“two traditional monarchs and their senior advisors [who] were met in Mthatha, as well as Richard Stephenson, who is mandated to represent the 4 of the Transkei Kingdoms regarding this Project [fn1]”*. Footnote 1 states that *“the Royal Monarchs Council has subsequently been formed which represents the following Kingdoms: Thembuland - King Zwelibanzi Dalindyebo; West Pondoland - King Mangaliso Ndamase; and Xhosaland - King Zwelonke Sigcau.”* Shell states that all comments received on the EMPr were

compiled and documented in the Comments and Responses report. This measure was inadequate for the following reasons:

25.5.1 The applicant communities were not registered as IAPs and did not receive an invitation to such meetings.

25.5.2 The applicants have already dealt with the inadequacy of consulting by only speaking with the communities' monarchs. Our decision-making is done by the community as a whole, rather than by a single monarch or chief. For example, as the people of Dwesa-Cwebe explain in the supporting affidavits filed together with this affidavit, their customary law would require either the Chief or the Communal Property Association ("**CPA**") to be notified. The elders must also be notified and consulted on important matters and in particular matters that may affect the community's relationship to the ancestors. The elders will also assist the chief in getting word out to the different villages where people will be called to a Komkhulu to discuss the matter openly and freely. Where it is a matter that affects fishing, the community fishing structures will specifically be notified as their dependence on the sea is well known in the larger communities and their views respected. This inclusive decision-making. It does not involve the

imposition of top-down decisions taken by monarchs without broader consultation.

25.5.3 In any event, the applicant communities do not fall within the Kingdoms listed in the EMPr and were not represented by the named monarchs or a Mr Richard Stephenson. This is set out in the founding and supplementary affidavits in Part A and I do not repeat it here.

25.5.4 The fact that Shell claimed that one person (Mr Stephenson and the monarchs) represented these Kingdoms is a clear sign that they were not interested in carrying out a meaningful consultation with us.

26 The lack of meaningful consultation is particularly troubling given how sensitive the ecosystems Shell wishes to blast are, and the significant impacts that the blasting will have on our culture, livelihoods and the environment. This heightens Shell's duties to consult.

27 Good consultation is about listening, hearing, and then taking the views expressed and incorporating these views in the planning process and the project implementation to ensure that the development speaks to people's needs. This will ensure that there is sustainable development. It will also lead to less conflict

down the road. Where there is good consultation and the development will benefit people, there is going to be support for this.

28 As it stands, we are not aware of any meaningful benefit that will come to the people who will be affected by Shell's blasting. Having now viewed the plan and learned more about it, we see that we are not eligible for the limited number of jobs that will be created. We have no shares. We have no right to revenue. As far as we know, there is no specific plan to ensure that we receive any benefits at all.

29 The only information we have about the project is what we have gleaned from the media, and from our engagements with lawyers and experts. To be consulted, we needed information on the nature of the impacts on our sea and our communities and the opportunity to engage to address these impacts.

30 That is not what has happened here.

Consultation under PAJA

31 PAJA requires that administrative action be procedurally fair. What constitutes a fair procedure depends on the specific facts of the case. In this case, fairness required that a meaningful consultation process be carried out with communities whose rights and interests would be negatively impacted by the seismic blasting.

- 32 As is explained above, the context required that notifications of the consultation process were made in a way that was accessible to community members (such as announcements on the radio, or visits to the community itself). After the community had been notified, Shell was required to provide them with the key information, presented in an accessible format. Shell was required to carry out consultations with members of the community, not simply traditional monarchs.

Customary fishing rights and the right to be heard

- 33 The applicant communities have a self-standing right to be heard by virtue of the customary fishing rights that they hold.
- 34 As Dr Sunde explained in her expert affidavit attached to the Founding Papers (at para 25):

Residents [of Dwesa-Cwebe communities] regard fishing and harvesting as isithethe (custom), however there were certain uses of the sea and marine resources that are considered isiko (obligatory rituals that are a part of their customary law). In the words of one resident "There are customs that we have that need the sea". In particular, going to the sea and using certain marine resources is isiko for traditional healers and for others when they are called to do so by their ancestors on specific occasions. The rituals performed in their community that are amasiko are regarded as part of their customary law, referred to as 'umthetho '. These obligatory customary rituals are integral to their culture .

- 35 The *isithethe* (custom) and the right to fish that arises from it is protected by the Constitution (including by the rights entrenched by sections 30 and 31 of the Bill

of Rights). This right cannot be taken away from us or even diminished without a process that recognises, protects and respects these rights.

36 The seismic blasting threatens to negatively impact upon those rights. This triggers community members' right to *audi*. This point will be addressed in legal argument.

37 Further detail regarding the nature of the applicant communities' customary fishing rights are set out in the affidavits in Part A. To the extent necessary, the applicants reserve the right to file a further expert affidavit on this topic, when supplementing their papers in response to the rule 53 record. I do not repeat the content of those affidavits here.

Consultation regarding the use of the commons

38 Apart from our *isithethe*, we have *isiko*: customary duties and obligations relating to the sea and other common resources like our land and forests.

39 As I know, and as the supporting affidavits filed along with this affidavit attest, our customary communities have a duty to protect our natural resources - sometimes called the 'commons' - including the ocean. We have been taught all our lives how to do that. This duty requires us to ensure that the resources are protected, also for future generations.

- 40 But we also believe the ocean is the sacred site where our ancestors live - we are *from* the sea - and so have a duty to ensure that the ancestors are not unnecessarily disturbed and that they are content. When they become angry, bad things happen. We must then appease them.
- 41 This means that if an activity stands to impact upon the commons and upon our ability to safeguard it, we must be consulted in the manner prescribed by our customary law.
- 42 It also means that if an activity could disturb our ancestors, we must be consulted and provided with the opportunity to follow our customary processes in dealing with the potential disturbance.
- 43 I am advised that there are other indigenous communities across the world who have the same duty to guard their common resources arising from their indigenous laws. This has now been recognised and protected in various international instruments:
- 43.1 The Convention on Biodiversity ("**CBD**"), to which South Africa is a party, requires States to, "subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their

wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices”;

43.2 The CBD also calls on States to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”;

43.3 In 2010 the Tkarihwaie:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity was adopted. The Code requires ‘recognition of sacred sites, culturally significant sites and lands and waters traditionally occupied by indigenous and local communities’. It reads:

This principle recognises the integral connection of indigenous and local communities to their sacred sites, culturally significant sites and land and waters traditional occupied or used by them and associated traditional knowledge, and that their cultures, lands and waters are interrelated [...] access to traditional lands and waters and sacred sites is fundamental to the retention of traditional knowledge and associated biological diversity.

43.4 The Code recognises traditional guardianship as recognising “the holistic interconnectedness of humanity with ecosystems and obligations and

responsibilities for indigenous local communities, to preserve and maintain their traditional role as traditional guardians and custodians of these ecosystems through the maintenance of their culture, spiritual beliefs and customary practices”.

- 44 Therefore, the applicants have an additional, self-standing right to consultation, which derives from our communities’ customary rights to access and use the ocean as an integral part of our culture and spiritual world, and our obligations to be the guardians of our sacred oceans which is part of what is sometimes described as our “commons”.

ii) Impacts not considered

- 45 Good consultation from Shell would have ensured that they understood how their proposed activities would impact upon us. It would also have allowed Shell to seek our agreement on the terms of their blasting and eventual drilling. That did not happen. But even if agreement could not be reached, good consultation would have ensured Shell, and the regulator, learned about the impacts that communities are concerned about. This would have enabled them to better attempt to mitigate at least some of these harms.
- 46 Given the lack of consultation with the applicant communities, there were a number of impacts that were not included in the EMPr and, as a consequence, were not brought to the attention of the decision-maker. This included spiritual

and cultural impacts; the impact on our livelihoods; and the cumulative impact of the various exploration rights guaranteed over our seas.

Spiritual and Cultural Impacts

- 47 The prospect of airguns going off in the sea is very troubling to us. One of the pillars of our cultural and spiritual beliefs is the relationship that we have with our ancestors, some of whom dwell in the sea. Those ancestors are extremely powerful, having been in the sea for generations. Our community believes that the sea is the ultimate resting place for our ancestors, and that those who are in other water sources such as rivers and streams will ultimately make their way to the ocean.
- 48 Our ancestors are a central part of our lives, and the sea is a site of connection to them. Our cultural rituals, including celebrations of births or weddings and mourning deaths, and day-to-day practices of prayer and thanksgiving, take place at the sea. In addition, the sea forms a substantial element of training for traditional healers, who use the knowledge gained from their ancestors as well as fauna and flora such as marine plants and fish to perform their healing. Some examples of these are referred to in the affidavit of Dr Jacqueline Sunde, which was attached to my founding affidavit.

- 49 I refer the Court to the supporting affidavit of Mzalwane Dlamini, which will be filed together with this affidavit. Mr Dlamini explains the role that the ancestors play in providing guidance and support through the struggles of the physical experience of human life. Mr Dlamini is a sangoma, and relies on the restorative, purifying and healing powers of the sea to alleviate the suffering of members of his community.
- 50 Mr Dlamini emphasises that the seismic blasting will threaten his connection to the ancestors, as well as being a mark of disrespect to them. Where the connection with the ancestors is disrupted, the community's performance of spiritual rituals, and our ability to take guidance from our ancestors, will be undermined.
- 51 For many of us, our connection to the sea and the ancestors who dwell there is similar to the connection that one may feel when visiting the grave of his or her ancestors. The level of respect that is expected at a graveside is the same level of respect that we are required to show our ancestors at sea.
- 52 Mncedi Mahlangana, Kuzile Juza and David Gongqose from the communities of Dwesa-Cwebe share their understanding and experience that resonates with ours in their supporting affidavits filed with this application.

- 53 Our communities hold the belief that if we anger our ancestors they will reciprocate with bad luck and even natural disasters such as floods or tornadoes. The affidavit of Nonhle Mbuthuma Forslund, which will be filed together with this affidavit, provides some examples of this.
- 54 There are ways in which we can appease our ancestors, and if we succeed in doing so we can mitigate their anger. For example, we could explain to them what is happening and why, or we could practise our rituals at different sites nearby. But there are two important points to consider here.
- 55 The first is that because we were not consulted about the seismic survey, and became aware of Shell's plans only when the seismic survey was about to start, we had neither the time nor the required information about the seismic survey to communicate with our ancestors.
- 56 In addition, given the extent of the seismic survey area and the long period over which the seismic survey will take place, practising our rituals nearby would not be possible.
- 57 If there had been a process of meaningful consultation, then we would have been able to advise Shell of our beliefs and practices and the importance of our ancestors in every realm of our lives. Based on that engagement, we would have been able to discuss constructively whether mitigation of the impact of the

seismic survey on our ancestors would be possible. Unfortunately, we are now left in the position that our ancestors have been disturbed and disrespected, which is a complete affront to our cultural and spiritual beliefs.

Livelihood Impacts

- 58 An important aspect of our relationship with the ocean is the way in which it supports the livelihoods of the communities along the Wild Coast. The sea is our primary - and in many cases our only - source of nutrition and income. If we are not able to catch fish, we will not be able to feed our families. We will also not be able to pay for items such as food, electricity and school fees from the small income we earn from selling fish.
- 59 In her expert affidavit, which was annexed to my founding affidavit, Dr Jacqueline Sunde describes the socio-economic importance of access to marine resources for the Dwesa-Cwebe community in particular. She confirms that the coastline is a source of basic food security for people along the Wild Coast, providing a source of protein to those communities, who are poor and under-resourced. Indeed, the 61 small-scale fishing co-operatives located in the seismic survey area have some of the highest unemployment and poverty trends along the coastline.

