CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 194/24

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 ENVIRONMENTAL JUSTICE NPC	Seventh Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B.V.	Third Respondent
IMPACT AFRICA LIMITED	Fourth Respondent
BG INTERNATIONAL LIMITED	Fifth Respondent
NATURAL JUSTICE	Sixth Respondent

GREENPEACE ENVIRONMENTAL ORGANISATION NPC	Seventh Respondent

Case CCT 196/24

And in the matter between:

NATURAL JUSTICE	First Applicant
GREENPEACE ENVIRONMENTAL ORGANISATION NPC	Second Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
SHELL EXPLORATION AND PRODUCTION SOUTH AFRICA B.V.	Second Respondent
IMPACT AFRICA LIMITED	Third Respondent
BG INTERNATIONAL LIMITED	Fourth Respondent
SUSTAINING THE WILD COAST NPC	Fifth Respondent
MASHONA WETU DLAMINI	Sixth Respondent
DWESA-CWEBE COMMUNAL PROPERTY ASSOCIATION	Seventh Respondent
NTSINDISO NONGCAVU	Eighth Respondent
SAZISE MAXWELL PEKAYO	Ninth Respondent
CAMERON THORPE	Tenth Respondent
ALL RISE ATTORNEYS FOR CLIMATE AND ENVIRONMENTAL JUSTICE NPC	Eleventh Respondent

Neutral citation: *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others; Natural Justice and Another v*

Minister of Mineral Resources and Energy and Others [2026] ZACC 33

Coram: Maya CJ, Kollapen J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage J, Theron J and Tshiqi J

Judgments: Kollapen J (majority): [1] to [156]
Rogers J (minority): [157] to [235]

Heard on: 16 September 2025

Decided on: 14 August 2026

Summary: Section 172(1)(b) of the Constitution — just and equitable remedy — true discretion — grounds for appellate interference established

Section 24 of the Constitution — environmental right — justifiable economic and social development

Mineral and Petroleum Resources Development Act 28 of 2002 — sections 79 to 81 — exploration right — precautionary principle — public participation

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ORDER

In Case CCT 194/24 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Eastern Cape Division, Makhanda):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

"The appeal is dismissed with costs, including the costs of two counsel, to be paid jointly and severally by the appellants."

4. The first to fifth respondents jointly and severally must pay the applicants' costs in this Court.
5. Each party must bear its own costs in relation to the application in so far as it relates to the Supreme Court of Appeal's failure to determine the applicants' cross-appeal in that Court.
6. Each party must bear its own costs in relation to the application in terms of rule 20.

In Case CCT 196/24 *Natural Justice and Another v Minister of Mineral Resources and Energy and Others*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Eastern Cape Division, Makhanda):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "The appeal is dismissed with costs, including the costs of two counsel, to be paid jointly and severally by the appellants."
4. The first to fourth respondents jointly and severally must pay the applicants' costs in this Court.
5. Each party must bear its own costs in relation to the application in so far as it relates to the Supreme Court of Appeal's failure to determine the applicants' cross-appeal in that Court.
6. Each party must bear its own costs in relation to the application in terms of rule 20.

JUDGMENT

KOLLAPEN J (Maya CJ, Mathopo J, Mhlantla J, Musi AJ, Theron J and Tshiqi J concurring):

Introduction

[1] In partial acknowledgment of the cornerstone role that dispossession played in the apartheid regime, much attention has been paid to establishing a coherent and enforceable framework for the use and protection of South Africa's natural resources as shared commons of both intergenerational and intragenerational importance. However, in an economically-driven era, the confluence of rights upon which a shared environment is incumbent and the legislative framework established to protect it remain vulnerable to the development project.

[2] Whilst the issue at the heart of this matter is seemingly circumscribed, being whether a remedy fashioned by the Supreme Court of Appeal was just and equitable, the interconnectedness of people, their environment and developmental interests demands that a catalogue of rights be considered in that assessment. This includes the section 24 right to a healthy, clean and safe environment; the right to participation in decision-making (which in turn implicates sections 24, 25, 30 and 31 of the Constitution) and the rights to the pursuit of equality and transformation, on the one hand, and to the promotion of sustainable development in a time of economic downturn, on the other. In this way, the matter situates the Court within a broader constitutional moment, providing the opportunity to strengthen the bedrock of constitutional rights jurisprudence of this Court in an ultimate balancing of the scales exercise.

[3] This case must also be understood against the backdrop of well-documented struggles by coastal communities to protect their land, marine resources and ways of life in the face of extractive activities that they believe threaten their very existence.

