

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

Case No: 3941/2021

In the matter between:

**SUSTAINING THE WILD COAST NPC** 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 B V** Third Respondent

**IMPACT AFRICA LIMITED** Fourth Respondent

**BG INTERNATIONAL LIMITED** Fifth Respondent

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**REPLYING AFFIDAVIT**

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I, the undersigned,

**REINFORD SINEGUGU ZUKULU**

do hereby make oath and say:

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- 1 I am an adult male residing at Baleni village which forms part of the Amadiba Traditional Community in Winnie Madikizela-Mandela Local Municipality in the Eastern Cape. I deposed to the Founding Affidavit in this matter, and to a Supplementary Affidavit.
- 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.
- 3 In this affidavit, I will use the same terms as in the founding affidavit.

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## I. OVERVIEW

- 4 This application seeks to interdict Shell from conducting a seismic survey along the Wild Coast without an environmental authorisation under NEMA.
- 5 Shell quickly opposed this application
- 6 The Ministers of Minerals and Energy and Forestry, Fisheries, and Environment initially indicated that they would abide the outcome of this application, and would merely file an explanatory affidavit regarding part B.
- 7 After a caseload management meeting conducted by this Honourable Court, the Applicants agreed to allow Shell five more days - to 12h00 on 14 December 2021 - to oppose this application.
- 8 Shell emailed its last annexure to its answering affidavit to us at 13h41 on 14 December 2021. We do not object to this delay.
- 9 A day later, the State Attorney:
- 9.1 indicated the Minister of Mineral Resources and Energy's intention to oppose Part A at 13h11; and
- 9.2 filed its answering affidavit opposing part A at 15h07, less than an hour before the Applicants were due to reply.

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- 10 Turning back to the merits, the application set out clearly the plain text of the MPRDA and NEMA that require Shell to obtain an environmental authorisation before conducting seismic blasting.
- 11 On Shell's own version:
- 11.1 they have no environmental authorisation under NEMA; and
- 11.2 the seismic survey that the Applicants seek to interdict "began on 08 December 2021".
- 12 Minister Mantashe indicates that he has no objection to this unlawful conduct. He argues that Shell's conduct is lawful because their EMPr "constitutes an environmental authorisation as envisaged by the NEMA." As we explained in our founding papers, this argument is baseless.
- 13 Shell does not even offer this argument. Despite filing an affidavit over 100 pages and several hundred pages of annexures, Shell makes no effort whatsoever to explain why it feels entitled to ignore the plain text of the MPRDA and the NEMA, and the criminal liability that comes with it. Indeed, in five paragraphs Minister Mantashe says more on the merits than Shell does in 219.
- 14 Instead of answering the crisp issue the court must consider, Shell first asserts that this matter has already been resolved in other litigation. Wrongly. As Shell's counsel put it in their heads of argument in the other matter, the test for what



constitutes irreparable harm in an interim interdict is a flexible one. In Shell's own words:

*"the weaker the prima facie right, the higher the threshold of prejudice – ie, the weaker the case, the more prejudice that an applicant must be able to demonstrate before being granted an interim interdict."*

- 15 We agree.
- 16 The right we assert is different from the Applicants in the other matter. So the test is different. So this matter is different.
- 17 Put differently, even if the papers were exactly the same but for the different legal issues pleaded, there would be grounds enough to differentiate between the two cases.
- 18 But the papers are not the same. At all:
- 18.1 We rely on extensive expert evidence regarding the reasonable apprehension of harm.
- 18.2 It is uncontested that none of the Applicant communities in this matter knew about Shell's planned survey until November this year.
- 18.3 Our cause of action is entirely different.
- 19 Our application must be assessed on its own merits. And our merits are strong.

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- 20 Shell then attempts to assert that it consulted adequately in seeking its EMPr in 2013 and in auditing it in 2020. Despite fixating on the previous litigation, Shell conveniently makes no mention of their (flawed) consultation processes in their applications to renew their license or criticisms rightly made about these processes in Govindjee J's judgment. More fundamentally, Shell does not dispute that none of the Applicant communities were aware of the planned seismic surveys in 2013, or even in 2020. Plainly, Shell's consultation fell short of what they will be expected to conduct if obliged to seek an environmental authorisation under NEMA.
- 21 Shell's Country Chair then opines extensively on the Applicants' expert opinions. He does so without introducing evidence from a single expert (except for four subparagraphs). In addition to being unqualified to do introduce this evidence – at all, much less beyond a reasonable doubt – Shell's Chair is simply not able to credibly answer the reasonable apprehension of harm we have. He attempts to create disputes of fact through his wordiness, but does not succeed. Nor does he demonstrate why this court should permit Shell's (criminally) unlawful conduct to continue.
- 22 Particularly where Shell discloses no defence on the merits.
- 23 In the circumstances, this Honourable Court should issue an interim interdict stopping Shell's flagrantly unlawful conduct.

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- 24 And then this Honourable Court should issue a final interdict that stops Shell from conducting its survey unless and until it obtains an environmental authorisation under NEMA.
- 25 In the following we briefly flesh out these arguments by:
- 25.1 detailing Shell's failures to consult meaningfully;
  - 25.2 demonstrating that there is no alternative remedy;
  - 25.3 showing how the balance of convenience favours the applicants;
  - 25.4 explaining why we have a reasonable apprehension of irreparable harm;
  - 25.5 replying paragraph-by-paragraph; and
  - 25.6 concluding.

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## II. NO CONSULTATION WITH CUSTOMARY FISHING COMMUNITIES

- 26 Most of the Applicants are members of communities that govern ourselves in terms of customary law. We have constitutionally recognised systems of customary rules regulating access to and use of shared resources like the sea. These rules form part of the broader customary law system of the community, which includes our institutional regulations, control of land, and other resources and social rules.
- 27 We often have different customary systems embedded within a larger community with an overarching system of governance. For example, the fishers from Hobeni, where Mr Mhlangala lives, have developed their own customary fishing system over generations. They are all simultaneously members of the Hobeni customary community for purposes of access to their communal land, and are also members of a specific clan in terms of lineage, members of the Ngubezulu traditional community for purposes of broader governance, and members of the Eastern Pondoland Kingdom.
- 28 Our obligations as households towards our neighbours, ceremonial events such as circumcision and the different occasions on which we brew Umqombothi related to the establishment of a homestead, the payment of bridewealth and the use of natural resources are all elements of a community's customary system.

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communities, we have governance structures specific to fishing, recognising that the customary rules that regulate our community's access reside primarily with those who practice it. To engage in a conversation regarding fishing, then, one would engage at a minimum with the customary fishing structure in the community. It is absurd to suggest that one can speak to a King, or even a senior traditional leader, to speak on behalf of the customary fishing community. It would be like consulting the Premier of a province on behalf of the recreational fishers who operate in that province: the Premier may have – and hopefully has – valuable insight. But they plainly cannot speak on behalf of, much less undercut the rights of, the affected fishers.

- 34 Today many of our customary fishing structures have also been recognised in terms of the Marine Living Resources Act. As noted in our founding papers, and not denied, many of us have formed co-operatives achieved through our struggles.
- 35 This recognition comes from a court case in which fishers from Dwesa-Cwebe, who were arrested for fishing 'unlawfully' without a permit, successfully demonstrated that they had the right to fish in terms of their customary law. While our lower courts frowned upon this, the Supreme Court of Appeal recognised our rights and said that if the State wants to 'outlaw' customary fishing rights, it must first recognise those rights and show it would be constitutional to take those rights away. What the State cannot do is simply ignore the existence of those rights.
- 36 But this is precisely what it tries to do.

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29 As a system of law it cannot be separated from our social and cultural lives. It is entirely intertwined with who we are.