- 60 Dr Sunde further records that the only formal employment opportunities for people in the Dwesa-Cwebe community are those arising from ecotourism. Any threat to the sustainability of the ecotourism industry therefore would heavily affect the local community.
- 61 Mr David Gonggose, a fisher from Dwesa-Cwebe, sets out in his affidavit filed herewith precisely how fish contributes to his family's survival. The affidavit of Mr Mahlangana shows that the Elliotdale and Willowvale district where the Dwesa-Cwebe communities are situated, are the poorest districts in the country. Roughly 92% of all households live under the poverty line, while between 70 and 77% are classified as ultra-poor.
- 62 For them, fish is not only the only source of protein available to them and their families, but the little cash income made by selling fish to the local hotel or on occasion showing tourists around the fishing spots, allows them to buy their children the school supplies they would otherwise go without.
- 63 There are few in our Amadiba community who are fortunate enough to be employed in the ecotourism sector and to earn a living for their families. The busiest season for the ecotourism industry is during the sardine run, from March to August each year, when tourists come to observe the different marine and bird species that chase the sardines. Members of the community provide

accommodation, transport and bicycle tours to tourists, as well as making and selling small curios to tourists.

- 64 The Department of Agriculture, Forestry and Fisheries' Policy for the Small Scale Fisheries Sector in South Africa (which was attached as annexure "JS2" to Dr Sunde's affidavit) recognises the importance of small-scale fishing in sustaining the livelihoods of communities:

At present the most important contribution of Small Scale fisheries towards poverty alleviation would be through the use of marine living resources for food security. Experience suggests that for the large majority of households involved in fishing activities (full-time or seasonal) in developing countries, fishing and related activities have not generated high economic returns but instead have helped them to sustain their livelihoods and have prevented them from falling deeper into poverty.

In situations of economically or institutionally restricted access to other capital (e.g. financial capital such as credit) or production factors (such as private land) the relatively easy and free access to fishing grounds allows the poor to rely more heavily on the local common resources to obtain the goods and services they need to sustain their livelihoods, or to gain access to remunerated employment. This safety-net dimension of fisheries is of greater importance and relevance to poor and marginalised households - particularly those with limited access to land and other resources.

Although these poverty alleviation mechanisms are perhaps less attractive from a purely economic point of view (no significant surplus rent is generated by the activities), the role of Small Scale fisheries as a livelihood support and coping mechanism for the poor is crucial from a social point of view particularly in areas where alternative employment may be scarce and where social security programmes are either minimal

or non-existent. In such areas fisheries can play a critical role as a "welfare" (or redistributive) system, that would otherwise have to be provided through other forms of social support by local, provincial or national Government.

65 Shell says there will be no impact on the fishing activity of our communities because we do not target any of the species that stand to be impacted, and that we do not leave the shore for fishing.

66 That is not true.

67 In the replying affidavit that I filed in earlier proceedings, I pointed out that our different fishing communities target different species depending on where we are situated and what 'basket' of species was awarded to us by the Department. Whereas the commercial sector receives permits per species, the small scale communities receive a 'basket': a number of species that we can catch. This not only assists in making sure that we have something to eat for most of the year, but is also a more sustainable approach to fishing.

68 Our different communities have varying access to boats and technology to fish beyond the nearshore. It would have been important for Shell to understand and consider this.

69 I repeat here the table that I presented in my earlier affidavit showing the species that are in our baskets and that are fished beyond the nearshore.:

Species	Location	Small scale fishing community resource basket on list from Department of Environment, Forestry and Fisheries
<p>TUNA – albacore, yellowfin and bluefin</p> <p>longfin tuna/albacore (<i>Thunnus alalunga</i>) bigeye tuna (<i>Thunnus obesus</i>) yellowfin tuna (<i>Thunnus albacares</i>) Southern bluefin tuna and bluefin tuna (<i>Thunnus maccoyii</i> and <i>T. thynnus thynnus</i>) respectively</p>	<p>Large migratory pelagic species that occur in offshore waters and beyond the shelf break</p>	<p>Mzamba coop (Yellowfin)</p> <p>Port Saint John's coop (all three species)</p>
<p>Squid</p>	<p>The squid (<i>Loligo vulgaris reynaudii</i>) occurs extensively on the Agulhas Bank out to the shelf edge (500 m depth contour)</p>	<p>Mzamba Coop</p> <p>Kei-Mor Coop</p> <p>Ngoma Dwesa-Cwebe Coop</p>
<p>Blue Marlin</p>	<p>This occurs beyond the shelf.</p>	<p>Dwesa-Cwebe Resource Basket (Mendwana)</p>

includes black, blue and striped marlin (<i>Makaira indica</i> , <i>M. nigricans</i>)		
Hake The Cape hake (<i>Merluccius capensis</i>)	The Cape hake (<i>Merluccius capensis</i>) is distributed widely on the Agulhas Bank while the deep-water hake (<i>Merluccius paradoxus</i>) is found further offshore in deeper water. Juveniles of both species occur throughout the water column in shallower water than the adults.	Mendwana Dwesa-Cwebe Resource Basket (Mendwana)
Sardines	Acts as food for the game fish like Marlin in the deep waters on edge of continental shelf.	Mzamba Coop PsJ Coop
Kingklip	“Found in the proposed exploration areas” according to the EMP _r (v) They spawn off the shelf edge in the south west south of Algoa and St Francis	Kei-More COOP

- 71 Neither was the impact on the ecotourism industry in our communities.
- 72 Given how precarious our lives are, based on the statistics and examples of household expenditure provided, showing how crucial fishing and ecotourism are in helping our communities put food on the table, any impact whatsoever on our ability to feed ourselves and our families will be a severe impact, an impact most of us are unlikely to be able to afford.

Cumulative Impact

- 73 In addition to the substantive considerations arising from Shell's application for an exploration right that ought to be taken into account, it is critical to take into account the context within which the application is made and the broader impact of Shell's proposed activities.
- 74 Shell is one of many entities seeking to establish the presence of oil and gas deposits off the coast of South Africa, with a view to exploiting those deposits if found. As I have stated above, there is another urgent application pending to interdict a seismic survey off the west and south-west coasts of South Africa, to be conducted by Searcher Seismic (Australia). As with this application against Shell, the communities along the west and south-west coasts allege that the entity conducting the seismic survey did not consult with them at any stage and

therefore did not appreciate the detrimental effect that a seismic survey will have on the marine and bird life, as well as on the livelihoods of the communities.

75 As such, it would not be appropriate to determine applications for licences for exploration activities and other human activities on an ad hoc basis and without considering the cumulative impact of a growing number of activities in the area in question. In other words, the Minister is not only required to consider Shell's proposed activities and the impact of these activities, but he is also required to consider the manner in which these activities will compound and be compounded by other exploration activities in the same area.

76 This obligation arises from the EIA Regulations, which impose a duty to consider cumulative impacts as part of the impact and risk assessment process on obtaining environmental authorisation. Cumulative impact is defined in the EIA regulations as *"the past, current and reasonably foreseeable future impact of an activity, considered together with the impact of activities associated with that activity, that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or diverse activities."*

77 I do not have direct knowledge of the other exploration activities being conducted along and in the vicinity of the Wild Coast. I am advised that details of these activities ought to be contained in the Rule 53 record. I will therefore elaborate

on this issue, to the extent necessary, in my supplementary founding affidavit to be filed in response to the Rule 53 record.

iii) Failure to consider customary law

78 Our day-to-day lives are governed by customary law. As I have explained above, from our customary law arises two relevant sets of rights that are protected in our constitution and international law:

78.1 *isithethe*, or the customary rights to fish; and

78.2 *isiko*, our duty to guard the commons as a sacred place of our ancestors and for ourselves and future generations.

79 In terms of our customary law, we have to be consulted if you want to do things on or in our land, ocean or forest, whether it will impact our rights to harvest the resources or our duties as guardians of our resources.

80 I am advised that the Code of Conduct to the Convention on Biological Diversity that I quote above, confirms this right of consultation:

80.1 the Code states that “activities/interactions should not interfere with access to traditional resources except with the approval of the community concerned. Activities/interactions should respect customary rules

governing access to resources where this is required by the community concerned” and that

80.2 “any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. Such consent or approval should not be coerced, forced or manipulated.”.

81 Not only must we thus be consulted, but it needs to be done in terms of our customary law. We have set out broadly what the customary law of our community and the communities of Dwesa-Cwebe would require for consultation. This can differ from community to community, but the principles of broad participation and consensus-seeking are normally the foundation for the procedural ‘rules’ of decision-making in our communities.

iv) Failure to Consider International Law

82 I am advised that when interpreting and applying the respondents’ legal obligations, this Court is enjoined to consider international law. The following international law instruments are relevant to this matter, given the manner in

which the grant of the exploration right to Shell and the conduct of the seismic survey implicates our rights:

- 82.1 The right to *“the enjoyment of the highest attainable standard of physical and mental health”* in terms of article 12(1) of the International Covenant on Economic, Social and Cultural Rights (**“ICESCR”**). It is widely recognised, including in article 12(2)(b) of the ICESCR, that the right to health extends beyond access to health care services to include the underlying determinants of health, including healthy environmental conditions;
- 82.2 The right to food, which is entrenched in article 11 of the ICESCR, as part of the right to an adequate standard of living. Article 11(2) specifically recognises the right to be free from hunger and imposes a series of obligations on state parties to achieve this right;
- 82.3 The right to work, which is protected by articles 6 to 8 of the ICESCR. These provisions explicitly include the right of everyone to gain a living by work that they freely choose or accept, as well as a right for all people to make a decent living for themselves and their families through their work. This right is a precondition for the enjoyment of other fundamental rights, as well as being an inherent part of the right to dignity. This right applies to all workers in all settings, in both formal and informal employment

sectors. The right to work is also guaranteed under the African Charter on Human and People's Rights;

82.4 The right to take part in cultural life, in terms of Article 15(a) of the ICESCR; and

82.5 The right to a clean, healthy and sustainable environment. Although this right is not explicitly recognised in an international treaty, it is a right that receives protection under customary international law.

83 The South Africa government is also bound by a number of duties arising from international instruments governing specific aspects of the environment, including the following:

83.1 The Convention on the Conservation of Migratory Species of Wild Animals: South Africa is bound in terms of article II section 4(b) to prevent, remove, compensate for or minimise threats to the movement of more than 50 marine and coastal species, including fin whales, sei whales, humpback whales, south Atlantic right whales, loggerhead turtles and leatherback turtles. As I have addressed above, the expert evidence relied on by the applicants is that several of these species will be adversely affected by the Seismic Survey;

83.2 The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region ("**Nairobi**

Convention”) provides a regional legal framework for the protection, management and development of state parties’ marine and coastal environments.

83.2.1 Article 4(1) the Nairobi Convention requires contracting parties to take *“all appropriate measures . . . to prevent, reduce and combat pollution . . . and to ensure sound environment management of natural resources”* in the convention area.

83.2.2 Article 8 further requires contracting parties to take *“all appropriate measures to prevent, reduce and combat pollution”* resulting both *“directly or indirectly from exploration and exploitation of the seabed and its subsoil.”*

83.2.3 Article 11 of the Nairobi Convention requires contracting parties to *“take appropriate measures to conserve biological diversity,”* including threatened and endangered species. This requirement extends beyond species themselves to rare or fragile ecosystems, requiring contracting parties to establish marine protected areas, and more importantly *“prohibit any activity likely to have adverse effects on the species, ecosystems or biological processes that such areas are established to protect.”*

83.3 The Nairobi Convention is supported by three Protocols, all of which have been ratified by the South African government. Relevant to this matter is

the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, which requires contracting parties to take action in relation to protecting specific species listed in its Annex II as well as establishing protected areas in order to protect those species. Annex II lists among the species requiring special protection the humpback whale, the loggerhead turtle and the leatherback turtle, all of which are likely to be adversely affected by the seismic survey. Article 4 of this Protocol requires that countries take *“all appropriate measures to ensure the strictest protection of the endangered wild fauna species”* that are listed in its Annex II. This includes the requirements that South Africa *“shall strictly regulate and, where required, prohibit activities having adverse effects on the habitats of such species.”*

83.4 The International Whaling Convention, which recognises the importance of sound for the survival of cetaceans and the physical and behavioural damage that may be caused by anthropogenic underwater noise. This convention specifically recognises the applicability of the precautionary principle and the obligation to reduce the effects of underwater noise despite their not being full scientific certainty as to its effects.