The sea is of deep importance to coastal communities along the Wild Coast. To quote from the founding affidavit in the High Court:

> "Our land and sea are central to our livelihoods and our way of life. Over generations we have conserved them, and they have conserved us. This is not merely a matter of nutrition and income, though it certainly is that. Some of our ancestors reside in the sea, and our traditional healers and pastors use the sea to heal us and to connect us with God."

[4] In areas such as Xolobeni, communities have for many years resisted proposed mining activities in order to preserve their environment, livelihoods and cultural practices. Similarly, in the Dwesa-Cwebe region, our courts have recognised that access to marine resources is not merely an economic concern but is intimately bound to customary practices and cultural identity.[1] Their resistance to extractive activities and battles to be recognised have not been without cost. It has, at times, been marked by threats to the safety and security of those involved. These histories reflect that environmental governance in coastal areas is often marked by deep contestation, in which the protection of ecological systems is inseparable from the protection of the rights to dignity, culture and livelihood.

[5] With the above in mind, I turn to the facts. This matter concerns consolidated applications for leave to appeal paragraphs 26 to 31 of the judgment and paragraph 32(b) of the order of the Supreme Court of Appeal. The Supreme Court of Appeal had suspended an order of the High Court of South Africa, Eastern Cape Division, Makhanda (High Court) setting aside a decision to grant an exploration right and its subsequent renewals (impugned decisions), pending the outcome of a third application for the renewal of that exploration right.

[6] In CCT 194/24, the first applicant is Sustaining the Wild Coast NPC, a non-profit company which inter alia (among others) aims to promote sustainable livelihoods and

[1] *Gongqose v Minister of Agriculture* [2018] ZASCA 87; 2018 (2) SACR 367 (SCA); [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA).

protect the natural environment on the Wild Coast. The second applicant is Mr Mashona Wetu Dlamini, a resident of Sigidi Village in the Umgungundlovu Community which forms part of the Amadiba Traditional Community. He acts for himself, on behalf of traditional healers along the Wild Coast and on behalf of the Umgungundlovu Community. The third applicant is Dwesa-Cwebe Communal Property Association, an entity that holds land of the Dwesa-Cwebe community, which was restored under the Restitution of Land Rights Act.[2] The fourth applicant is Mr Ntsindiso Nongcavu, a fisherman who brings the application in his personal capacity and on behalf of fellow Wild Coast fishers. The fifth and sixth applicants are Messrs Sazise Maxwell Pekayo and Cameron Thorpe, who are part of Kei Mouth Fisheries, and launch the application on their own behalf, and on behalf of their community and Wild Coast fishers. The seventh applicant is All Rise Attorneys for Climate and Environmental Justice NPC, a law clinic representing communities fighting against climate change. I shall refer to them collectively as the SWC applicants.

[7] In CCT 196/24, the applicants are Natural Justice, a voluntary association which provides legal support to indigenous people and local communities, and Greenpeace Environmental Organisation, which works towards the achievement of environmental rights and social and environmental justice in communities across South Africa. I shall refer to them collectively as the NJ applicants. Where the context requires, I will use "applicants" to refer to both the SWC and NJ applicants.

[8] The respondents who oppose the applications are: the Minister of Mineral Resources and Energy (Minister), who is the first respondent in both cases; Shell Exploration and Production South Africa BV and BG International Limited (collectively, Shell), who are the third and fifth respondents in CCT 194/24 and the second and fourth respondents in CCT 196/24; and Impact Africa Limited (Impact), who is the fourth respondent in CCT 194/24 and the third respondent in CCT 196/24.

[2] 22 of 1994.

Where the context requires, I will use "company respondents" to refer to Shell and Impact collectively.

[9] This dispute regarding a just and equitable remedy brings together three crucial components as they relate to the present as well as the future: people; the environment (in particular, the Wild Coast); and social and economic development. Before this Court is the question of what constitutes a just and equitable remedy in light of the interaction between these three crucial components. They do not stand separate and isolated from each other but are interconnected and interdependent in significant ways. This inextricable link was described in *Fuel Retailers*[3] as follows:

> "Unlimited development is detrimental to the environment, and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."[4]

[10] This entails the need to recognise the value and the necessity of economic development, while ensuring that such development is sustainable, carefully balancing environmental and socio-economic considerations. This was expressed by this Court in *Fuel Retailers* when it said that "[s]ustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment".[5] This Court went on to say that it has a duty to ensure that the responsibility to look after the environment is properly discharged.[6]

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[3] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13; 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC).