30 As Dr Sunde pointed out in her report submitted by the Applicants, "Dwesa-Cwebe residents refer to the customary rights that arise in the land and adjacent coastal areas as a result of the residence of their ancestors. [...] Residents of the Hobeni community recognise specific rocks as belonging to specific clans. For example, amaDingatha have got their own rock at the sea where they come for spiritual healing. They would come to that rock to talk to their ancestors"

31 Dr Sunde goes on:

*"Residents 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." This all means that if you disturb or destroy one aspect of our customary system, you may tear at the very fabric of our community and our culture. This is why we guard it so jealously.*

32 Shell does not deny this. Correctly so.

33 This means that, in order to understand the contents of the customary law relating to a specific aspect, for example fishing, one would need to engage with the members of the customary fishing system. The fishers themselves. In all our

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- 37 In terms of the Constitution, our customary law is now not only expressions of culture, but has the force of law. More than that, because of the centuries of a complete disregard for our customary systems and, in particular, the rights to land and natural resources that arise from it, our Constitution has provided customary law special protection.
- 38 That special protection includes protection for the customary law requirements of consultation. In our communities, we do not 'consult' through notices, deadlines for written submissions and faceless responses. We engage each other and we take as much time as we need to reach, as far as possible, consensus.
- 39 The Applicants attached the Small-Scale Fisheries Policy to their founding papers. In our founding papers Dr Sunde described the process of engagement over seven years with small scale fishers across the country that led to the promulgation of that policy in 2012.
- 40 The policy's introduction reads:

*"This policy aims to provide redress and recognition to the rights of Small Scale fisher communities in South Africa previously marginalised and discriminated against in terms of racially exclusionary laws and policies, individualised permit-based systems of resource allocation and insensitive impositions of conservation-driven regulation. In line with the broader agenda In line with the broader agenda of the transformation of the fishing sector, this policy provides the framework for the promotion of the rights of these fishers in order to fulfil the constitutional promise of substantive equality. Indeed, in terms of our Constitution, the State is committed to, respecting, protecting, promoting and fulfilling the rights of*

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*Small Scale fishers in South Africa. In so doing, this policy discharges the State's obligation in terms of Article 1 of the African Charter on Human and Peoples' Rights to 'adopt legislative and other measures' to give effect to the rights enshrined in the Charter. In particular, this policy gives effect to the protection of peoples' rights to "pursue their economic and social development according to the policy they have freely chosen" and to "freely dispose of their wealth and natural resources".*

- 41 With this policy, South Africa began to align itself with the international frameworks that Dr Sunde further expand upon in her report, unchallenged by the respondents.
- 42 Just a year after the promulgation of this policy, Shell's EMPr was submitted with not a mention of our small scale fishing communities.
- 43 I am aware that, for an outsider such as Shell and their consultants, it is not convenient to deal with communities and practices with which they may be unfamiliar. That makes engagement with a Council of Monarchies very convenient. But this is precisely why it was incumbent upon Shell to ensure that they understand who we are, how their activities will impact us, and how to engage with us. They did none of that.
- 44 Shell spends many pages setting out the process followed in complying with the relevant legal requirements for a public consultation process required when developing an EMPr. This does not help their case. At all.

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- 45 They say that they prepared a draft stakeholder database "through stakeholder analysis" and "using previous studies in the area". Understandably, Shell does not share any details on what 'stakeholder analysis' was done nor what previous studies in the area they relied upon. Of course they make no effort to justify why they determined such previous studies were sufficient.
- 46 What is clear that the 'stakeholder analysis' and the previous studies were insufficient because they did not identify the numerous small scale and subsistence fishing communities all along the coastline, like my own, where Shell will operate.
- 47 They ignored us.
- 48 Instead, they noted:
- 48.1 36 different entities representing commercial and recreational fishers; and
- 48.2 three monarchs, none of them having jurisdiction over amaMpondo aseQaukeni (Eastern Pondoland) and none of them empowered to speak on behalf of customary fishers' anywhere along the Wild Coast.
- 49 What is even more surprising given that the EMPr acknowledges "Xhosa and Zulu mythologies and intangible heritage include several references to water, particularly in terms of ancestor and origin lore". They were aware of the deep

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significance of the sea to our culture and heritage, and yet they did not come to talk to us or even to our queen.

- 50 Shell points to the documents distributed to I&APS by email, to newspaper adverts, and to focus groups to which I&APs were invited. None of these have any relevance to our communities who were ignored throughout.
- 51 Shell does not say that they did not know that we exist and may well be impacted. They cannot, because they refer to 'subsistence' fishing in their EMPr and refer to our 'mythologies'. Shell were also specifically informed of communities like ours who will be the most directly affected in at least one letter they received in April 2013 and attach to their papers.
- 52 Instead, Shell says that they engaged with Royal Representatives on behalf of all the people.
- 53 But then Shell also says we should not accuse them of rendering all the Xhosa and amaMpondo people of the Eastern Cape 'invisible', because any one of us were free to still register as an I&AP if only we would read their English and/or Afrikaans notices in the newspapers.
- 54 On their own version, Shell made no effort to consult us specifically, even though they had a process to proactively identify stakeholders and I&APs. The process

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they followed made it practically impossible for any community member to be alerted to the application or to the opportunity to be consulted.

55 It is no surprise that none of us found out about their application. I note that this fact – that we did not know about the application – is not in dispute.

56 This failure is particularly galling because of Shell's response to the statement of Mr David Russell. Helpfully, they call Mr Russell's approach "practical" They say he "demonstrates a sensible approach in particular to Shell". They contend that his otherwise 'sensible' criticism of their actions in this matter is answered because 'additional implemented mitigation measures' were imposed in 2020 and because they "conducted focussed meetings with selected fishing vessel operators along the Wild Coast". Shell at the same time confirms Mr Russell's point – that consultation with affected parties is crucial – and entirely misses the point. Mr Russell contends it is irresponsible not to consult with us, the small-scale fishing communities who stand to be impacted. None of Shell's answers even contemplate doing so.



### III. THERE IS NO ALTERNATIVE REMEDY

57 Shell argues that there is an alternative remedy open to the Applicants – to apply to the Minister under section 90 of the MPRDA, read with section 47, to suspend or cancel the right on the basis that Shell's exploration is in contravention of the MPRDA.

58 That is not a viable alternative legal remedy. While this is a legal argument that will be made by counsel at the hearing of the matter, I note at this stage that the seismic study will be complete and any harm done by the time this alternative process is followed.

59 More practically, this simply is not a viable alternative remedy because the Minister's mind is not open to it. Minister Mantashe is quoted on Twitter by @GovernmentZA, the "official South African Government account", as saying the following in his briefing to "the media on the latest developments in the upstream petroleum industry in South Africa":

*"We consider the objections to these developments as apartheid and colonialism of a special type, masqueraded as a great interest for environmental protection."*

60 I attach a copy of the tweet hereto marked RSZ3.

61 This tweet was 'Retweeted' by Minister Mantashe Media Liaison Officer, Mr Nathi Shabangu.

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62 In addition, the Minister has now filed an answering affidavit defending Shell's illegal conduct.

63 Plainly there is no prospect that the Minister will intervene to stop Shell's unlawful conduct. To do so would be, on his own version, to advance 'apartheid and colonialism of a special type.' There is no alternative to this Court's duties to stop Shell's criminal behaviour.

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#### IV. THE BALANCE OF CONVENIENCE FAVOURS THE APPLICANTS

64 Shell does not engage with the strength of the right asserted by the Applicants. It is plainly strong. This argument will be developed at the hearing of the matter based on what Shell argues.

65 As noted above, Shell's counsel correctly argues that the stronger the Applicants' prospects of success on the right we assert, the lower the threshold of prejudice we need to establish.

66 The simple explanation for this position is that the stronger the right in the interim interdict, the more likely a final interdict will be granted. And our prospects of a final interdict are strong.

67 Shell asserts that the balance of convenience favours their continued, unlawful conduct primarily on the basis that they have made significant investments in this project and have contractual obligations. These are not convincing arguments. I deal with these assertions in more detail below, but I note briefly here that Shell elected not to deny any of facts asserted by the Applicants regarding balance of convenience. Specifically Shell does not deny that:

67.1 The right was awarded several years ago and was meant to be exercised in a three-year-period.

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67.2 Shell knew that the right had been granted years before they acquired it, and knew it had not been exercised in the correct period.