84 In addition to the South African government’s obligations arising from international environmental law, the state is also bound by the United Nations Declaration on the Rights of Indigenous People, which includes the following provisions:

- 84.1 Article 3 provides that indigenous people have the right to self-determination, which includes the right to freely pursue their economic, social and cultural development;
- 84.2 Article 5 provides that indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State;
- 84.3 Articles 8(2)(a) and (b) impose on state parties the obligation to provide effective mechanisms for the prevention of and redress for any action which has the aim or effect of depriving indigenous people of their integrity as distinct peoples, or of their cultural values or ethnic identities, as well as any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- 84.4 Article 11(1) provides that *“indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature”*;
- 84.5 Article 12(1) provides that *“indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs*

and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains”;

84.6 Article 18 protects the *right to participate in decision-making in matters which would affect 16 their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”;*

84.7 In terms of article 19, “*states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”;*

84.8 Article 20(1) provides that “*indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”;*

84.9 Article 25 provides that “*indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and*

coastal seas and other resources and to uphold their responsibilities to future generations in this regard”;

84.10 Article 29 entrenches the right of indigenous people *“to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination”;* and

84.11 Article 31(1) protects *“the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the 23 right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”*

85 The following rights of indigenous people are protected under the International Labour Organisation’s Indigenous and Tribal People’s Convention 169 of 1989:

85.1 Article 7, which provides as follows:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions

and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

85.2 Article 8, which entrenches the right of indigenous people to retain their own customs and traditions, where these are not incompatible with fundamental rights defined by the national legal system and with fundamental human rights;

85.3 Article 15(1), which provides that *“the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially*

safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources”; and

85.4 Article 23(1), which provides that *“handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.”*

86 There are therefore extensive obligations arising from international law, both in relation to the protection of the environment and the respect for the rights of indigenous people. Had the Minister taken these obligations into account, and in the light of the impact that Shell’s exercise of its exploration right will have on our rights, the Minister would not have granted an exploration right to Shell. Indeed, on a proper interpretation of the provisions I have listed above, I submit that the Minister was obliged to refuse Shell’s application.

iv) Unacceptable Environmental Harm

87 In my founding affidavit I made reference to reports prepared by several experts in which they address the environmental harm that is likely to arise from Shell’s

seismic survey. I do not wish to repeat those allegations here, but it is necessary to highlight some aspects identified in the expert reports:

87.1 Elwen and Gridley highlight the gaps in knowledge about the harm that may arise from the seismic survey, particularly in the light of the fact that the EMPr was completed in 2018. They note that since the completion of the EMPr, two species of whale and one species of coastal dolphin have decreased in population size or conservation status, while others have shown changes in distribution or abundance that may affect the understanding of their population size or conservation status. They also highlight that the marine turtle species in South Africa, which range from vulnerable to critically endangered, are very likely present in the seismic survey area. There is also a high number of endangered and critically endangered fish species in the seismic survey area. They note that the acoustic disturbances that may arise from the seismic survey may lead to behavioural changes and physiological stress, which may affect cetaceans and penguins at a population level.

87.2 Nowacek expresses his opinion that the noise from the seismic survey will likely affect cetaceans by inducing a physiological stress response, by disrupting biologically essential behavior and by masking acoustic communication. Because sound travels faster in water than in thin air, these impacts will likely be experienced by cetaceans over large areas.

Nowacek is of the opinion that the mitigation measures set out in the EMPr are not sufficient to manage this impact.

87.3 Harris, Olbers and Wright state that, based on peer-reviewed literature, physical damage to marine animals has been directly linked to the kind and level of sound to be used in the seismic survey. There is plausible evidence to suggest that the seismic survey is likely to affect vulnerable and threatened species, including the humpback whale, which is on the IUCN red list. The impact will be felt most by mothers and their calves, whose ability to communicate with each other may be adversely affected. Marine animals are likely to display avoidance behaviour. There is, in addition, evidence to show that the African penguin has avoided feeding sites that are close to seismic survey activities. Turtle hatchlings are unable to avoid the area and will therefore suffer extreme disturbance. The seismic survey could also have a negative impact on zooplankton, which is an essential food source for marine life. They conclude that the mitigation measures contained in the EMPr are insufficient to address these risks.

87.4 Alexander Winkler has provided his opinion that the seismic survey will likely have a negative impact on shallow-water hake and spiny dogfish, including their foraging behaviour and their reproductive processes. It is

also likely that any coelacanth present in the area will be adversely affected.

88 The Minister was obliged to take these threats into account in considering the application for an exploration right, and to do so through the lens of the precautionary principle. The proper application of this principle would oblige Shell to establish that there are no substantial risks of environmental harm arising from its activities. Given the evidence outlined above, it is unlikely that Shell would be able to establish this.

89 The Minister's failure to consider this harm highlights his failure to take relevant considerations into account and is in breach of South Africa's environmental obligations as outlined above.

v) Failure to Consider NEM: ICMA

90 The National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("**ICMA**") creates specific measures for the protection of the coastal zone. Read together with NEMA, it operates as a supplementary framework that provides supplementary protections against the overuse, degradation and inappropriate management of the coast line.

91 Section 63(1) of ICMA provides for a set of ten factors that must be taken into account in the case of environmental authorisation for coastal activities:

91.1 the representations made by the applicant and by interested and affected parties;

91.2 the extent to which the applicant has in the past complied with similar authorisations;

91.3 whether coastal public property, the coastal protection zone or coastal access land will be affected, and if so, the extent to which the proposed development or activity is consistent with the purpose for establishing and protecting those areas;

91.4 the estuarine management plans, coastal management programmes, coastal management lines and coastal management objectives applicable in the area;

91.5 the socio-economic impact if the activity-

91.5.1 is authorised;

91.5.2 is not authorised;

91.6 the likely impact of coastal environmental processes on the proposed activity;

91.7 whether the development or activity-

91.7.1 is situated within coastal public property and is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations;

91.7.2 is situated within the coastal protection zone and is inconsistent with the purpose for which a coastal protection zone is established as set out in section 17;

91.7.3 is situated within coastal access land and is inconsistent with the purpose for which coastal access land is designated as set out in section 18;

91.7.4 is likely to cause irreversible or long-lasting adverse effects to any aspect of the coastal environment that cannot satisfactorily be mitigated;

91.7.5 is likely to be significantly damaged or prejudiced by dynamic coastal processes;

91.7.6 would substantially prejudice the achievement of any coastal management objective; or

91.7.7 would be contrary to the interests of the whole community;

91.8 whether the very nature of the proposed activity or development requires it to be located within coastal public property, the coastal protection zone or coastal access land;

91.9 whether the proposed activity or development will provide important services to the public when using coastal public property, the coastal protection zone, coastal access land or a coastal protected area; and

91.10 the objects of ICMA, where applicable.

92 Section 63(5) of ICMA provides that the competent authority must ensure that the terms and conditions of any environmental authorisation are consistent with any applicable coastal management programmes and promote the attainment of coastal management objectives in the area concerned.

93 Since Shell did not obtain environmental authorisation as required by NEMA and the MPRDA, it circumvented the specific protections in place in respect the coastal zone in which its seismic blasting will take place.

- 94 There is accordingly a host of peremptory considerations that have not been taken into account.

vi) Conclusion on grounds for review

- 95 In light of the above, the decision to grant the exploration right is reviewable on the following grounds:

95.1 The decision-maker failed to take relevant considerations into account. As such, the decision is reviewable under s 6(2)(e)(iii) of PAJA and the principle of legality;

95.2 The decision was not procedurally fair and falls to be reviewed under s 6(2)(c) of PAJA;

95.3 The decision was not procedurally rational and is reviewable under the principle of legality;

95.4 The decision-maker failed to comply with a mandatory and material procedure or condition prescribed by the empowering provision and the decision contravenes a law. Thus, the decision falls to be reviewed under sections 6(2)(b) and 6(2)(f)(i) of PAJA and the principle of legality;

95.5 The decision is otherwise unconstitutional or unlawful and is subject to review under s 6(2)(i) of PAJA and the principle of legality.

IV. GROUND OF REVIEW: RENEWAL DECISIONS

i) Shell's Failure to Consult in Renewal Applications

96 To the extent that Shell was required to consult with interested and affected persons with regard to its applications in 2017 and 2020 to renew the exploration right, it failed to do so.

97 I note that the fact that we do not know when the

98 Section 81 of the MPRDA requires that an application for a renewal of an exploration right must include an exploration work programme (setting out the programme for the renewal period) and must show that the applicant complied with the conditions of the environmental authorisation.

99 I have consulted with members of the Amadiba Traditional Community. Neither I, nor any of the persons with whom I consulted, were approached by Shell for comment on its renewal applications. We have not had sight of an exploration work programme. Shell did not obtain an environmental authorisation under NEMA, so cannot have shown that it complied with the conditions set out therein.

ii) Conclusion on grounds for review

100 In light of the above, the renewal decisions are reviewable on the following grounds:

100.1 The decision-maker failed to take relevant considerations into account. As such, the decisions are reviewable under s 6(2)(e)(iii) of PAJA and the principle of legality;

100.2 The decisions were not procedurally fair and fall to be reviewed under s 6(2)(c) of PAJA; and

100.3 The decision-maker failed to comply with a mandatory and material procedure or condition prescribed by the empowering provision. Thus, the decisions fall to be reviewed under section 6(2)(b) of PAJA and the principle of legality.

V. GROUNDS OF REVIEW: DECISION TO ALLOW SHELL TO COMMENCE SURVEY WITHOUT AN ENVIRONMENTAL AUTHORISATION UNDER NEMA

i) The decision is unlawful

101 As is explained above, Shell was not permitted to commence its exploration activities without having first obtained an environmental authorisation under NEMA. This is a peremptory requirement in terms of section 5A(a) of the MPRDA and section 24F(1)(a) of NEMA. These provisions were applicable at the time that Shell sought to commence its exploration operations.

102 As a consequence, the decision to allow Shell to commence its survey activities was unlawful.

ii) Conclusion on grounds for review

103 In light of the above, the commencement decision is reviewable on the following grounds:

103.1 A mandatory and material procedure or condition prescribed by the empowering provision was not complied with and contravenes a law. Therefore, the decision falls to be reviewed under sections 6(2)(b) and 6(2)(f)(i) of PAJA and the principle of legality;

103.2 The decision is otherwise unconstitutional or unlawful and is subject to review under s 6(2)(i) of PAJA and the principle of legality;

103.3 The decision was materially influenced by an error of law and is thus reviewable under s 6(2)(d) of PAJA and the principle of legality.

VI. DELAYS AND CONDONATION

i) Review application brought within 180 days

104 Section 7(1) of PAJA requires that proceedings for judicial review under PAJA must be instituted without unreasonable delay and not more than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the administrative action and the reasons for it, or might reasonably have been expected to become aware of the action and the reasons for it.

105 The administrative action in question here is (1) the decision to grant the exploration right; (2) the renewal decisions; and (3) the decision to allow Shell to commence the seismic blasting without an environmental authorisation under NEMA.

106 As I have explained above, due to a lack of adequate notification and consultation, the applicants were not aware of these decisions. I only became aware of Shell's plan to conduct the seismic study in early November 2021, when I read about it in media reports. A number of the other applicants learned about it later. Given Shell's lack of consultation, we could not reasonably have been expected to know about the grant of the exploration right, the renewal decisions and the commencement decision before November 2021.

107 In the circumstances, this review application has been instituted without unreasonable delay and well within the 180 day period prescribed by PAJA.

108 In the event that the Court disagrees and finds that the review has been launched out of time, the applicants pray for condonation and the extension of the 180-day period to the date that the applicants' amendment of the Notice of Motion in Part B is perfected. There is good cause for the delay in instituting these proceedings (set out above) and it is in the interests of justice that the 180-day period be extended.

ii) Condonation for failure to exhaust internal remedies

109 I am advised that, ordinarily, a party seeking to review and set aside a decision in terms of PAJA is required to demonstrate that they have exhausted all internal remedies before doing so. Section 96(1) of the MPRDA provides for an internal appeal against any decision made in terms of the MPRDA, including a decision to grant an exploration right.