[4] Id at para 44.

[5] Id at para 45.

[6] Id at para 102.

Background

[11] The Wild Coast is a 250-kilometre strip of the Eastern Cape coast and, apart from its overwhelming beauty, carries deep cultural and economic significance, supporting the spiritual practices and customary fishing rights of the communities living along the coast. The Wild Coast is also home to many species of endangered marine and avian life. The area enjoys a special legal status as designated coastal property in terms of sections 12 and 21 of the Natural Environmental Management: Integrated Coastal Management Act[7] (ICMA). In particular, section 11 of the ICMA vests the ownership of such property in the citizens of South Africa which resonates with the constitutional injunction that "South Africa belongs to all who live in it".[8] In acknowledgement of the sensitivity of this coastal ecosystem, this designation affords it a high level of protection and demands that the state, as the trustee of the property, ensures that the property is "used, managed, protected, conserved and enhanced in the interests of the whole community" and for the benefit of present and future generations. As I shall later explain, the state as trustee of this property has a heightened duty in this regard to the protection and conservation of this property and this duty is brought to bear when it considers how the property is put to use.

[12] In or around 2012, Impact applied for a technical co-operation permit in terms of section 76 of the Mineral and Petroleum Resources Development Act[9] (MPRDA). That permit was granted by the Deputy Director-General of the Department of Mineral Resources and Energy (DMRE) on 27 July 2012. In 2013, Impact applied for an exploration right in terms of section 79 of the MPRDA to undertake a seismic survey[10] to seek out oil and gas reserves on the Wild Coast. Impact submitted an environmental management programme (EMPr) on the proposed activities. The DMRE granted

[7] 24 of 2008.

[8] Preamble to the Constitution.

[9] 28 of 2002. A technical co-operation permit allows a holder thereof to conduct desktop studies and acquire existing seismic data for a designated area. It is a permit which is used for initial, low-impact exploration research and does not include any exploration activities.

[10] A seismic survey involves a vessel which tows airguns and receivers over the surface of the ocean. The airguns discharge pressurised air to generate soundwaves towards the seabed (seismic blasting). The reflected soundwaves are analysed to image the subsurface to determine the presence of oil and gas deposits.

Impact the exploration right on 29 April 2014. No meaningful exploration activities were conducted in terms of the right during its initial term of three years, and Impact applied for and was granted two renewals in terms of section 81 of the MPRDA on 20 December 2017 and 26 August 2021. In June 2021, the Director-General of the DMRE consented to the transfer of a 50% participating interest in the exploration right to Shell.

[13] On 29 October 2021, Shell gave notice of its intention to commence with a 3D seismic survey along the Wild Coast. On 2 December 2021, the SWC applicants approached the High Court for relief in two parts. Part A resulted in the company respondents, on 28 December 2021, being interdicted from undertaking the seismic survey operations under the exploration right, pending the finalisation of Part B, which sought to review and set aside the impugned decisions. Thereafter, the NJ applicants sought and obtained leave to join as applicants in the proceedings.

[14] The issue that arises for determination in this matter is narrow but consequential. At its centre lies the enquiry whether the remedy fashioned by the Supreme Court of Appeal was "just and equitable". Resolving this question requires careful attention not only to the nature and scope of the High Court's findings, which are upheld on appeal and remain extant, but also the broader context and circumstances in which this litigation is located. I turn to consider the rights that are implicated, and the milieu in which the Court's remedial discretion is being exercised.

Legal framework

Constitutional rights

[15] There are several constitutional rights implicated by the administrative decision in question.

[16] Section 24 of the Constitution[11] establishes the right to the environment as a fundamental human right and the ultimate source of environmental rights in South Africa. The nature of the right to the environment is one exercised both individually and collectively, and it extends the duty to protect the environment for the benefit of present and future generations. This requires an educated peek into the future with all the attendant uncertainties to safeguard the environment for those who will come after us. This right has been described as a justiciable fundamental right requiring that environmental considerations be accorded appropriate recognition and respect in the administrative process.[12] The effectiveness of environmental law depends to a large extent on creating and sustaining a culture that is sensitive to and aware of the environment. In practical terms, this means that any administrative decisions or actions which could impact the environment must be carried out in a way that is procedurally fair, lawful and reasonable.[13]

[17] This right consists of two parts: a right to a healthy environment and a right to the protection of the environment. The former entails a negative obligation on government to refrain from actions that create an environment harmful to health or well-being. The latter entails a positive obligation on government to take measures to promote, protect and fulfil that right.[14]

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[11] Section 24 of the Constitution proclaims the right of everyone—

> "(a) to an environment that is not harmful to their health or wellbeing; and
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> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[12] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* [1999] ZASCA 9; [1999] 2 All SA 381 (A); 1999 (2) SA 709 (SCA); 1999 (8) BCLR 845 (SCA) at para 20.