68 Shell's assertions that they must be allowed to proceed must be seen in light of their failure to defend the lawfulness of their activities.

69 These averments must be accepted as true. Because they are true. Plainly they weigh against Shell in considering the balance of convenience.

70 Shell asserts – repeatedly - that the award of an exploration right to them is right enough.

71 But it isn't.

72 Shell has an exploration right. We do not deny this. But both the MPRDA and the NEMA make clear that Shell must first get an environmental authorisation under the NEMA before exercising the exploration right they have.

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**V. WE REASONABLY APPREHEND IRREPARABLE HARM**

- 73 Given the strength of the right we assert, I submit the threshold we must cross is low.
- 74 Our papers include the evidence of several leading marine experts regarding the reasonable prospect of harm should the seismic study proceed.
- 75 In answer Shell relies solely upon their Board Chairperson's testimony except for four sub-paragraphs.
- 76 A key contention made by a number of the expert reports filed by the Applicants is that it is very expensive to properly research the impact of seismic studies for reasons they explain. They therefore point out that Shell's repeated insistence that there is "no evidence" of harm should not readily be understood as evidence of "no harm".
- 77 The correct legal position in South Africa is the 'precautionary principle': to the extent that there is uncertainty, the law requires caution on the side of conservation.
- 78 This standard has not been met by Shell. Or by Minister Mantashe.

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79 To the contrary, Shell asserts that the lack of certainty should count in their favour.

80 This is wrong.

81 As is noted in Shell's own papers, their high watermark is that there is little evidence one way or the other.

82 In this matter, this is no help to Shell.

83 I note that the Applicants have had only one full day to reply. In the following section, I note some of the highlights of the facts that establish the reasonable apprehension of harm that we face.

Cultural and spiritual harm

84 Shell contends that it "respectfully notes the [...] important role that the sea plays in communities' cultural and spiritual expressions".

85 Yet Shell does not respond to the evidence provided by the Applicants of the harm that is done by their activities to these expressions they acknowledge. In the following, I only mention some of the averments that Shell does not deal with at all:

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*"The material basis of Dwesa-C  
three elements: sense of place  
ontology connecting them to th  
substantiated through socio-eco  
tangible and intangible culture".*

*"Many Nguni clans believe that  
certain rivers and streams [...] research conducted elsewhere  
ancestors of these clans reside i  
Cwebé residents believe that ther  
hence the ocean is sacred, with  
Disturbing these ancestors will ca*

*"Residents of the Hobeni corn  
belonging to specific clans. For  
own rocks at the sea where they  
come to that rock to talk to their an*

86 Shell's activities will disrupt these sacred f

Shell has made no attempt to mitigate ag

have not consulted us at all. They haven't

mitigation is possible.

87 This would not be the case if they had sou

under NEMA.

#### Livelihood impact

88 Shell says that it "is certain" that the seismic

livelihoods and our ability to fish. Shell says

conducted too far away from where the comm

ocean to be detrimental to their interests at all

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*"The material basis of Dwesa-Cwebe's ocean-coastal culture comprises three elements: sense of place linked to their coastline, a relational ontology connecting them to their ancestors and the way meaning is substantiated through socio-ecological interactions, thus including both tangible and intangible culture".*

*"Many Nguni clans believe that the ancestors reside in the sea and in certain rivers and streams [...] This isiXhosa belief is confirmed in research conducted elsewhere along the Eastern Cape coast. The ancestors of these clans reside in the ocean. In addition, most Dwesa-Cwebe residents believe that there are ancestral spirits in the ocean and hence the ocean is sacred, with its significance increasing with depth. Disturbing these ancestors will cause them great distress".*

*"Residents of the Hobeni community recognise specific rocks as belonging to specific clans. For example, amaDingatha have got their own rocks at the sea where they come for spiritual healing. They would come to that rock to talk to their ancestors."*

- 86 Shell's activities will disrupt these sacred features of our culture and spirituality. Shell has made no attempt to mitigate against such disruption, because they have not consulted us at all. They haven't even bothered to consult us to see if mitigation is possible.
- 87 This would not be the case if they had sought an environmental authorisation under NEMA.

#### Livelihood impact

- 88 Shell says that it "is certain" that the seismic survey will have no impact on our livelihoods and our ability to fish. Shell says so because "the survey is being conducted too far away from where the communities' fish and enjoy the ocean to ocean to be detrimental to their interests at all".

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89 I disagree.

90 In the Founding Papers, we included tables listing the species that the Dwesa-Cwebe fishers harvest. Here, I highlight the species that are beyond the nearshore and that are included in our 'baskets' allocated to our communities in terms of the Marine Living Resources Act:

Species	Location	Small scale fishing community resource basket on list from Department of Environment, Forestry and Fisheries
<b>TUNA – albacore, yellowfin and bluefin</b>  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	Large migratory pelagic species that occur in offshore waters and beyond the shelf break	<ul style="list-style-type: none"> <li>Mzamba coop (Yellowfin)</li> <li>Port Saint John's coop (all three species)</li> </ul>
<b>Squid</b>	The squid ( <i>Loligo vulgaris reynaudii</i> ) occurs extensively on the Agulhas Bank out to the shelf edge (500 m depth contour)	Mzamba Coop Kei-Mor Coop Ngoma Dwesa-Cwebe Coop
<b>Blue Marlin</b>	This occurs beyond the shelf.	Dwesa-Cwebe Resource Basket (Mendwana)

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includes black, blue and striped marlin ( <i>Makaira indica</i> , <i>M. nigricans</i> )		
<b>Hake</b> 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)
<b>Sardines</b>	Acts as food for the game fish like Marlin in the deep waters on edge of continental shelf.	Mzamba Coop PsJ Coop
<b>Kingklip</b>	"Found in the proposed exploration areas" according to the EMPr (v)  They spawn off the shelf edge in the south west south of Algoa and St Francis	Kei-More COOP

91 These are species not covered by Shell's reassurances at all.

Leading experts' public letter

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- 92 I note that South Africa's leading marine scientists co-signed a letter, introduced in my supplementary affidavit and elaborated upon in Mr Burger's affidavit, that stated the following:

*"There is a growing body of evidence pointing to the immediate and long-term, and largely unmitigable, negative impacts (including irreparable harm) of this invasive method on marine creatures, from large (including acoustically sensitive whales and dolphins) to small (e.g. plankton, upon which all ocean trophic systems depend), that make up our valuable marine ecosystems, and upon which our coastal communities and economies depend."*

- 93 In its answering affidavit Shell does not dispute the expertise of the signatories, or even the contents of the letter.

- 94 I submit that even if this letter had been disputed by Shell's Chair, it would stand.

- 95 But as it was not disputed, it must be accepted by this Court.

- 96 In the circumstances, I submit that it is entirely reasonable for the Applicants to accept South Africa's leading marine scientists' word that there is a growing body of evidence that seismic studies will cause irreparable harm.

Dr Nowacek

- 97 Shell does not challenge Dr Nowacek's expertise in the field. This is understandable as the EMPr cites his work.

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98 Shell challenges Dr Nowacek's conclusion that the proposed mitigation measures are inadequate. They purport to do so on the basis of Dr Nowacek's own work. Unconvincingly.

99 Most notably, Shell admits that it did no project-specific acoustic modelling (contrary to the current best practice).

100 Instead Shell asserts generally that 'acoustic modelling in the area has been considered.' They provide no details on what acoustic modelling has been considered. Shell has no answer to the importance of project-specific acoustic modelling at all. The following statement from Dr Nowacek is therefore unchallenged: "Without acoustic modelling, the EMPr could not have accurately assessed the harms that the seismic survey could cause". Even worse, the following statement is unchallenged:

*"An assessment for the harms of a seismic surveying activity that does not use the most current science and does not contain acoustic modelling cannot accurately assess the harms that this seismic surveying will cause. This means that mitigation measures could be inutile and misdirected."*

101 Shell's reliance on Dr Nowacek's 2013 work is no answer. Particularly as they ignore the 2015 and 2021 studies he cites under oath.