110 The applicants did not lodge an appeal against the Minister's decision to grant an exploration right, the renewal decisions or the commencement decision for the following reasons:

110.1 First, although we became aware of the exploration right and Shell's intention to conduct a seismic survey on the strength of that right in November 2021, the right was granted on 29 April 2014. Almost eight years have passed since the exploration right was granted.

110.2 We also became aware of the renewal decisions and the commencement decision in November 2021. By that stage, the seismic blasting was about to begin (in early December 2021). There was insufficient time to follow the internal appeal process within the Department. We approached the court urgently for an interdict.

110.3 Second, although no relief was sought against the Minister in Part A of this application, and despite having earlier indicated that he would abide the Court's decision in relation to the interim interdict, the Minister opposed Part A of this application, filing an answering affidavit and addressing legal argument to the Court as to why the application for an interim interdict ought to be dismissed. After judgment was handed down, granting the relief in Part A, the Department applied for leave to appeal against the judgment. This creates at least a reasonable perception on the part of the applicants that the Minister is biased in favour of Shell.

110.4 This perception is fortified by public statements made by the Minister, in which he directly criticised those who have spoken out in opposition to

Shell's seismic survey. He stated that "*We consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection*". I refer the Court to annexure "**RSZ5**", in which this statement was made. Another example appears in the attached annexure marked "**RSZ6**" in which the Minister's refusal to review Shell's exploration right is recorded. In the light of this public attitude towards the applicants and others who seek to assert their environmental and other rights, there is a clear indication that the Minister will not approach the appeal with an open mind.

110.5 Third, as is mentioned above, the parties have agreed to expedited time frames for the resolution of Part B of this application. It is in both parties' best interests for the matter to be resolved without any further delay, including any delay caused by following the formalities of an appeal process.

111 In the circumstances, we are of the view that there would be no purpose served by lodging an internal appeal, and that all parties' interests would be best served by avoiding any further delays.

112 To the extent necessary, and for the reasons set out above, the applicants seek condonation for their failure to exhaust all of the internal remedies available to them.

VII. THE FINAL INTERDICT

i) A clear right

113 The applicants seek to interdict Shell from undertaking survey operations under Exploration Right 12/3/252.

114 The applicants have demonstrated a clear right to this interdictory relief. This right stems from the following:

114.1 First, the statutory requirement that Shell must obtain an environmental authorisation under NEMA before it is permitted to commence its seismic survey (addressed above); and

114.2 Second, the right of the applicant communities to be consulted before the exploration right was granted (and to the extent necessary, before the renewal decisions were made). This right stems from four independent sources: the provisions of the MPRDA, the provisions of PAJA, the impact on the customary fishing rights held by the applicants and the customary law rules relating to the use of the commons.

ii) A reasonable apprehension of harm

115 The applicants have demonstrated a reasonable apprehension of harm, in the event that the final interdict is granted. This is set out at length in the affidavits in Part A and above. In brief, the harms include the negative impact of the seismic survey on the applicants' livelihoods, the harm to the applicant communities' spiritual and cultural practises, and the unacceptable and cumulative harm to the environment.

iii) No reasonable alternative remedy

116 As I demonstrate above, there is no alternative remedy available to the applicants. The Minister has, through his statements in the media and his conduct in this litigation, revealed his position on this matter. There is a reasonable perception of bias by the Minister towards Shell. In the circumstances, the internal appeal processes set out in the applicable legislation and regulations do not constitute a reasonable alternative remedy for the applicants.

VIII. ADMISSION OF THIS SUPPLEMENTARY AFFIDAVIT

117 The applicants seek leave to file this supplementary affidavit (together with its supporting affidavits). I maintain that the affidavit should be admitted for the following reasons:

117.1 As is clear from the above, this affidavit is necessitated by the amendment of the applicants' relief. In the case management meeting held in January 2022, Shell indicated that it does not intend to oppose the amendment. Similarly, the State did not raise any objection.

117.2 The evidence in this affidavit is material to the applicants' case. It sets out the grounds for the declaratory order and review relief sought by the applicants.

117.3 There is good reason why the material raised in this affidavit was not included in the founding affidavit. The notice of motion and founding affidavit were drafted under extreme time constraints, given the urgent need to interdict Shell's survey activities (which was sought in Part A). When preparing the case, the applicants determined that they wished to amend the notice of motion. They informed the court of their intention to do so at the hearing of Part A. The notice of amendment will be filed timeously and this affidavit has been prepared expeditiously.

117.4 The respondents will not be prejudiced by the admission of this affidavit. During the case management meeting held in January 2022, a timeline was agreed by the parties for the conduct of this matter. Provision was made for the filing of our notice of amendment and supplementary affidavit. Therefore, the admission of this affidavit will not disrupt the

conduct of this hearing. In addition, there is ample time allocated to allow the respondents to consider the content of this affidavit before their answering affidavits are due.

IX. CONCLUSION

118 In the circumstances, the Applicants persist in seeking the relief sought in our amended notice of motion, including costs.

119 The parties have agreed to expedite the hearing of Part B. This means that the agreed timetable has relatively tight timelines for filing. Given the scope of the matter and the evidence involved, we seek the costs of three counsel.

REINFORD SINEGUGU ZUKULU

I certify that the above signature is the true signature of the deponent who has acknowledged to me that they know and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2022 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1306/22

Name of Ship: BGP "Pioneer"

In the matter between:

CHRISTIAN JOHN ADAMS	First Applicant
STEENBERGS COVE SMALL SCALE FISHING COMMUNITY	Second Applicant
AUKATOWA SMALL SCALE FISHERIES COOPERATIVE	Third Applicant
WILFRED POGGENPOEL	Fourth Applicant
ROSEY SHOSOLA	Fifth Applicant
COASTAL LINKS LANGEBAAN	Sixth Applicant
SOLENE SMIT	Seventh Applicant
NORTON DOWRIES	Eighth Applicant
CAMELITA MOSTERT	Ninth Applicant
ANTHONY ANDREWS	Tenth Applicant
NICOLAAS BOOYSEN	Eleventh Applicant
REGAN JAMES	Twelfth Applicant
GREEN CONNECTION	Thirteenth Applicant
WE ARE SOUTH AFRICANS	Fourteenth Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Respondent

SEARCHER GEODATA UK LIMITED

Third Respondent

SEARCHER SEISMIC (AUSTRALIA)

Fourth Respondent

PETROLEUM AGENCY SOUTH AFRICA (PTY) LTD

Fifth Respondent

BGP "PIONEER"

Sixth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicants intend to make an application to this Honourable Court on **7 February 2022** for an order in the following terms:

PART A

1. Dispensing with the forms of service and time periods prescribed in terms of the Uniform Rules of Court insofar as is necessary and hearing the matter as one of urgency in terms of Rule 6(12).
2. That the third, fourth and sixth respondents be interdicted from commencing, alternatively the continuing, the seismic survey of the west and south-west coast of South Africa in terms of a Reconnaissance Permit granted by the First Respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 ("**MPRDA**") pending -
 - 2.1 the outcome of the applicants' internal appeal against the decision to grant the Reconnaissance Permit to the third and fourth respondents in terms of section 96 of the MPRDA; and
 - 2.2 the outcome of part B of this application.

3. Ordering those respondents who oppose the relief sought in part A of this application, jointly and severally (the one paying the others to be absolved), to pay the costs of Part A of this application, including the costs of three counsel on a scale as between attorney and client.

TAKE NOTICE FURTHER THAT the applicants will rely on the affidavit and annexures of Christian John Adams and others in support of the application.

TAKE NOTICE FURTHER THAT the applicants have appointed the Legal Resources Centre and Richard Spoor Inc as their attorneys of record and the address at which they will accept service of notices and other process in these proceedings is set out below.

If any of the respondents intend to oppose Part A of this application, they are required to:

- (a) deliver notice to the applicants of their intention to oppose by 16:00 on Monday, 24 January 2022 and in such notice to appoint an address within fifteen kilometres of the office of the Registrar at which they will accept notice and service of all process in these proceedings; and
- (b) deliver an answering affidavit on or before 16:00 on Thursday, 27 January 2022;
- (c) the applicants will deliver their replying affidavit on or before Monday, 31 January 2022; and

- (d) deliver their heads of argument on or before 16:00 on Friday, 04 February 2022.

PART B

TAKE NOTICE THAT the applicants intend to make an application to this Honourable Court on a date and time to be determined by the Registrar for an order in the following terms:

1. Insofar as is necessary, exempting the applicants in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, 2000 from the obligation to exhaust their internal remedies and condoning any failure by the applicants to comply with section 96(1) of the MPRDA.
2. That it be declared that the first respondent's decision to grant a reconnaissance permit to the third and fourth Respondents is in breach of section 75(1)(c) of the MPRDA and is accordingly unlawful.
3. That the first respondent's decision to award the third and fourth respondents the Reconnaissance Permit is reviewed and set aside and substituted with the following: "the application for a Reconnaissance Permit in terms of section 74 of the MPRDA is refused."
4. In the event of the first respondent's decision to dismiss the applicants' appeal in terms of section 96 of the MPRDA, alternatively a failure of the first respondent to make a decision in relation to the applicants' appeal in terms of section 96 of the MPRDA, an order reviewing and setting that decision and substituting it with the following: "the appeal is upheld and the

Reconnaissance Permit is set aside”, alternatively that “the appeal is upheld and the Reconnaissance Permit is cancelled”.

5. That it be declared that the third and fourth respondents have breached their obligations arising from -

- 5.1 section 74(4) of the MPRDA; and

- 5.2 section 24(2)(a) of the National Environmental Management Act 107 of 1998 (“**NEMA**”) read with item 21B of Listing Notice 1 of the Environmental Impact Assessment Regulations 2021.

6. That the third and fourth respondent, and the sixth respondent and/or any other vessel so engaged by the third and fourth respondent to conduct seismic surveys under the reconnaissance permit, be finally interdicted from commencing, alternatively recommencing, the seismic survey of the west and south-west coast of South Africa unless and until the first respondent lawfully grants a Reconnaissance Permit in terms of section 75 of the MPRDA having been satisfied that -

- 6.1 the third and fourth respondents’ application for a Reconnaissance Permit fully complies with the application requirements in terms of of section 74 of the MPRDA and section 24(2)(a) of NEMA read with item 21B of Listing Notice 1 of the Environmental Impact Assessment Regulations 2021; and

6.2 the third and fourth respondents consult meaningfully with all interested and affected parties; and

6.3 the third and fourth respondents obtain the requisite environmental authorisation for its proposed activities.

7. Ordering the respondents jointly and severally (the one paying the others to be absolved) to pay the costs of Part B of this application, including the costs of three counsel.

TAKE NOTICE FURTHER THAT the applicants will rely on the affidavit and annexures of Christian John Adams and others in support of the application.

TAKE NOTICE FURTHER THAT the applicants have appointed the Legal Resources Centre and Richard Spoor Inc as their attorneys of record and the address at which they will accept service of notices and other process in these proceedings is set out below.

TAKE NOTICE FURTHER THAT:

1. Under Rule 53(1)(a) of the Uniform Rules of Court, the respondents are called upon to show cause why the aforementioned decisions should not be reviewed and corrected or set aside.
2. Under Rule 53(1)(b) of the Uniform Rules of Court, the first and second respondents are required, within 15 days after receipt hereof, to dispatch to the Registrar of this Honourable Court the record of the proceedings sought

to be reviewed and set aside (including all plans, correspondence, reports, memoranda, documents, evidence and other information which were before the respondents at the time when the decisions in question were made), together with such reasons as they are by law required to give or desire to make, and to notify the applicants that they have done so.