[13] Kidd *Environmental Law* 2 ed (Juta & Co Ltd, Cape Town 2011) at 27.

[14] Id at 22.

[18] Section 24 contemplates the need to promote "justifiable economic and social development"[15] while simultaneously "securing ecologically sustainable development".[16] The right to the environment is paired with the constitutional vision of "the integration of environmental protection and socio-economic development", though this balancing act takes place through the "ideal of sustainable development" as "[s]ustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment".[17] The rights under sections 24 and 22 exist conjunctively: one's freedom to trade does not entail conducting a trade in such a manner that violates the environment while, in turn, environmental protection cannot be invoked to unduly restrict responsible trading. Accordingly, the environment and economic development must operate in tandem and neither trumps the other;[18] such is intended to occur through sustainable development.[19]

[19] Though this Court has noted that sustainable development is challenging to define, there are certain elements of the concept which have been identified:

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[15] *Fuel Retailers* above n 3 at para 44.

[16] Id at para 45.

[17] Id.

[18] See, for example, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* [2004] ZAGPHC 18; [2004] 3 All SA 201 (W); 2004 (5) SA 124 (W) at 144B-C:

> "Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns."

See also *Fuel Retailers* id at para 113:

> "Running right through the preamble and guiding principles of [the National Environmental Management Act] is the overarching theme of environmental protection and its relation to social and economic development. . . . Economic sustainability is not treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for [the National Environmental Management Act] lies in the extent to which it is inter-related with environmental protection."

[19] *Fuel Retailers* id. Sachs J notes:

> "Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms."

> "[T]he integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner."[20]

[20] Issues that relate to the environment do not only have a national dimension but are the collective concern of all. There have been significant developments at the international level around climate change concerns that impact on our approach at the national level to these issues, particularly the intersection between the environment and development.

[21] Climate change, by its nature, transcends borders. Its causes are diffuse, its consequences shared but uneven and its governance inherently international. It follows that the content and scope of the state's obligations under section 24 must be understood within the broader framework of international law.

[22] In the past three years, three major international tribunals have delivered opinions addressing states' obligations in relation to climate change.[21] While advisory in form, these opinions authoritatively interpret binding treaties and customary international law. They form part of an emerging and coherent body of jurisprudence reflecting what can properly be described as a global reckoning with the legal and anthropological implications of climate change.

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[20] Id at para 51.

[21] International Court of Justice, Obligations of States in respect of Climate Change (Advisory Opinion), 2025 ICJ Rep. 187 (*ICJ Advisory Opinion*); International Tribunal for the Law of the Sea, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion) 2024 Case No 31; and Inter-American Court of Human Rights, Climate Emergency and Human Rights (Advisory Opinion AO-32/25), 29 May 2025.

[23] On 23 July 2025, the International Court of Justice (ICJ) delivered its Advisory Opinion on the Obligations of States in Respect of Climate Change.[22] In this Opinion, the ICJ affirmed that states are subject to obligations under treaty and customary international law to prevent significant environmental harm, to act with due diligence and to ensure that activities within their jurisdiction or control do not cause damage to the global climate system. Where a state authorises activities that materially contribute to greenhouse gas emissions without exercising the requisite level of care, the resulting omission or conduct may be attributable to that state for the purposes of international responsibility. Accordingly, decisions must be taken within a framework of heightened diligence, informed by scientific knowledge, international commitments and the foreseeable impacts of emissions on present and future generations.

[24] This convergence reflects a moment in international law in which climate change has moved from the margins of environmental diplomacy to the centre of legal accountability. Decisions implicating our environment demand justification, diligence and coherence in state conduct.

[25] Community and cultural rights are also implicated. Sections 30[23] and 31[24] of the Constitution guarantee the protection of communities and their practices. These sections have been described as affording individuals and communities the protection

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[22] *ICJ Advisory Opinion* id.