102 I note that Shell tries to undercut clear studies that the EMPr's mitigation regarding zooplankton, which is based on an assumption that the impact is only

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within a 10M range, is out of step with published work that there will be a significant decline in zooplankton abundance within a 1.2 km distance.

103 Shell does so on the basis of a 'query' from Richardson et al which results in a different estimate of impact. I deny that they have accurately characterised Richardson et al's study, which makes little mention of sample size particularly as McCauley et al show widespread impact.

104 Plainly, McCauley et al establish a reasonable apprehension of harm.

105 Shell concludes, based on a 1996 study, that there is no meaningful impact on 'seismic-created mortality.'

106 The conclusion is entirely unjustified.

#### **Doctors Harris, Olbers and Wright**

107 Shell 'acknowledges the experience' of Doctors Harris, Olbers, and Wright.

108 Shell tries - baselessly - to besmirch their evidence because of "their association with WILDOCEANS". Their evidence must be accepted over the evidence of Shell's Board Chairperson.

109 More importantly, Shell does not deal with their evidence meaningfully.

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110 I note that Shell cannot deal with Doctors Harris, Olbers, and Wright's evidence, confirmed in supporting affidavits, that:

*"Despite the fact that the airgun fires downwards, the sound pressure waves will reflect, refract and echo in all directions, not just downwards, but in upwards and outwards directions, laterally and diagonally as well. Water is a very good conductor of sound and pressure and its passage and the pressure outcomes are not as perfectly predicted as the statement would have us believe. It must be noted that:*

1) *Sound wave that go up and reflect back downwards, interacting with other produced waves, can result in both convergence areas (amplified sound pressure levels) and shadow areas (reduced sound pressure level areas). There may be small pockets where null sound pressure is created, but these pockets do not form a continuous zone in the 0-3 m depth zone. The physics show us that "loud" and "quiet" zones will occur at the surface, and underwater, as one moves away from the source. It is reasonable to expect that many endangered baby turtles will find themselves in "loud" high sound pressure.*

2) *The sound pressure will also be carried upwards diagonally (not only straight up) impacting baby turtles in surrounding surface waters in a circle away from the airgun. The radius of impact and disturbance in this circle is likely to be at very least a few hundred metres away from the source (the airgun) as there is scientific evidence that zooplankton are killed by the physical disturbance up to 1.2km away in surface waters. This indicates that there is a sound shock wave in the surface waters surrounding the airgun activity. There is also evidence that sperm whales can experience a loud or high sound pressure level (convergence) zone up to 1.62 km away from the source (Madsen et al. 2006) The turtles in the surface waters are not only contending with sound waves and the impacts thereof, but are at risk of entanglement in or collision with the seismic gear or physical disturbance due to pressurised air bubbles: 1. There is a lot of other gear in the water, including the airgun itself, the large cables attaching the hydrophone array to the vessel, the "birds" or floats attached along the long cable to keep it floating at the right depth. These floats will most likely be at surface or near surface. 2. It must also not be discounted that the seismic airgun releases a blast of pressurised air and bubbles, which travel upwards at each firing. Thus, even if a baby turtle fortuitously finds shelter in a pocket of quiet water just above the airgun, it will be impacted by pressurised bubbles, increasing speed as they move to the surface. This is a disturbance that needs to be considered especially since any turtles that pass through a bubble area will also be passing next through the hydrophone array with its cables and floats that lie directly in its path*

*RSZ*

*N. M*

*in the surface waters. Despite its convenience, Doctors Harris, Olbers and Wright agree that there is not a continuous silent zone in the 0-3 m depth zone. As confirmed by Doctor Harris's confirmatory affidavit, physics show us that "loud" and "quiet" zones will occur at the surface, and underwater, as one moves way from the source.*

- 111 This means that there is a high risk of harm to turtle hatchlings.
- 112 In addition, the sound pressure will also be carried upwards diagonally impacting turtle hatchlings in surrounding surface waters in a circle away from the airgun.
- 113 The radius of impact and disturbance in this circle is likely to be at least a few hundred metres away from the source (the airgun) as there is scientific evidence that zooplankton are killed by the physical disturbance up to 1.2km away in surface waters. This indicates that there is a sound shock wave in the surface waters.
- 114 Again, Shell seems to assume the fact that some data is not definitive - such as the fact that a study indicates that while seismic studies lead to decreased catches, there is not sufficient "information about the underlying biological cause of catch rate reduction" - means that Shell should be allowed to proceed.
- 115 The precautionary principle suggests precisely the opposite.
- 116 Shell also has no answer to the point that at night visual observers cannot operate. As set out in their original report, if PAM was effective enough then why add visual surveys in the day. PAM simply is not adequate.

RSZ

N M

117 Shell also does not address the fact that any independent monitoring will not provide any protection to (endangered) turtle hatchlings, coelacanth, or zoo-plankton and fish that cannot be seen or evaded.

118 The monitoring cannot be accepted as effective because it does not detect species that are not visible above the surface of the water.

119 Furthermore, we make the point that visual monitoring of even the largest animals are expected to be observed at best around 65%, which means that 35% of time they are missed. It goes to reason that smaller cetaceans will be detected even less effectively.

120 Shell fails to note that it is not only adult fish that need to be considered. Younger juvenile fish will not have same ability to evade impact, and larval fish are carried in the current further offshore and are effectively the same as zoo-plankton and likely to suffer mortality.

121 Finally, Shell appears to rely on mortality of no more than 30% of zooplankton at any distance from an airgun. This is a significant amount of harm.

Mr Russell

122 Mr Russell notes the importance of consultation with local fishing communities.

RSZ

N M

123 As Shell acknowledges, the failure to have such consultation can lead to devastating economic losses.

124 Despite this, Shell does not establish, and does not even attempt to establish, mitigation through consultation with communities. Because no such consultation happened.

125 Shell defends this on the basis of "focussed meetings with selected fishing vessel operators along the Wild Coast, potentially operational in the survey area."

126 It is common cause that none of these meetings engaged with the Applicant communities.

Dr Bruton

127 Shell accepts Dr Bruton's expertise.

128 The answering papers attempt to argue that no coelacanths will be in the seismic study area.

129 Dr Bruton advises that it "makes no sense to conclude that they do not inhabit suitable habitats between these locations just because we have not as yet found them there."

N M

RSZ



130 I agree.

131 I submit that Dr Bruton's evidence that there are likely coelacanths in the survey area ought to be accepted. If it is, I submit that Mr Winkler's evidence that there is a reasonable apprehension of harm to from the seismic study should be accepted. Shell has no meaningful basis to deny this.

RSZ

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**VI. PARAGRAPH BY PARAGRAPH REPLY**

132 In this section of the affidavit I deal with the pertinent allegations in the answering papers which have not been dealt with above and which require a response. To the extent that I have not dealt with any of the allegations set out in the answering papers, I deny the allegations which are in conflict with what is stated in the applicants' papers but I do not burden these papers by again addressing those issues hereunder.

133 I deal first with Shell's answer and then address the Minister's answer.

**Ad paragraphs 4 – 6**

134 I deny these paragraphs.

135 The application served on 02 December 2021 was signed. A hard copy was served on 03 December 2021.

136 The supplementary affidavit served in the afternoon of 07 December 2021 included evidence regarding the harm from Shell's seismic study.

137 I deny that the time period to answer was unreasonable. Notably, Shell repeatedly asserts extensive experience with this subject material. It is their bread and butter.



138 I also deny that the timetable set by the Court was inadequate.

**Ad paragraph 7**

139 I admit that the copy of the EMPr annexed to Shell's papers is accurate to the best of my knowledge.

**Ad paragraphs 9 – 15**

140 I deny that Shell or any other multinational corporation was defamed in the founding papers. They were accurately described.