3. Within 10 days of receipt of the record from the Registrar, the applicants may, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement their founding affidavit in terms of Rule 53(4) of the Uniform Rules of Court;
4. If any of the respondents intend to oppose the application, they are required, under Rule 53(5):
 - (a) within 15 days after the receipt of this notice of motion or any amendment thereof, to deliver notice to the applicants that they intend to oppose and in such notice to appoint an address within fifteen kilometres of the office of the Registrar at which they will accept notice and service of all process in these proceedings; and
 - (b) within 30 days after the expiry of the time referred to in Rule 53(4), to deliver any affidavit they may desire in answer to allegations made by the applicant.
5. If no such notice of intention to oppose is given, application will be made to this Honourable Court for an order in terms of the notice of motion on 7 February at 10h00 or so soon thereafter as counsel may be heard.

TAKE NOTICE FURTHER THAT each respondent opposing the relief herein is required to appoint in its notice of opposition an address referred to in rule 6(5)(b) at which such respondent will accept notice and service of all documents in these proceedings.

Dated at Cape Town on this 21st day of **JANUARY 2022**

First to Thirteenth Applicants' Attorneys

LEGAL RESOURCE CENTRE
Wilmien Wicomb
Aintree Business Park
Block D
c/ Doncaster & Loch Roads
Kenilworth
Cape Town
7708

Per email: wilmien@lrc.org.za
Telephone: 021 8792398

Fourteenth Applicant's Attorney

RICHARD SPOOR INC
Richard Spoor
Per email: johan@rsinc.co.za/
khanya@rsinc.co.za

To:
THE REGISTRAR OF THE ABOVE HONOURABLE COURT
Cape Town

And to:
DEPARTMENT OF MINERAL RESOURCES
First Respondent
Trevenna Campus, Building 2C
Cnr Meintjes and Francis Baard Street

Sunnyside
 Pretoria 0002
 Tel: 012 444 3982
 Fax: 012 444 3145

SERVICE BY EMAIL

And to:
MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES
Second Respondent
 c/o the State Attorney
 316 Thabo Sehume Street
 SALU Building
 Pretoria 0002

SERVICE BY EMAIL

And to:
SEARCHER GEODATA UK
Third Respondent
 c/o CLIFFE DEKKER HOFMEYR
 Mr Roy Barendse
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Fourth Respondent
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SERVICE BY EMAIL


And to:
PETROLEUM AGENCY SOUTH AFRICA (PTY) LTD
Fifth Respondent
 Tygerpoort Building


7 Mispel Street
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Cape Town
South Africa
Per email: thovhakalea@petroleumagencysa.com


SERVICE BY EMAIL


And to:
BGP “PIONEER”
Sixth Respondent
c/o CLIFFE DEKKER HOFMEYR
Mr Roy Barendse
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Cape Town
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Per email: roy.barendse@cdhlegal.com


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[Photos] Minister of Mineral Resources and Energy, Mr Gwede Mantashe briefs the media on the latest developments in the upstream petroleum industry in South Africa.



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“We consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection.” - Minister Mantashe



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Mantashe says department won't review Shell decision

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Wednesday 12 January 2022 - 4:44pm



File: Mineral Resources and Energy Minister Gwede Mantashe. **GCIS**

CAPE TOWN - Mineral Resources and Energy Minister Gwede Mantashe (<https://www.enca.com/news/mantashe-says-no-evidence-seismic-surveys-cause-harm-marine-life>) says his department won't review the decision granting Shell exploration rights on the Wild Coast.

He was responding to a Parliamentary question following the scathing court judgment against Shell last month.

READ: Court halts Shell's seismic survey off the Wild Coast
(<https://www.enca.com/news/shell-seismic-survey-stopped-court-order>)

The High Court sitting in Makhanda halted Shell's seismic survey, highlighting that the petroleum giant had failed to adequately consult affected communities.

It said there was evidence that the blasts would irreparably harm marine life.

Mantashe says his department believed Shell's survey to be legally compliant, and most potential effects significantly low.

Source: eNCA

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WATCH | ActionSA | Party welcomes former DA Midvaal mayor

Former DA member Bongani Baloyi has joined the party. The announcement comes as the party plots its course towards the 2024 general elections.

eNCA

(<https://www.enca.com/videos/watch-actionsa-party-welcomes-former-midvaal-da-mayor>)

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

Case No: _____ / _____

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
MASHONA WETU DLAMINI	Second Applicant
DWESA-CWEBE ASSOCIATION	COMMUNAL PROPERTY Third Applicant
NTSINDISO NONGCAVU	Fourth Applicant
SAZISE MAXWELL PEKAYO	Fifth Applicant
CAMERON THORPE	Sixth Applicant
ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

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

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

DAVID MALIBONGWE GONGQOSE

do hereby make oath and state the following.

1. I am an adult male residing at Hobeni Village, Eastern Cape and an elder in my community. I was one of the three fishers arrested in 2012 for attempting to fish in our waters who successfully defended myself based on customary rights to fish of our community.
2. The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. They are, to the best of my knowledge and belief, both true and correct.

I WAS NOT NOTIFIED OR CONSULTED

3. I did not know about the SHELL application for an Exploration Right and plan to do Seismic Survey until November 2021. I heard about it from the fishers on a Whatsapp group with the NGO, Masifundise and then after that I heard about the court case on the radio and television.
4. I am told that there was a public participation process about this exploration in 2013.
5. At that time, and in the years 2010 – 2015, I was an active member of the Hobeni Fisherman's Association. The Hobeni Fisherman's Association represents the active fishermen and women who fish for a livelihood in my area. Our Association was definitely not notified about this.
6. We also belong to a small scale fisher network called Coastal Links which was already active in 2013 and 2014. This network was not notified.

7. Between 2013 and 2015, our fishers also had regular contact with Eastern Cape Parks and Tourism Agency (ECPTA), Department of Environmental Affairs (DEA) and Department of Agriculture, Fisheries and Forestry (DAFF) on various matters. This was never mentioned.
8. No one told us that SHELL was planning on doing this in our waters or explained anything to us about it at the time or at any time prior to November 2021 when the Legal Resources Centre agreed to assist my community.
9. In 2013, we did not have electricity in our houses and in our village yet so we all relied on battery radios. Only a few people had televisions powered by generators. There are no newspapers delivered here to my village as it is very far from town. I did not read anything about this project or hear about it on my radio stations back then in 2013-2014.
10. SHELL did not consult and inform our Chief, Chief Pathisile. He did not know about it.
11. If SHELL had consulted us properly they would have come to Chief Pathisile and to our community leaders and asked for a meeting. Chief Pathisile informs us fishers specifically if it is something to do with the sea. He would have called the whole community but especially the fishers to a meeting at his place, which we call Komkhulu.
12. He would have told SHELL they must explain to us what they want to do. He would then have asked us what we thought about it and we would have a chance to ask SHELL how is this going to affect our fish because I think the fish will be destroyed. I think they will be very scared and will swim far away from our area. The Chief will let us tell them if we want this development or not. He does not decide for us – he will ask questions and let us decide if this is going

to be a good thing for our community or not. The Chief knows that I am very serious about fishing and my fishing rights. Ever since we went to court to fight for our customary rights he knows that the fishermen and women of Hobeni are very concerned about anything that will affect our livelihoods and he would have informed us.

MY LIFE AND LIVELIHOOD AS A FISHER

13. I am David Malibongwe, the grandson of Ungqubu, the son of UBashe who was the chief of the area, the chief of amaDingata. My father, and his father and great grandfather were all born next to the sea in the locality known as Lalini, where the old Haven Hotel was built. My grandfather and great grandfathers' graves are still there next to the sea. I was also born there and grew up there with my parents, fishing, until we were forced to move when the reserve was established. That area is the land, forest, rocks and waters of amaDingata. I belong to this land and to this sea.
14. My father, a sub-headman in Mhlanganisweni, was a fisherman. From the age of about 11, I joined him on the waters. Our family, like many others in our community, survived from fishing. It not only provided us with a much-needed source of protein, but through selling fish to the local tourist hotel, my father was able to send me to school. He did not have any other employment.
15. I am now a full-time fisherman. My father died in 2010 and I support my mother and my three children from my fishing. My mother is elderly, frail and sick.
16. I too have no other employment. On occasions in the holidays I might work as a gilly for the tourists, taking them to the best fishing spots and showing them where to fish, finding bait for them and helping them.

17. My monthly household's main purchases include:

- a. R600 paid to neighbour per month to assist with care and washing of my mother.
- b. R400 per month in special protective disposable underwear for my mother.
- c. Our food costs approximately R1000 and an additional R15 per litre of paraffin per month. In total we spend between R500-R1000 on paraffin, depending on what we can afford.

18. Food is very expensive and costs are going up every year. In my village we say that we give children money to go to the shop to buy some maize or food and they come home and they have eaten our money because there is so little money left. Per month, a 12 kg bag of maize costs us R120, samp costs us R130, sugar costs R215 for 12.5kg. It costs us R50 to go to town one way so each trip to go shopping will cost R100.

19. My mother sometimes needs special medicine and she also has to go to Madwaleni Hospital for check-ups. Then I have to hire a special car to transport her. This costs me R600 per trip. We have to go approximately every three months.

20. I also have to buy airtime, but when I put R10 on my phone, it is finished in no time. I have to try and save to buy school shoes for my children. School shoes for each child costs R120 or more.

21. We have no money left at the end of the month. We often have no food in the house by the end of the month and sometimes my children go to bed hungry. I need to go fishing just to feed my children or sell fish to the hotel to get enough

food for the month. But this is very difficult as often one goes to fish and does not catch a single fish.

22. I go fishing twice a week most weeks, depending on the weather. It's a long walk to the sea as it takes me about an hour to get there and another hour back up the hill. There was a time in December last year when the weather was very windy and the sea was not good for fishing. In December I could not go as often as I would have liked. The weather is changing and it is getting very difficult for fishing.

23. I sell my fish to the Haven Hotel. They pay R25 per kilo. I get paid per kilo so sometimes I get R 250 and sometimes R300. I may sell two to three fish per month.

24. Occasionally when I get work as a gilly for tourists, my earnings vary from person to person but I earn about R200 per day. I have not worked as a gilly for a long time.

25. We used to have a vegetable garden but it is very difficult as we have had a lot of wind this past year and it damages the crops. We do not have much in our garden.

26. My house was seriously damaged in strong winds again this past year, the second time in three years. My mother sleeps in the Rondavel but the roof leaks when it rains. It will take a lot of money to fix my house. It would cost in the region of R5000.

27. I have applied to the Housing Dept and Social Development to get an RDP house. I have gone to their offices in town many times and told them that my mother is an invalid as she has had a stroke and that our house is not safe for her. I went years ago in about 2019. I have been back and asked them many

times and officials have been to visit me and have seen the condition we are living in but we are still waiting.

28. My household income includes R1900 for my Mother from her grant as well as R600 for her carer. Then I get R 450 for my one child but no grant for the other child as her mother took the birth certificate and I have not been able to get Social Development to help me with this even though I have tried. I also received R350 COVID relief although there were some months this did not come. I thus get R 3300 in total per month including the money to pay my mother's helper. Then depending on fishing, I can supplement that with R 500 - R1000 per month.

29. I don't know how I would survive if this was no longer possible to fish.

OUR DUTY TO PROTECT THE OCEAN

30. Just as in the days of my father, the most common *intlanzi* that we catch are Kob, Musselcracker, Galjoen, Blacktail, Bluefish and Pignose Grunter. My mother harvested for *Imbaza*. From time to time we also harvest *iMbatyisa*, *Ingwane*, *Korrofish*, *Isigwegwe*, *Inyakrala* and *Amasenene*. In the old days we harvested *Ingquba* which is perlemoen.

31. My father taught me everything about the sea. How to fish, and how to ensure that we look after it for the next generation. He taught me that if I catch a small fish, I must put it back and then it will grow into a big fish that we can catch. We must not harvest crayfish when they have eggs. We must put the little ones back.

32. He also taught me that when I have a problem, I must seek wisdom from the ancestors. He taught me that we belong to the sea and our land and so we must take care of it.
33. We grew up knowing these things, they were the rules that came from *abantu abadala* (the old ancestors) and were handed down to us.
34. Everything that my people are, comes from the sea and the land, which came from our ancestors. AmaDingata have special rocks at the sea, everyone knows these are our rocks. Our ancestors are in the sea. Most of the clans in my area are connected to the sea. *Amabamba*, *amaQuangase*, *ntombiFalati*, *Ngosini*, they also have their own special sacred places.
35. In my culture, the sea is the home of the ancestors. We cannot disturb them. We honour them and we go and seek their wisdom and help when we have problems. Even those of us who believe in the Christian God, we perform special rituals if we need to their wisdom and guidance. We call this ‘*ayakamagusa*’ and it is similar to talking to God. We believe the sea water is healing water, as it is where the Ancestors live.
36. We cannot do anything that will disturb or upset our ancestors. When we speak to them, we speak softly and we must be quiet.
37. In my culture, something like a seismic survey that makes so much noise and can kill fish and other animals and affect the water that is near it will most certainly disrupt them.

DAVID MALIBONGWE GONGQOSE

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2021 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

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

Case No: _____ / _____

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
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MASHONA WETU DLAMINI	Second Applicant
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DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
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NTSINDISO NONGCAVU	Fourth Applicant
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SAZISE MAXWELL PEKAYO	Fifth Applicant
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CAMERON THORPE	Sixth Applicant
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ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant
---	-------------------

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
---	------------------

MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Respondent
--	-------------------

SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA LTD	Third Respondent
--	------------------

IMPACT AFRICA LTD	Fourth Respondent
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BG INTERNATIONAL LIMITED	Fifth Respondent
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SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

KUZILE JUZA

do hereby make oath and state the following.

1. I am an adult male residing at Hobeni Village, Eastern Cape. I am an elder in my community.
2. The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. They are, to the best of my knowledge and belief, both true and correct.
3. I am a member of the Nyawuze clan and a community leader. I am in the process of being initiated through *ukutwasa* which is the process *amagqirha* journey through to become traditional healers and spiritual leaders in my culture.
4. I was actively involved in the Dwesa-Cwebe communities' struggle to claim their lands, forests and ocean after democracy in 1994. I was in the team that helped to document our histories for the land claim settlement during the period 1994-1999 and negotiated the land claim settlement which was finally settled in 2001. I was a trustee of the first Dwesa-Cwebe Land Trust.
5. As a community leader, a traditional healer in training and member of the original Land Trust I have knowledge of the history and customary practices of my community. Many community members turn to me for advice on community and civil matters. I am also called upon to share our history with tourists and visitors to our village.
6. I did not hear about the SHELL application to undertake seismic testing for oil and gas until the end of 2021 when I was informed by community members who heard about it on social media. I subsequently also heard about it on the radio. I am sure that SHELL did not consult my community on this matter. I would have been informed and would have been asked to help to inform people.

7. We do not have newspapers here and only a few people have televisions. We often do not have electricity or cell phone signal. We would have been called to a meeting at our Chief's house to discuss this matter had he be informed. SHELL would have been told to come and explain this project to us but we did not hear anything from them. I am extremely worried as a project of this nature will have a huge impact on us.
8. It is difficult to describe to people who do not come from our culture why this SHELL project poses such a big problem for us. We often do not talk of these matters as they are considered sacred. We have been ridiculed for our beliefs so sometimes we keep them secret.
9. For our clans, the sea is our Great Home, and for us it is the resting place of our ancestors. It is therefore considered sacred at this deep level. We were born here, on this land with forests and rivers that run into the sea. In our way of understanding and looking at the world, the land is connected to the sea by the rivers and the cycle of life which travels through water. We have been brought up to revere these connections to our ancestors. To speak softly in their presence, humbly and with awe and gratitude.
10. We are taught from an early age that we have to respect our ancestors. We are taught that if we do not respect our ancestors, we do not respect ourselves. If we do something that will upset them, that goes against our customary way of doing things, and they will be angry. There will be consequences. For example, if we treat another person badly, things will go very wrong in our lives and in our community. The fabric of our community will break down, children will not listen to parents and will get into bad situations and eventually *ubuntu* as we know it will be affected.

11. Likewise we are taught that if you do not care for your natural resources that are part of you, that you depend on for life, then the ancestors will be angry. We are bound by this. Then you will see their anger in disastrous events that will happen to nature, like terrible droughts or other disasters that will affect your ability to find food from nature. We grow up knowing “*singabantu sinyanzelekile ukukhusela Indalo nosikungqo, ukukhusela impilozethu*”, meaning we are bound to protect our nature for our heritage and our wellbeing.
12. We understand the land, forests and the sea as our shared commons derived from our ancestors that settled this area. Our sea and coastline is not only important to us as the members of Hobeni, but many other important *amagqirha* from inland communities come and perform special rituals here at the sea.
13. We know that this right to our commons means we can use the natural resources, but we must use it carefully. That is our duty.
14. When we signed our Land Settlement Agreement we agreed to continue this conservation together with our government and to use our resources on a sustainable basis and to share responsibility to manage these resources. Our settlement agreement says there will be such co-management (see Annexure MM4 to Founding Papers).
15. You can see the deep connection that we have to our nature in that all of our clans have a special spirit animal that is connected to the ancestors. For amaTshawe it is *Imbabala*, the bushbuck. For the Rhadebe it is *unonkala* (crab). Those clans who have special spirits connected to their ancestors who reside in the rivers and streams we call *abantu bomlambo*, meaning the people of the water.

16. It is very difficult to find the words in a foreign language to explain this to an outsider. We believe that water is the source of life. We are very blessed here with many powerful rivers, waterfalls, pools and streams running through our forest into the sea. From the other side of Cwebe across the great Mbashe to Ngqabara River, this is the territory of our ancestors and they and their spirits reside here.
17. We don't own the sea in the way that English people talk about owning things. We say "*wesilesenatho*": we are born, as if you are one with the same mother. We are born with nature, with these natural resources, so we cannot be separated from them. We have a duty to care for them. We grow up learning that we must care for them as we use them so that they will be there for the next generation. At the same time, they are the dwelling places of our ancestors. We are connected to this land, to the forest and sea because our ancestors and their spirits are here and continue to be here. This places a duty upon us.
18. We are taught this from a very young age. We learn through the rituals that our families perform that we are connected to our ancestors.
19. In these rituals, the sea has a very special place. It is here that *amaqqirha* will communicate with the ancestors and we go to them for help when we need guidance from the ancestors. There are some very strict customary rules linked to this belief, for example, one may never put meat into the sea as a gift for the ancestors.
20. *Amaqgirha* will perform a special ritual next to the sea where they will place certain artifacts. This often includes some snuff, perhaps some white beads and

brandy in a basket and this will be floated out to sea. These rituals are normally done when a family needs to appease the ancestors or get guidance.

21. When I was born I was one of a twin, I was taken to the sea three days after I was born and I was placed at the waters' edge. My parents gave thanks to the Ancestors as it is believed that twins are a gift and great blessing from the Ancestors. I thus have a very strong connection to my Ancestors. In our community this is known and acknowledged in the greeting of a person who has received this blessing. It is considered an important ritual for parents to perform and it is still performed today.

22. My community is completely dependent on the well-being of our natural resources around us. There is no development here. We rely on the sea, our forests and or land and on eco-tourism from the hotel. The hotel is dependent on our community as tourists come from far to our area because our coastal forests, rivers and the beautiful coastline are famous. They come to learn about the history of our area which is very significant to amaXhosa and our cultural and spiritual traditions.

23. Our ancestors settled this land more than two hundred years ago.

24. Our ancestors can reside on our land, in the sea or in the forest. For those clans whose ancestral spirits reside in the rivers and the sea, we call them *abantu bomlambo*.

25. If someone wants to do something that will impact our ancestral connection they must come and explain it to us properly. They must tell us exactly what it is and why they want to do it. Then in my community it is expected that they must inform all the elders. The elders will then discuss it with them and amongst each other. They will consider if it touches our ancestral practice. If needs be,

the elders will approach the ancestors with the help of *amagqirha* and explain the situation to them through a ritual and ask for their wisdom and guidance on this matter.

26. I live in Mhlanganisweni, which is considered part of lower Hobeni, adjacent to the nature reserve and the sea. The community members around me depend on the sea for their livelihoods, supplementing their harvests with small amounts of vegetables grown in their household gardens.

KUZILE JUZA

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2021 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

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NTSINDISO NONGCAVU	Fourth Applicant
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ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant

and

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

SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

MNCEDI MHLANGANA

do hereby make oath and state the following.

1. I am an adult male residing at Cwebe Village, Eastern Cape. I am the Chair of the Communal Property Association.
2. The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. They are, to the best of my knowledge and belief, both true and correct.
3. In my Founding Affidavit, I set out the following:
 - 3.1 The Dwesa-Cwebe Nature Reserve, which belongs to our Dwesa-Cwebe communities, and the adjacent Marine Protected Area lies squarely in the middle of the exploration area.
 - 3.2 The ocean is of extraordinary importance to our communities for spiritual and cultural reasons:
 - 3.2.1 Like our ancestors before us, we have known and used a range of fish and other inter-tidal resources since time immemorial.
 - 3.2.2 In the criminal trial of three fishers from Hobeni in Dwesa-Cwebe, Ms Vuyelwa Siyaleko explained in her testimony to the court that the sea has a particular significance for her as a local traditional healer both culturally and spiritually. "She has dreams in which the ancestors tell her to go to a particular spot on the coast. She must then go there and make offerings to the ancestors. Afterwards, she will sleep by the ocean to observe whether the sea – and therefore the ancestors – accept the offerings." We consider the ocean to be sacred.

3.2.3 When the Supreme Court of Appeal confirmed that the Dwesa-Cwebe communities deserved “the fullest protection of their customary system guaranteed by s211 of the Constitution”, Schippers AJ¹ held:

It is important to remember that as regards conservation and sustainable utilization of marine resources in the MPA, the Dwesa communities have a greater interest in marine resources associated with traditions and customs, than other people [...]

3.3 The ocean and our access to fish has been and remains the mainstay of our livelihoods:

3.3.1 As early as 1934, archives show that a local white Magistrate attempted to stop our community members from harvesting and catching fish on our coast to keep it pristine for white tourists. The proposal was blocked by another Magistrate more familiar with our area, on the basis that we “have been gathering the above mentioned for generations [...] The shellfish etc gathered on this coast augment the natives’ food supplies in times of famine”. Since that time, our communities were forcibly removed more than once and, through betterment schemes of the apartheid government, forced into more densely populated villages that further deprived us of the ability to grow food. Fish became ever more important to us.

3.3.2 Thus, when attempts started in earnest from the 1990s to deprive our communities of their access to the resources in the Reserve and the ocean, we resisted: our lives depended on it. Sadly, when from around 2010 the

¹ *Gongqose Others v Minister of Agriculture, Forestry and Others, Gongqose and S* (1340/16, 287/17) (2018) Gongqose 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) (1 June 2018) ZASCA 87; (2018) 3 All SA 133.

government decided that we were no longer allowed to access the sea, our community members were forced to continue going to the sea for food despite serious harassment from enforcement officers. Many people were arrested, some died. That is how important our access to the ocean was for us.

3.3.3 This is why David Gongqose and others had to go to court to have our customary rights to the ocean confirmed.

3.4 I was never consulted about the proposed survey. I don't know of any member of the Dwesa-Cwebe villages who were. As the chairperson of the Dwesa-Cwebe CPA, I first heard about the planned survey from seeing a video shared on a whatsapp group by an activist from Mthatha in around mid-November 2021. Our deputy-chairperson first heard about it on a whatsapp group for fishers on 7 November 2021.

4. In this affidavit, I will provide some further information that I am advised would be relevant to this application.

THE COMMUNITIES OF DWESA-CWEBE

5. Before going into more specifics around the lack of consultation with our communities, I am advised that it would be helpful to explain more about what our villages look like and who we are.