141 While nothing turns on it, I believe it is important to specifically deny that Shell's history in South Africa, or Africa generally, reflects the glowing image they attempt to establish. Shell played a central role in assisting the apartheid state to secure oil and gas. Shell recently settled a lawsuit to compensate the Ogoni people for the harm Shell inflicted on them.

**Ad paragraphs 16 – 18**

142 I deny that gas is a strategic bridge to low carbon emission targets, or that the proposed drilling of our coast is compatible with the fight against climate change.

143 I repeat that even the IEA says that there is no space for new investments in oil and gas.



144 That said, that is not the subject of this dispute.

145 These issues would be most appropriately ventilated in a NEMA process, which Shell is scrupulously avoiding subjecting itself to.

**Ad paragraphs 19 – 20**

146 I deny this paragraph.

147 The likely harms from seismic blasting are supported through extensive expert evidence in this application.

**Ad paragraphs 21 - 32**

148 In describing seismic surveys generally as 'standard practice', Shell contends that after decades of seismic surveys, "there is no research globally showing that serious harm, injury death or stranding of marine mammals" has occurred from exposure to sound.

149 What they don't say is that the research that would provide this evidence is prohibitively expensive, as the Applicants' expert evidence shows and that Shell does not dispute.

150 In the circumstances, the precautionary approach is the appropriate legal standard.

RSZ

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151 In any event, I deny, on the strength of the experts we consulted, with Shell's bold assertions of "no research" showing serious harm. We have dealt with our expert responses in this regard elsewhere.

**Ad paragraphs 33 - 42**

152 As noted above, the mitigation strategies are not sufficient.

153 Our experts note, and Shell does not dispute, that PAM is can only deal with large animals part of the time. Indeed, Shell supplements PAM during the daytime. It has no answer to the gaps that clearly occur during night-time blasting or during rain.

**Ad paragraphs 43 – 47**

154 Shell claims this matter has already been resolved by this court.

155 Shell is wrong.

156 The previous matter dealt was brought by different applicants with a different cause of action and with different facts and different grounds for urgency.

**Ad paragraphs 48 – 60**

RSZ

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157 Shell claims this matter is not urgent.

158 But their denials are specious.

159 On Shell's version, the earliest any Applicant learned of the proposed seismic blasts was 29 October 2021.

160 This notice was given more than seven years after the EMPr was approved and the exploration right granted. Shell is asked to answer crisp legal questions, and factual questions they claim to have decades of expertise to deal with.

161 But, while Shell repeatedly tries to assert that the Applicants have known about the proposed blasting since 29 October 2021, this is simply not true.

162 The timelines explained in our founding papers are not challenged with any facts.

163 They must be accepted as correct.

164 We have brought our challenge to court as quickly as possible. Not one aspect of our timeline is challenged in this regard.

**Ad paragraphs 61 – 66**

165 I note that Shell withholds their arguments regarding the reason why they need not comply with the MPRDA or NEMA.

RSZ

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166 I deny that this is proper. While an affidavit is not meant for extensive legal argument, parties are required to disclose their pleaded case. Shell has not done so.

167 Shell's complaints regarding when the EA was required, and which listed activities are triggered, are contrived:

167.1 As set out in the founding papers, section 5A of MPRDA provides that no exploration activities can occur without an environmental authorisation. This is an ongoing requirement that has applied since 5A came into operation and continues to apply to Shell today.

167.2 Section 24F of the NEMA prohibits the commencement of a listed activity without an environmental authorisation. Any activity that requires an exploration right has been a listed activity since 08 December 2014, and was recently confirmed for seismic surveys in June 2021.

168 I note that on its own version, Shell commenced with a listed activity on 08 December 2021.

169 On any construction, Shell's conduct is unlawful and ought to be interdicted.

170 I note that the harms associated with Shell's activities are set out above.

**Ad paragraphs 67 – 82**

RSZ

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171 Shell's pitiful failure to consult is set out above.

**Ad paragraphs 83 – 89**

172 I note that Shell's predecessors did some work, but that, on their own version, they did not 'commence' activities.

173 I agree.

**Ad paragraphs 90 – 113**

174 I deny that these paragraphs address the harms cited above and in our founding and supplementary papers.

**Ad paragraph 114.1**

175 I deny that consultation with these entities addresses any of the Applicants' concerns. To the contrary, this only serves to highlight the gaps in Shell's consultation that will be addressed under NEMA.

**Ad paragraphs 114.2 – 123**

176 In these paragraphs Shell makes many assertions about the state of research on seismic studies.

RSZ

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177 These points are addressed above. Most fundamentally, they pit Shell's Board Chair's reading of the literature against expert views.

178 I do wish to note a few points:

178.1 Shell relies upon Popper et al's work from 2014. This is out of date. Specifically Shell fails to note Popper and Hawkin's research from 2019 that essentially says we don't know enough about seismic surveys to make conclusions. Under the precautionary principle this weighs against Shell.

178.2 Shell asserts that the soft starts will address the risks to invertebrates. There is no basis for this suggestion – soft starts may mitigate against risks to cetaceans, there is no evidence that they mitigate harm to invertebrates.

178.3 Shell asserts that 90% of the survey area is deeper than 1 000 m and that this is beyond the spawning ground for various reef fish. This does nothing to address the risks in the 10% of the survey area – a massive area in and of itself – or to other fish.

**Ad paragraphs 124 – 131**

179 In these paragraphs Shell sets out the various reasons it will suffer prejudice if compelled to comply with NEMA.

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180 As noted above, Shell makes no effort to explain why the Exploration Right was not exercised for several years, nor do they explain why they did not seek an environmental authorisation under NEMA.

181 This is particularly noteworthy as Shell asserts that they have a 'contractual commitment' to exercise their right that this Court must weigh heavily while offering no explanation why a court-mandated delay would be a problem when previous breaches of the 'contractual commitment' to survey were not a problem.

182 If Shell is obliged to follow the NEMA process, there is no basis to suggest that state will not work with Shell to address any issues with their MPRDA licensing. I note that this is entirely consonant with the Minister's position in this litigation.

183 Shell asserts that a third renewal application would oblige them to drill an exploration well at the cost of ZAR1,5B.

184 I note that this highlights an absurdity in Shell's case: on their version Shell believes it can drill our seas without any NEMA approval whatsoever.

185 More fundamentally, I submit there is a high likelihood that if this Court obliges Shell to comply with NEMA that the Minister would favourably consider an application by Shell to amend their right to remove the obligation to drill, should they seek it under the MPRDA.

N M

RS2

186 Shell asserts that if they are not able to start surveying in December, they "will have no choice but to terminate the survey altogether". They say this because they assert that weather standbys in April and May will prevent the completion of the survey. They offer no explanation why the evidence they gather in this period would not be useful. Nor do they say why they cannot merely complete the last bits of the survey next year.

187 More fundamentally, this is all premised on the prospect of Shell's activities being interdicted in part A but Shell succeeding in part B. This is unlikely.

188 I deny that Shell puts forward any factors that justify its continued unlawful conduct.

#### **Ad paragraph 132**

189 In this paragraph Shell complains about our expert evidence.

190 I note that Shell also complained about the lack of expert evidence in the other dispute.

191 Shell also incorrectly claims that their evidence is confirmed by ERM's experts.  
This is not true in two ways:

191.1 Only paragraph 138 is confirmed by ERM.

N M

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191.2 ERM's confirmatory affidavit does not assert, much less establish, any expertise in marine biology.

**Ad paragraphs 133 – 136**

192 In these paragraphs, Shell engages with the evidence of Dr Nowacek.

193 As noted above, Shell cannot address the fact that their EMPr's mitigation measures are out of step with current research.

194 They make much of the letter from our attorneys, but it is clear that this is not material.

195 What is clear is that Shell cannot disprove Dr Nowacek's evidence. Instead they grasp at straws.

**Ad paragraph 137**

196 In this paragraph Shell engages with the evidence of Doctors Harris, Wright and Olbers.

197 Shell attacks their credibility because of their association with Wild Oceans, which is opposed to oil and gas exploration. But Shell has no basis to dispute that the respective Doctors' views developed based on their expertise.