6. Dwesa-Cwebe, as a community, was created for purposes of the land claim instituted by all seven of our communities who were dispossessed and forcibly removed, some two or even three times, for the creation of the Dwesa-Cwebe Reserve. We straddle different traditional councils and administrative areas.

7. When our communities were forcibly displaced, we were dumped in different areas quite far from each other. In 2003, it was estimated that there are 2382 households in the seven Dwesa-Cwebe communities combined, and 14720 people.
8. Our people are very poor. In 2013, our lawyers at the Legal Resources Centre made submissions to the Department of Agriculture, Forestry and Fisheries (as it then was), about the proposed resonation of the Dwesa-Cwebe Marine Protected Area to change its 'no-take' status and allow us to fish. I quote an extract from that submission:

"In the very same year that DEAT declared [the Dwesa-Cwebe Reserve] a no-take reserve (2001), Census SA declared the Elliotdale and Willowvale districts to be the poorest districts in the country (SA Census in Shackleton 2007:137). Subsequently a study by the Agriculture and Rural Development Research Institute found that 93% of households in rural Elliotdale and 91% of households in rural Willowvale had incomes below a poverty line set at R533 per adult equivalent per month. Between 70% and 77% of the households were classified as 'ultra-poor' (ARDRI 2001 in Shackleton 2007:138). This was confirmed by Branch et al (2002) in a study focusing specifically on fishing households undertaken for the Subsistence Fisheries Task Group. This study found that 34% of fishing households along the Eastern Cape coast were classified as 'ultra-poor' households and 57% were classified as 'poor' (Branch et al 2002). It is clear from individual interviews conducted in both Ntubeni and Hobeni (Sunde 2013) that the declaration of the 'no-take' status of the reserve intensified the already chronic poverty experienced by the communities,

particularly that of Hobeni, where there was no easy access to open areas of coastline and the community was hard hit by the simultaneous retrenchment from the mines, with many men returning to the rural areas. This situation remains unchanged in the past decade since the declaration of the 'no-take' MPA and the signing of the Settlement Agreement in 2001.

Dwesa-Cwebe MPA is located within the Mbashe Municipality, which forms part of the Amatole District Municipality. The number of residents living below the poverty line "has increased significantly between 1996 and 2004, for the Eastern Cape as a whole, and particularly for the poorer areas of Amathole" (Amatole District Municipality 2008:10). The Mbashe municipality is one of the areas where poverty levels are "high and concentrated" (Amatole District Municipality 2008:10). Mbashe Municipality has the highest rates of poverty (90.38%) and dependency on social grants (5.10) in Amathole District, coupled with high unemployment (78.51%) and higher than average proportion of people (7.12%) aged over 64 years. An indication of the depth of poverty in the area is revealed by the Municipality's share of the Provincial poverty gap (6.01%), which is substantially higher than its share of the Provincial population (4.31%). (Amatole IDP 2011). This area is the most dependent local economy in the Province (IDP 2011). A most depressing indicator is that related to the provision of toilet facilities. In 2001 the Census indicated that within the Mbashe municipal area within which Elliotdale and Willowvale (and hence Dwesa-Cwebe) are located, 73,8 % of households had NO toilet facilities what so ever and only 18, 5 had pit latrines whilst a few used the bucket system. In 2008

this figure remained unchanged with the Community Census confirming that 74% of households had NO toilet facilities what so ever (Sa Statistics 2009).

On Quality of Life, Mbhashe district emerges as the most underdeveloped in the Province with a low level of access to water services, below average access to clinics and very limited access to electricity, sanitation, and refuse services (Amatole IDP 2011).

These municipal wide statistics are confirmed by the household studies conducted in the villages of Dwesa-Cwebe itself. The survey conducted by Palmer et al (2003) and reported by Palmer et al (2003) and Timmerman (2003) indicated that 74.4% of households at Ntubeni, and 94.1% of households at Cwebe, had cash incomes below the Household Subsistence Level as adjusted for that year. When the in-kind value of own produced food and livestock products are included the proportion of households with incomes below the HSL dropped by approximately 25% at Ntubeni, and by approximately 15% at Cwebe. Poverty levels at Cwebe were clearly more pronounced than at Ntubeni, although they were also high at Ntubeni. When the samples were aggregated, then 84.3% of the households in both villages had cash incomes below the HSL, and 64.1% of the households had total incomes below the HSL.

9. Indeed, there are no proper roads in our area at all. As a result, it takes hours to travel from one village to the next even with a car, which very few people in our areas own. On foot, it is possible to follow more direct routes, but our

villages are so far flung that that takes even longer and is simply not feasible.

Very few people ever travel to one of the other communities.

10. The closest town from Cwebe is Elliotdale, which is more than an hour away by car despite the road being significantly better than between our villages. Willowvale is two and a half hours away by car.

11. I can also confirm that we have received the minimum in services. Most of us did not have electricity in 2013; our village only got electricity in 2018.

12. I mention these things to show the Court that the channels of communication that may work for people in the cities, don't work in our areas. Of course, we have our customary channels of communication, which I describe below.

CONSULTATION

13. I am advised that Impact Africa Limited Prepared an application for an Exploration Right to use seismic surveys in 2013. They had a public comment period for interested and affected parties to raise issues between 22 March and 12 April 2013.

14. At the time, I was working for the Eastern Cape Parks and Tourism Authority (ECPTA). I was the Community Liaison Officer for the whole Dwesa-Cwebe area, covering all seven villages. If any company wanted to consult our community and ECPTA had been informed about that, they would have informed me and asked me to assist with such liaison. I was not informed.

15. Also as a member of the Cwebe and greater Dwesa-Cwebe communities, I was not informed about this and I don't know of anyone in my community who was informed. To this day, other than our lawyers, no one has explained to us what

seismic testing is, how it could impact us or how it could be done in a way that it would not cause harm to us. No one explained it to us at all.

16. I am advised that advertisements were placed in *The Times*, *Die Burger* (Eastern Cape), the *Herald* and the *Daily Dispatch* newspapers on 22 March 2013, notifying the public about the proposed project.

17. From what I have described about our communities, I think it will be clear that newspapers do not reach us in our villages. No newspapers are delivered here, let alone the ones where advertisements were placed.

18. The only contact with the outside world is the radio. A handful of people have television.

19. However, in 2013, when the public participation of survey was done, many of us still had no electricity, so even radios were often not accessible to us.

20. I should also mention that people here speak isiXhosa. A few can speak some English, but no-one speaks Afrikaans. Even if we had seen the advertisement in the newspapers, we would not have been able to understand what it meant.

21. Had we understood, and wanted to register as interested and affected parties, most of us would have been unable to do so without access to electricity, let alone phones, computers or the internet.

HOW OUR COMMUNITY SHOULD HAVE BEEN CONSULTED

22. In our community there are clear channels of communication that are accepted as part of our customary way of decision-making. If a person or company wants to consult our community, they will go to the Traditional Leadership or the Communal Property Association. But either way the Chief will be informed and

he will inform his elders. This group of elders from our community is called the traditional committee. They assist the Chief. He informs them and they then inform the CPA and the respective villages about the meeting. The Elders know what channels of communication to use in order to get the word out. For example, they know to use funerals, imigidi (traditional rituals) in order to inform people about a meeting at Komkhulu.

23. Men and women are invited to such a meeting and can speak. Everybody is given an opportunity to speak.

24. The Chief encourages people to ask questions and put forward their opinions.

The Chief gauges the decision of the people from their inputs. He says people must indicate the resolution and talk to it. The Chief takes the resolution of the people. He does not have the power to decide on his own, but takes it from the people. There is no proper consultation unless the people have had a chance to engage in this way and indicate their resolution. They can raise their hands and speak. In this way the meeting will reach a decision and resolve what must be done or not done.

25. Our Chief was not informed about this.

THE SURVEY WILL AFFECT THE ANCESTORS

26. My family have always lived here in Cwebe, as long as we can remember. We were born on this land, the land of our ancestors. We belong to this land, this forest and this sea. We grew up knowing that we belonged to this area and there were boundaries such as the rivers that indicated our territory. For

example, Nyumbazane on the east is the boundary with Nkhanya at Xhora Mouth and Mbhanyana on the other side with Hobeni, the river is the boundary.

27. We grew up learning from our parents that our lives depended on this land, this forest and this sea and therefore we belong to it. We say '*sixhomekeke elwandle*' – we belong to the sea. In saying that it also means we depend on it, and we belong to it as our ancestors are there. This belonging also is seen through '*isilawu*', the rituals that we perform at the sea with *amagqirha* (traditional healers). *Isilawu* refers to our connecting with the sea and the ancestors in the sea. The sea is always used by *amagqirha* to connect with our ancestors but in addition, some clans' ancestors have very special connections with the rivers and the sea. For example, in our area, the totem animal representing the ancestors of the Rhadebe clan is Unonkala, the crab. All clans have a totem and for some they don't distinguish between land and water, like the amaBamba clan's ancestor, the snake, lives in some pools or ponds and outside of these.

28. We grew up knowing that we are connected to this nature, the land, forests and sea and that we have a responsibility to care for it, to be the guardians of it. This is *Ukulondoloza Indalo Yethu* – caring for our nature. These ways of caring for our nature are taught to us by our parents who were taught by their parents. The old ones always knew that because we depend on the natural resources in our territory for our food and for our survival we must care for it. We have many examples of '*ukulondeloza*' linked to our forest and the sea.

29. Some examples include:

29.1 Our parents taught us that if we go to our coastal forest to cut the bark for medicine, we must first check where the sun rises and sets on this tree and its bark, we must cut it where the sun does not make contact with the bark so that the tree is protected there;

29.2 If we want to take roots of a plant or a tree we must take one from here then the next one we must not take immediately next to that place, we must take it a distance away from where we took the first roots, on the other side.

29.3 If we want to harvest leaves for their sap, which is medicinal, we must take the older leaves, we must not take new shoots of the tree;

29.4 When catching fish we must put any small fish that we catch back so that they can grow,

29.5 We must not harvest the young, small mussels off the rocks.

29.6 We also learnt that there are seasons for everything. We must work with the seasons, work with nature's way of protecting herself. For example, there are seasons for rock lobster. When the female has eggs we must not harvest lobster.

30. Our parents observed the seasons and the tides very closely. They believed that nature protects herself through these seasons and we must work with them when planting or harvesting. Even the sea has times when she closes, when the moon is full and when the moon is empty and it impacts the sea and when we should harvest.

31. Our parents also taught us to learn to protect our natural resources from disease and the impact of the climate and to work with the climate in a way that will support our health. For example, they taught us that to cut trees down in

winter when there is no rain here and water is scarce is not right as the other trees will be affected. We must only do so in spring or summer when there is rain. They also knew how to protect our trees and plants from locusts using natural ways. They taught us that if there are locusts we must burn a special tree called *unyenyo* and this chases the locusts away. In this way we learnt to conserve nature in ways that also helped protect our own fields and food for our own health.

32. We know that the seismic survey will impact our ocean. It will impact all of us as we belong to the sea through our ancestors but it will also impact the living creatures in the sea that the fishers depend on for their livelihoods. In our culture we believe the ancestors in the sea must be respected. We cannot make noise and disturb the ancestors in the sea or if they are living in a river or pools. We know that if we do so, it will affect us.

MNCEDI MHLANGANA

I certify that the above signature is the true signature of the deponent who has acknowledged to me that they knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2022 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS

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

Case No: 3491/2021

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
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MASHONA WETU DLAMINI	Second Applicant
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DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
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NTSINDISO NONGCAVU	Fourth Applicant
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SAZISE MAXWELL PEKAYO	Fifth Applicant
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CAMERON THORPE	Sixth Applicant
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ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant
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and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
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MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	Second Respondent
--	-------------------

SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA LTD	Third Respondent
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IMPACT AFRICA LTD	Fourth Respondent
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BG INTERNATIONAL LIMITED	Fifth Respondent
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SUPPORTING AFFIDAVIT

I, the undersigned,

MZALWANE MBHONJELWA DLAMINI

do hereby make oath and state the following

- 1 I am a male elder residing at Mdatya Village, Bizana, Eastern Cape. I am a Sangoma and an elder of the Umgungundlovu community. This affidavit serves as an account of my role in and understanding of the beliefs and practices of my community.
- 2 The facts contained in this affidavit fall within my own personal knowledge and belief, save where the contrary appears from the context. To the best of my knowledge and belief, they are both true and correct.
- 3 The land that I live on is the original land of my ancestors, once fought for bravely and now held with pride. It remains to this day a beacon of hope for the amaMpondo, who fought numerous battles to maintain this land.
- 4 The homestead I live in now was acquired by my father through our community's customary process of land acquisition. When I was a young boy, my family left Mdatya for Dipini, a neighbouring village a few kilometres away. I returned to Mdatya in 1994. I believed, and still believe, that my ancestors wanted me to resettle on this land for the benefit of all who live here.