RSZ

NM

198 Shell complains that the studies they cite use captive animals. But that is merely a product of the state of research in the field. Shell also cites research on captive animals where it suits them.

199 Shell then argues – without any citation – that there will not be turtle hatchlings in the survey area. Incongruously, Shell also argues without any citation that ‘an almost perfect pressure null’ is created that will protect hatchlings.

200 Shell is not able to cite any source for this bald assertion. There is no literature that documents a truly silent zone above seismic gun arrays. It is true that the most of the energy from the array is directed downwards, but there is significant energy to the sides and, if nothing else, the reflected and reverberating energy certainly reaches the surface. It is indeed much safer for an animal to be above the array than just below it, but there is no way to ensure that the turtles would stay above the array.

#### **Ad paragraph 138**

201 In this paragraph, Shell challenges Mr Burger’s evidence.

202 They assert that Mr Burger ‘overlooked’ the 2020 audit. But he didn’t. He addresses its shortcomings squarely.

RSZ

N M

203 Shell does not dispute Mr Burger's specific criticisms of the 'weak and inadequate' mitigation measures.

**Ad paragraph 139**

204 In this (lengthy) paragraph, Shell denies accepts Mr Russell's expertise but attempts to deny his evidence that Shell's seismic surveys caused significant disruptions to Namibian fisheries.

205 But the highwater mark of Shell's argument is the lack of specific research on this question. They are not able to dispute the fact that Namibian fisheries were adversely affected.

206 Shell also tries to argue that they have conducted the type of consultation processes Mr Russell proposes. But it is common cause that none of their consultations have involved the Applicant communities.

**Ad paragraph 140**

207 In this paragraph accepts Dr Bruton's expertise.

208 They then spend many pages restating research regarding coelacanths.

RSZ

N M

209 In all of these pages they provide no basis to rebut Dr Bruton's expert opinion that coelacanth's are likely in the survey area, much less Mr Winkler's evidence that there is reasonable prospect that seismic surveys will put coelacanth's at risk.

**Ad paragraph 141**

210 I note that Shell does not deny the impact of the survey on fish. Instead, Shell's defence is the lack of 'conclusive studies'.

211 I deny this, and note that Shell goes on to misstate the current position regarding the impact of seismic studies on zooplankton.

212 I note, however, that if Shell finally follows the NEMA process the evidence will be fully assessed. It is the Applicants' view that the precautionary principle will mean that the lack of conclusive studies weighs against Shell. But that argument will be made in that process. For the present purposes, the question is whether a NEMA EA is required. It is.

**Ad paragraph 144**

213 I note that Shell cites its continued criminal conduct as an excuse to continue their criminal conduct.

RSZ

NM

214 I deny that this Court should permit this.

**Ad paragraph 145**

215 Shell complains we did not challenge the authorisation of the EMPr.

216 But we simply did not know about it.

217 More fundamentally, this case deals with whether Shell must seek an EA under NEMA.

218 They must. As much as Shell would like this case to be about the pending review application(s), it simply isn't. Those reviews must be adjudicated on their own merits.

**Ad paragraph 146**

219 In this paragraph Shell acknowledges the ultimate aim of the survey – to drill.

220 This ought to be considered under a NEMA process.

**Ad paragraphs 151 – 152**

221 Shell complains that we say that Shell will "blast our seas".

RSZ

N M



222 The term 'blast' may be emotive, but it is also accurate. It is used in the EMPr and in published works about seismic surveys.

223 Shell is blasting our seas.

**Ad paragraphs 153 – 154**

224 While Shell denies that there was no meaningful community involvement it cannot point to any meaningful community involvement. We stand by our founding papers.

**Ad paragraphs 155 – 156**

225 I note that while Shell complains that we have called their conduct 'literally criminal', but does not explain why it is not 'literally criminal'.

**Ad paragraphs 157 – 158**

226 I note that Shell does not deny Ms Mbokazi's evidence regarding traditional healers and the sea, which predates AllRise's incorporation.

227 Her evidence must be accepted.

**Ad paragraphs 159 – 161**

RSZ

N M

228 I note Shell's continued reliance upon the woefully inadequate heritage assessment.

229 We accept that shipwrecks are heritage. But they are not our heritage. The NEMA process will canvass our heritage.

230 I note Shell's untenable position that subsistence fishers were considered in the EMPr but none of us were consulted. Again, this will be addressed through the NEMA process.

**Ad paragraphs 162 – 163**

231 I deny these paragraphs.

232 In determining whether the harms of the seismic studies are permissible under NEMA, the fact that the ultimate purpose is to conduct activities that will intensify climate change is plainly relevant.

233 We agree that the manner in which climate change will be considered in the NEMA process is not a matter to be addressed by this Honourable Court.

234 We merely note that there has been no consideration of climate change to date, but climate change will be considered in the NEMA process if and when Shell agrees to comply with it.

N M

RS2

235 We ask this Court to compel Shell to follow the law and commence the NEMA process.

**Ad paragraph 165**

236 The EMPr consultation process did not reach communities.

237 It prioritised our Kings.

238 None of the Applicants were aware of any of the "open house" meetings.

239 This will be addressed in the NEMA process Shell is avoiding.

**Ad paragraphs 166 – 167**

240 I note these paragraphs.

241 I deny that it is impossible for this Court to make a factual finding on this issue.

242 Mr Stephenson alleged to have a mandate from Princess Sigcau.

243 Unlike other kingdoms, Mr Stephenson did not provide such a mandate to Shell.

N M

RSZ

244 Princess Sigcau denies giving such a mandate. She does not do so in a 'single-sentence denial'. To the contrary, she (correctly) explains that she has no powers to mandate Mr Stephenson. Shell may not accept her facts, but this Court must.

**Ad paragraph 168**

245 I again deny Shell's baseless accusation that we have lied in our affidavits.

246 The simple fact is that none of the Applicant communities were consulted in 2013 or 2020.

**Ad paragraphs 169 – 170**

247 I note Shell's continued reliance upon the EMP's findings about socio-economic impacts despite the fact that no indigenous communities were consulted in the EMP process.

248 Shell's reliance is misplaced. The NEMA process will address this.

**Ad paragraphs 171 – 172**

249 I note Shell's unsubstantiated denial that the Dwesa-Cwebe applicants' hard fought fishing rights will be disrupted.

**Ad paragraph 173**

RSZ

N M

250 I note Shell's continued reliance upon the public participation process that failed to reach any of the Applicants.

251 I note specifically that Shell stands by their insufficient notification process to 'mariners' despite the fact that they plainly failed to identify the Applicant communities.

**Ad paragraphs 174 – 177**

252 I note Shell's admission regarding the sensitivity of fish to sound.

253 As set out in Mr Russell's affidavit, this can have severe effects on fishers such as the Applicants.

254 Nothing in the EMP or the answering papers addresses these concerns.

255 I again deny that climate change is irrelevant. It is plainly a factor in the NEMA process that Shell is avoiding.

**Ad paragraph 178**

256 I note Shell's bald averment that we have 'deliberately avoided bringing a review'.

257 This is simply false.

RSZ

N M

258 Our case is our own. We believe that the NEMA process we demand best balances the parties' various rights. This is not meaningfully denied by Shell.

259 We stand or fall on our merits. We believe our merits are strong.

**Ad paragraph 180**

260 I note Shell's denial that Applicant communities were not aware of the EMPr process.

261 Shell has no basis for such a denial whatsoever.

**Ad paragraph 186**

262 I deny that we have misrepresented the IEA's report.

263 We haven't.

264 The IEA's report specifically says the following: "there are no new oil and gas fields approved for development in our pathway."

265 I deny that this is irrelevant. The harms incurred by the seismic study must be assessed against the fact that no new oil and gas fields ought to be approved.