- 5 The Umgungundlovu community delights in a rich cultural and spiritual life. We rarely think solely as individuals. We see the need to serve and protect those around us as ourselves. This principle is vital to understanding who we are.
- 6 I can now further explain our sacred connection to the ancestral world. Our community is made up of intertwined relationships between the living and the dead, and we see our ancestors as guides in the afterlife to the living. They remain connected to us for our protection and direction through the struggles of the physical experience of human life. We owe it to them to protect their peaceful rest.
- 7 The sea is essential to our community's spiritual practices. Our people live their lives with the belief that our ancestors reside and find peace in the ocean. Like all rivers and tributaries lead to the sea, our ancestors end up in the sea.
- 8 My role as a Sangoma is to communicate to the spirits of our ancestors and give instruction and advice to heal illness and spiritual difficulties. Although I am aware that some do not understand this approach, in my own experience, by the truth that I have seen, my work as a Sangoma alleviates the suffering of our people. The sea is fundamental to this because of its purifying and restorative power. I often conduct ceremonies in the ocean, bathing community members in the sea to cleanse them and bring good luck to their lives. It is also my duty to plead with the ancestors on behalf of the community.

- 9 It cannot be stressed enough, but stress again, I will; the sea is sacred to our spiritual practices. The proposed seismic blasting will profoundly affect our way of life by disrupting and perturbing our connection with the sea, and in turn, our spiritual practices.
- 10 Further, our way of living, the cultural practices of the amaMpondo, would be irrevocably affected by the blasting as we maintain that the ancestors must be shown respect. This respect is not a fanciful notion for us but rather an acknowledgement of our living duty to strengthen our bond with the ancestral realm. We maintain respect so that harmony can exist between the living and the dead. This harmony supports a trouble-free life for our people.
- 11 If the sea is disturbed by the continuous sound of the seismic blasting, the ancestors will become perturbed, and we will not be able to communicate with them or to perform our spiritual practices.
- 12 The seismic blasting will not only disturb the peace of our ancestors and be taken as a sign of disharmonious action but also, the ancestors will be deeply angered by the interference with the ocean itself. The sea makes its own noise. This noise is understood and welcomed by the ancestors. However, loud artificial noises are disruptive and make our ancestors angry. Our ancestors take pride in their victorious battles to protect our land and sea against waves of colonial and

Apartheid aggression. They fought these battles to maintain the sovereignty of our people, and in turn, the harmony of this land.

- 13 Those aggressors that once came to disrupt harmony and this new aggression by Shell is much the same in the eyes of the ancestors. When the ancestors are angered, we fear that this will lead to flood and devastation for all those who live here.
- 14 Finally, I would like to address a concern of our people that this seismic blasting will disturb the ecosystem and marine habitat that exists here, which, crucially, our community depends on for our livelihoods. The land, of course, sustains us, but the sea is integral to our living too. It provides us with a steady water supply and natural resources, including medicinal plants, and of course, ample nourishment from fish and shellfish. The products of our labour are used for every homestead's subsistence; we believe that what we give, we receive, and what we receive, we give. This is our sacred practice.
- 15 Shell has not spoken to the community about what they intend to do in our sea. We heard about the blasting by word of mouth in December 2021 after seeing the news of protests against the seismic blasting on social media. This community has a right to be heard and consulted. This is my statement.

MZALWANE MBHONJELWA DLAMINI

I hereby certify that the Deponent has acknowledged that he knows and understands the content of this affidavit, which was signed and sworn before me at _____ on this the _____ day of _____ 2022, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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

Case No: _____/____

In the matter between:

SUSTAINING THE WILD COAST	First Applicant
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MASHONA WETU DLAMINI	Second Applicant
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DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Third Applicant
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ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC	Seventh Applicant
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and

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

I, the undersigned,

NONHLE MBUTHUMA FORSLUND

do hereby make an oath and state the following:

- 1 I am an adult female South African from Sigidi village, Umgungundlovu, Amadiba and the Spokesperson of the Amadiba Crisis Committee ('ACC').
- 2 In this affidavit, I wish to explain why our land and sea is so important to us, and to emphasise that consultation is essential to ensuring that we benefit from development projects. I explain that consultation is not only achievable but it has also ensured sustainable development when it was done previously.
- 3 I grew up in a village called Sigidi. On the northern side, Sigidi village starts at the Mzamba River. It stretches to the Mpahlane river in the south. Sigidi is part of the Umgungundlovu community, and Umgungundlovu is part of the Amadiba Traditional Community.
- 4 I love Sigidi, Umgungundlovu, and Amadiba. I am proud to be a member of these communities.

- 5 My love for Sigidi started at a young age. As children, our land was so important to us. We would explore our stunningly beautiful and safe land, and we took endless pleasure from it. I specifically remember learning to swim in the small pools created by our rivers and streams as a very young child and then learning to swim in the sea when I was 10 or 11. I loved spending time in the sea as a child - mainly at the Mzamba estuary. One time I got in trouble with my mother because she sent me to fetch firewood, and instead, I got carried away and swam all day. When I came home, she asked me why I hadn't brought the firewood. I lied and told her I had been chased away by police. She told me she knew I was lying because of the salt in my hair and laughed.
- 6 Swimming at the Mzamba estuary is a truly special experience. I particularly loved the space girls had to spend time together at the Mzamba estuary talking and discussing issues without stress or any risk about safety.
- 7 The safety I felt in Sigidi growing up - and I still feel today - was truly special. We would walk around widely - playing, going to school, or helping our parents by fetching firewood or fresh water - and neither our parents nor ourselves ever even thought about crime.
- 8 My education started very late - I think I was around 11 when I first went to school. I didn't enjoy it at first. I disliked it so much that one day I decided I didn't want to

go to school and went to my grandmother's house instead. She didn't mind me skipping school - she even said she was fine without school, so I would also be fine.

9 But my mom found out and was so angry. She told me that I had no choice but to go to school and even went to the headmaster to say to him to let her know any time I missed school. She reassured him she would never stop me from going to school by asking me to do tasks, as many parents in Sigidi used to do quite often.

10 I am so grateful that my mother made me go to school. It took a long time, but I eventually received my matric degree, and I learned English.

11 This allowed me to become a tourist guide, which was my first job (I still consider myself to be a tourist guide, but I haven't been paid to guide any tourists in a long time) and I went to training and achieved a certificate.

12 I loved the entire experience of being a tourist guide:

12.1 I loved the extensive training we received on how to describe the majesty of our land and sea in English;

12.2 I loved the joy of being paid to spend time in our beautiful land;

- 12.3 I loved sharing the beauty of our land and sea and our culture with people from around the world. The way they appreciated our land and culture so much helped me appreciate our land and culture more and more.
- 13 In the 1990s, the state and NGOs worked with us to build this tourist economy. We appreciated how our livelihoods were improving, and we had such hope that things would get better and better for us as that partnership helped us grow our tourist economy more. We thought we would become rich from this tourism one day, and we loved that we could 'develop' in a way that preserved and protected our land and seas. We also appreciated that we were specifically trained to do the work and own the projects ourselves. We did not need degrees to participate in this work, but we thought that, over time, we would get those degrees.
- 14 This was the kind of people-centred government we expected when we fought for democracy as loyal African National Congress members.
- 15 This process involved extensive consultation, which of course, takes time — but taking time to consult results in more sustainable projects that genuinely provide benefits to affected communities.
- 16 This was certainly our experience with the tourism projects that came early in democracy - after good consultation, they worked well and benefited us. In an

audit conducted by the Department of Environment Affairs and Tourism, the Amadiba project was judged the most significant operating community tourism project in South Africa. In December 2000, we won the Community Public Private Partnership Presidential Award. We were proud of ourselves and grateful to the many state officials who worked with us.

- 17 One of my life's greatest tragedies is that the state support stopped when we said no to the proposed Xolobeni mining project. We argued that mining developments could only take place with the full and informed consent of the Xolobeni community. Not only did the support stop, but it seemed to us that mining supporters and municipal officials actively sabotaged our tourism projects.
- 18 It feels that we are being punished for not letting the mine eat our land.
- 19 Generally, it feels as if the state is not interested in ensuring that we are consulted. It seems to favour mega projects on our land.
- 20 As was the case when we opposed the Xolobeni mining project, we are accused of being anti-development, but nothing could be farther from the truth! All we want is development that comes from partnerships with us and is guided by our values and our skills. We believe that this type of development will be better for us and that many other people will benefit from this approach.

- 21 We have been unfairly criticised by Shell and by the government for asserting our rights to consultation and sustainable development.
- 22 As Mr Zukulu explains, we only learned about the proposed seismic blasting in November 2021, many years after the exploration right was granted. We were not consulted in the original application for the exploration right nor were we consulted in the renewal applications.
- 23 If they had bothered to consult with us, they would have learned about our powerful ancestors in the sea. Instead, the only ancestors in the sea noted in their documents are the people who died in shipwrecks along the Wild Coast. While we accept these shipwrecks as part of our heritage, suggesting that this is our only heritage is insulting.
- 24 Many of our most powerful ancestors reside in the sea. If we had been consulted, we would have told Shell this.
- 25 Our ancestors are very important to us. I view my ancestors as my connection to God. My relationship with my ancestors alleviates the suffering in my life. As silent and trustworthy advisors, my connection with my ancestors gives me peace of mind as they support me in every battle of life. They protect and direct my family and me through the uncertainties and struggles of human life.

26 Peace is essential to our ancestors. We live with the belief that we must respect our ancestors' peace to maintain the harmony of our ties with our ancestors. Loud noises, like the proposed seismic blasting, are likely to upset this peace.

27 On land, we have careful rules to ensure that we do not disturb the peace of our ancestors. An example is that children are prohibited from playing near graves. When we consult with our ancestors, we speak and sing softly. This is not only for our ancestors' sake, it is also for our own sanity. When the peace of ancestors is disturbed, they do not remain silent. They usually go to their descendants in dreams until the disruption is addressed. I can think of two clear examples where ancestors' peace was disturbed:

27.1 In Mpindwini village, a road was built near to the grave of Madoda Ndovela. This caused noise and disruption of Madoda's peace. He went to his descendants in their dreams and complained about the noise. Eventually, the only solution was to change the route of the road.

27.2 In Nyavini village, the construction of Mtentu road caused great disruption to an ancestor buried on the road's path. Once the contractors dug up the road, water kept rising and flooding the road and causing problems to the construction. They found out that they dug up the bones of a human being. In our culture, one cannot exhume a grave without consulting the ancestors,

and our community believes that the reason the water rose was because the ancestor was disturbed.

28 When I die, my wish is to be cremated and have my rest in the sea. I want to join the powerful ancestors there. I also want to have peace. I am worried that there will be much disruption on our land in the coming generations. It does not seem likely that I will have peace if buried on land. In the sea, I can have peace. Or so I thought. Shell's blasting and the prospect of future drilling make me worried that I will not have peace even in the sea.

CONCLUSION

29 I ask this Honourable Court for the relief set out in the notice of motion.

NONHLE MBUTHUMA FORSLUND

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit was signed and sworn to at _____ on this the ____ of _____ 2021 in accordance with the provisions of Regulation R128 dated 21 July 1972 as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR 774 of 23 April 1982.

COMMISSIONER OF OATHS