RSZ

N M

266 This is something that is properly canvassed in the NEMA process which Shell is avoiding.

**Ad paragraphs 187 – 192**

267 I deny that the contents of these paragraphs relate solely to the merits of part B.

268 They are relevant for part A as well.

269 The paragraphs establish the reasonable prospect of harm from the EMPr itself, given the inadequacy of the mitigation measures.

**Ad paragraphs 195 – 196**

270 I deny the assertion that we have delayed too long.

271 We have filed our papers as quickly as possible. Shell does not dispute this.

**Ad paragraphs 197 – 200**

272 I note Shell's refusal to articulate their legal arguments in their answering papers.

273 I deny that Shell's Renewed Exploration Right takes the matter further. That has never been in dispute. The question is whether they require an EA under NEMA.

RSZ

N M

**Ad paragraphs 201 – 204**

274 I note Shell's bare denials.

275 I submit that the factual averments underpinning the legal submissions we made in the founding papers must be accepted.

**Ad paragraphs 205 – 207**

276 I deny that the Minister offers us an alternative as contemplated by the test for interdictory relief.

**Ad paragraphs 208 – 211**

277 The suggestion that the Applicants have 'designed' this litigation to our strategic advantage is denied.

278 As we have explained – and Shell has not denied – we prepared our papers as quickly as possible under the circumstances.

279 We have afforded Shell a reasonable extension of time to answer, and prepared this reply under very constrained timelines (including not objecting to the DMRE's late entry).

RSZ

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280 While Shell baldly asserts that we have not acted in good faith, that is simply not supported on the papers.

281 We have litigated an important legal point in good faith as we are entitled to do under NEMA.

282 I deny that there is any basis to seek a costs order against any Applicant. Such an order would bankrupt us.

**Ad paragraphs 215 – 219**

283 I deny that the Applicants have taken an abusive approach to this matter.

284 We are litigating on a crisp issue: is a NEMA authorisation necessary?

285 To obtain an interim interdict, we must establish our reasonable apprehension of harm. To do so, we rely on expert evidence.

**Ad Minister Mantashe**

286 I note that the Applicants do not oppose the Minister's application to file the affidavit belatedly.

RSZ

N M

287 I deny that there is any basis to argue that an EMPr under the MPRDA is an EA under the NEMA. An EMPr under the MPRDA is merely an EMPr under the NEMA.

288 I deny that Shell's conduct is lawful.

289 I note that the Minister appropriately does not seek costs against the Applicants.

## VII. CONCLUSION

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

291 Given the lengthy answering papers and the short time periods to reply and file heads, we seek the costs of three counsel.

292 We also seek condonation for not filing this replying affidavit by 16h00 on 15 December 2021 as directed by the Court. I note that we have replied to the Minister's belated answering affidavit in this reply. The delay was also occasioned by the need to get the text of the affidavit confirmed by different experts. I submit that the prejudice to the respondents is minimal.



NM

**REINFORD SINEGUGU ZUKULU**

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 Port Edward on this the 17 of December 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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9

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16



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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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Replying to @GovernmentZA

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**David** @zidhiva · Dec 10

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Messages



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RSZ

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

Case No: 3941/2021

In the matter between:

SUSTAINING THE WILD COAST NPC	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 B V	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent

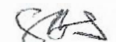
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CONFIRMATORY AFFIDAVIT

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I, the undersigned

JEAN MARY HARRIS



do hereby make oath and say as follows:

1. I am an adult female marine scientist, and am currently the Executive Director of WILDOCEANS, the marine programme of the Wildlands Conservation Trust (WILDTRUST), an NGO focused on biodiversity protection and building socio-ecological resilience in Southern Africa and the western Indian Ocean.
2. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
3. I, together with Dr Jennifer Olbers and Dr Kendyl Wright, prepared an expert report and affidavit which was referred to in the Applicants' Supplementary Founding Affidavit. My qualifications and experience are set out therein.
4. I have read the Replying Affidavit of Reinford Sinegugu Zukulu and confirm the contents thereof insofar as they relate to me and the expert opinion by me. I specifically confirm the contents of paragraphs 107 to 121. I further confirm that opinion expressed therein is to the best of my knowledge and belief true and correct.
5. I respectfully submit that I am qualified by my qualifications, training and experience to express the expert opinions which are set out in the Replying Affidavit.

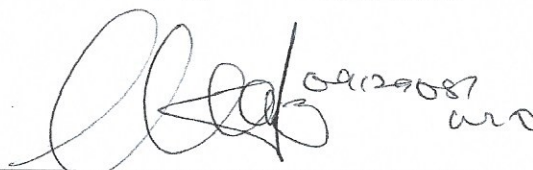


JEAN MARY HARRIS

I hereby certify that the deponent has acknowledged that she:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

Thus signed and sworn to before me, at *BT Beach* on *16* December 2021.

  
COMMISSIONER OF OATHS

NAME: *Solomon Bheki AD*

CAPACITY: *W/O*

ADDRESS: *133 Grey Stok Road*

AREA: *BT Beach 8000*



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

Case No: 3941/2021

In the matter between:

<b>SUSTAINING THE WILD COAST NPC</b>	First Applicant
<b>MASHONA WETU DLAMINI</b>	Second Applicant
<b>DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION</b>	Third Applicant
<b>NTSINDISO NONGCAVU</b>	Fourth Applicant
<b>SAZISE MAXWELL PEKAYO</b>	Fifth Applicant
<b>CAMERON THORPE</b>	Sixth Applicant
<b>ALL RISE ATTORNEYS FOR CLIMATE AND THE ENVIRONMENT NPC</b>	Seventh Applicant
and	
<b>MINISTER OF MINERAL RESOURCES AND ENERGY</b>	First Respondent
<b>MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES</b>	Second Respondent
<b>SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B V</b>	Third Respondent
<b>IMPACT AFRICA LIMITED</b>	Fourth Respondent
<b>BG INTERNATIONAL LIMITED</b>	Fifth Respondent

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**CONFIRMATORY AFFIDAVIT**

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I, the undersigned

**JENNIFER OLBERS**



do hereby make oath and say as follows:

1. I am an adult female marine scientist, and am currently employed as a Senior Marine Scientist (Sharks and Rays Protection Project) at WILDOCEANS, the marine programme of the Wildlands Conservation Trust (WILDTRUST), an NGO focused on biodiversity protection and building socio-ecological resilience in Southern Africa and the western Indian Ocean.
2. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
3. I, together with Dr Jean Harris and Dr Kendyl Wright, prepared an expert report and affidavit which was referred to in the Applicants' Supplementary Founding Affidavit. My qualifications and experience are set out therein.
4. I have read the Replying Affidavit of Reinford Sinagugu Zukulu and confirm the contents thereof insofar as they relate to me and the expert opinion by me. I specifically confirm the contents of paragraphs 107 to 121 and that the opinions expressed therein are to the best of my knowledge and belief true and correct.
5. I respectfully submit that I am qualified by my qualifications, training and experience to express the expert opinions which are set out in the Replying Affidavit.

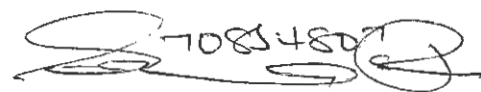


JENNIFER OLBERS

I hereby certify that the deponent has acknowledged that she:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

Thus signed and sworn to before me, at Bluff on 16 December 2021.



COMMISSIONER OF OATHS

NAME: Sibusiso Twome Mkhobu  
CAPACITY: Sgt  
ADDRESS: No 133 Gray Park Road  
AREA: Bluff



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

Case No: 3941/2021

In the matter between:

SUSTAINING THE WILD COAST NPC	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 B V	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent

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CONFIRMATORY AFFIDAVIT

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I, the undersigned

KENDYL ANDREA WRIGHT

12 

do hereby make oath and say as follows:

1. I am an adult female marine scientist, and am currently employed as a Marine Protected Area Scientist (Marine Protected Area Expansion Project) at WILDOCEANS, the marine programme of the Wildlands Conservation Trust (WILDTRUST), an NGO focused on biodiversity protection and building socio-ecological resilience in Southern Africa and the western Indian Ocean.
2. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
3. I, together with Dr Jean Harris and Dr Jennifer Olbers, prepared an expert report and affidavit which was referred to in the Applicants' Supplementary Founding Affidavit. My qualifications and experience are set out therein.
4. I specifically confirm the contents of paragraphs 107 to 121 and that the opinions expressed therein are to the best of my knowledge and belief true and correct.
5. I respectfully submit that I am qualified by my qualifications, training and experience to express the expert opinions which are set out in the Replying Affidavit.





KENDYL ANDREA WRIGHT

I hereby certify that the deponent has acknowledged that she:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

Thus signed and sworn to before me, at *Amangintoti* on *16<sup>th</sup>* December 2021.

  
COMMISSIONER OF OATHS

NAME: *J T Pillay*

CAPACITY: *CS7*

ADDRESS: *21 Khotso Mthysa Road*

AREA: *Amangintoti*



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

Case No: 3941/2021

In the matter between:

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

and

<b>MINISTER OF MINERAL RESOURCES AND ENERGY</b>	First Respondent
<b>MINISTER OF ENVIRONMENT, FORESTRY, AND FISHERIES</b>	Second Respondent
<b>SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B V</b>	Third Respondent
<b>IMPACT AFRICA LIMITED</b>	Fourth Respondent
<b>BG INTERNATIONAL LIMITED</b>	Fifth Respondent

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**CONFIRMATORY AFFIDAVIT**

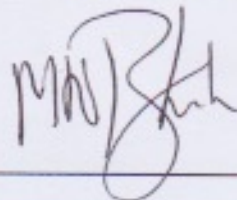
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I, the undersigned,

**MICHAEL NOEL BRUTON**

do hereby make oath and say as follows:

1. I am an adult male aquatic marine scientist, a retired Professor of Ichthyology, and currently a Director of Mike Bruton Imagineering.
2. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
3. I prepared an expert affidavit which was referred to in the Applicants' Supplementary Founding Affidavit. My qualifications and experience are set out therein.
4. I have read the Replying Affidavit of Reinford Sinegugu Zukulu and confirm the correctness of paragraphs 127 to 129 to the best of my knowledge and belief.



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**MICHAEL BRUTON**

I hereby certify that the deponent has acknowledged that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

Thus signed and sworn to before me, at Cape Town on 16 December 2021.



7174527-1 C87  
JAWUKA  
COMMISSIONER OF OATHS

NAME: LUXO LO JAWUKA  
CAPACITY: CONSTABLE  
ADDRESS: CHURCH STREET  
AREA: RONDEBOSCH





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

Case No: \_\_\_\_\_/2021

In the matter between:

**SUSTAINING THE WILD COAST NPC**

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 B V**

Third Respondent

**IMPACT AFRICA LIMITED**

Fourth Respondent

**BG INTERNATIONAL LIMITED**

Fifth Respondent

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**FOUNDING AFFIDAVIT – CONDONATION**

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I, the undersigned,

**RICHARD SPOOR**

T.



declare under oath as follows:

- 1 I am the Applicants' attorney of record together with the Legal Resources Centre. My offices are at M7 Moroccan Building, Bagdad Centre, White River, Mpumalanga. I am authorised to depose to this affidavit on the Applicants' behalf.
- 2 The facts deposed to in this affidavit are true and correct and are within my personal knowledge unless the context indicates otherwise.
- 3 In this affidavit I explain the Applicants' application for condonation for:
  - 3.1 the late filing of the signed replying affidavit; and
  - 3.2 the late filing of the heads of argument.


#### **REPLYING AFFIDAVIT**

- 4 The replying affidavit was meant to be served and filed by 16h00 yesterday.
- 5 An unsigned copy of the replying affidavit was emailed to the parties at 07:16 this morning.
- 6 The replying affidavit seeks condonation for the delay from 16h00 yesterday to 07:16 today. I do not repeat those averments.

f.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

- 7 In this affidavit, I explain why the signed copy was only provided to the parties much later in the day, and why the properly commissioned reply will only be served and filed tomorrow morning.
- 8 As he notes in his affidavits, Mr Zukulu lives in the rural Baleni village.
- 9 He was not able to print a copy of his affidavit today as Baleni Senior Secondary School was closed today.
- 10 A copy of the affidavit had to be brought to him from Port Edward which is about two hours drive from Baleni.
- 11 The affidavit was not brought to him directly – he had to collect it at the Komkhulu –great place – of Umgungundlovu. He signed the affidavit at Komkhulu.
- 12 There is no phone network at Komkhulu.
- 13 The signed copy of the affidavit had to go all the way back to Port Edward before it was scanned. When we received it many pages were entirely illegible. A different scanner had to be used. When the improved version was sent to us, we sent it to the other parties at 18h26.
- 14 We noted, however, that the affidavit was signed but not properly commissioned.

T. 



- 15 We are organising for Mr Zukulu to commission his affidavit properly before court commences tomorrow.
- 16 This will require Mr Zukulu to drive two hours to Port Edward to collect the printed affidavit and to commission at or around 08h00.
- 17 We ask that the late filing of the signed and commissioned replying affidavit tomorrow be condoned.
- 18 We sincerely regret the delays.
- 19 But I submit that the explanation is reasonable and the prejudice minimal as the unsigned version was furnished to the parties and there are no changes between the signed and unsigned versions. I note in this regard that Shell was able to cite the reply in their heads of argument.
- 20 The Applicants face great prejudice if their reply is not admitted.
- 21 I submit that a proper case for condonation for the late filing of the reply has been made out.

#### HEADS OF ARGUMENT

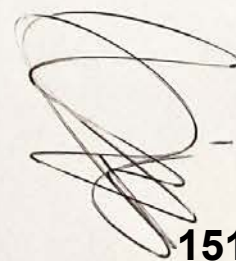
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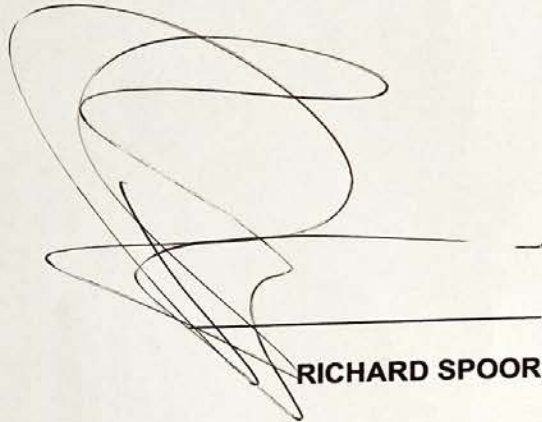
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- 22 The Applicants' heads of argument were meant to be served and filed by 16h00 today as directed by this Honourable Court.
- 23 They were only served by email shortly after 20:00.
- 24 The delay was occasioned by the fact that junior counsel was ill with Covid-19. While there was an attempt to address this by briefing a second junior, there was simply too little time to permit the timeous filing of the heads.
- 25 This position was worsened by the fact that the attorneys drafted the founding and replying affidavits with little involvement from counsel given the urgency of the matter. This meant that counsel had to read into the facts (including the replying affidavit) and were initially less familiar with the affidavits than would ordinarily be the case. This lengthened the process for the drafting of heads of argument, further contributing to the delay.
- 26 I submit that the prejudice to the parties is limited as the affidavits in this matter fully ventilate the arguments contained in the Applicants heads of argument.
- 27 If the heads of argument are not admitted, the Applicants will be severely prejudiced.

T.

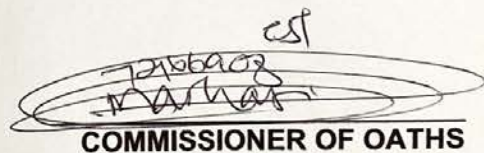


- 28 In the circumstances, the Applicants seek condonation for the late filing of their signed and commissioned replying affidavit and for the late filing of their heads of argument.



**RICHARD SPOOR**

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 SEA POINT SARS on this the 16 of DECEMBER 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**