[23] Section 30 provides:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[24] Section 31 provides:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
>
> (a) to enjoy their culture, practise their religion and use their language; and
>
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

to pursue their cultural practices, and they protect diversity within our country.[25] This Court in *Christian Education*[26] noted that these rights, together with other rights in the Constitution, underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association.[27] There, this Court said:

> "Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm."[28]

[26] Furthermore, these rights are linked to human dignity. This Court in *Tshwane City*[29] held that cultural rights, whether of the Islamic community, the VhaVenda, or seTswana speakers, are integral to a sense of identity, self-worth and dignity.[30]

[27] Related to the facts in this case are the diverse practices within a culture. This Court has observed in *Pillay*[31] that—

> "[w]hile cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being in the world remains the same."[32]

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[25] *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 150.

[26] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[27] Id at para 24.

[28] Id.

[29] *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC).

[30] Id at para 126.

[31] *Pillay* above n 25.

[32] Id at para 54.

Legislative provisions

[28] The National Environmental Management Act[33] (NEMA) is the central umbrella environmental legislation in South Africa. A primary purpose of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. These include the precautionary nature of the legislation;[34] the principle that "the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest, and the environment must be protected as the people's common heritage";[35] and the need to pursue environmental resources in such a way to avoid discriminating against any person, "particularly vulnerable and disadvantaged persons".[36] NEMA provides that sustainable development applies a risk-averse and cautious approach, taking into account the limits of current knowledge about the consequences of decisions and actions.[37] Furthermore, NEMA ensures that decisions take into account the interests, needs and values of all interested and affected parties (IAPs).[38]

[29] Section 24 of NEMA establishes the protocol for applying for environmental authorisation, which is required for any listed activity or specified activity to determine the potential impacts of such activity on the environment.[39] This includes several procedural requirements, including an obligation to ensure that every application has "public information and participation procedures which provide all interested and affected parties . . . with a reasonable opportunity to participate in those information and participation procedures".[40]

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[33] 107 of 1998.

[34] Id section 2(4)(a)(vii).

[35] Id section 2(4)(o).

[36] Id section 2(4)(c).

[37] Id section 2(4)(a)(vii).

[38] Id section 2(4)(b) and (g).

[39] Id section 24(1).

[40] Id section 24(4)(a)(v).

[30] The MPRDA is legislation intended to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources". One of the MPRDA's guiding principles is to guarantee equitable access to and sustainable development of the nation's mineral and petroleum resources in order to eradicate all forms of discriminatory practice in the mineral and petroleum industries.[41]

[31] Sections 79 to 81 of the MPRDA dictate the process for applying, granting and renewing exploration rights. The MPRDA was amended in various respects by the Mineral and Petroleum Resources Development Amendment Act[42] (MPRD Amendment Act). Some of those amendments came into operation on 7 June 2013. Other amendments – relating to the so-called One Environment System (OES) – came into force on 8 December 2014 by virtue of a further amendment act.[43] Since Impact's application for an exploration right was lodged and accepted before 7 June 2013, I shall quote section 79 in the form it existed prior to that date. Since the exploration right was granted on 29 April 2014, I shall quote section 80 in the form it existed after the amendments of 7 June 2013. Since the two renewals were granted in 2017 and 2021, I shall quote section 81 as it existed subsequent to the amendments of 8 December 2014.

[32] Section 79 is entitled "[a]pplication for exploration right" and, prior to 7 June 2013, provided:

> "(1) Any person who wishes to apply to the Minister for an exploration right must lodge the application—
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> (a) at the office of the designated agency;
>
> (b) in the prescribed manner; and
>
> (c) together with the prescribed non-refundable application fee.

[41] Id section 12.

[42] 49 of 2008.

[43] National Environmental Management Laws Amendment Act 25 of 2014.

(2) The designated agency must accept an application for an exploration right if—

(a) the requirements contemplated in subsection (1) are met; and

(b) no other person holds a technical co-operation permit, exploration right or production right for petroleum over any part of the area.

(3) If the application does not comply with the requirements of this section, the designated agency must notify the applicant in writing of that fact within 14 days of the receipt of the application and the reasons therefor, and must return the application.

(4) If the designated agency accepts the application, the designated agency must, within 14 days from the date of acceptance, notify the applicant in writing—

(a) to notify and consult with any affected party; and

(b) to submit an environmental management programme in terms of section 39 within a period of 120 days from the date of the notice.[44]

(5) Any technical co-operation permit in respect of which an application for an exploration right has been lodged in terms of subsection (1) shall, notwithstanding its expiry date, remain in force until such application has been granted or refused."[45]

[33] Section 80, entitled "[g]ranting and duration of exploration right", provides as follows:

"(1) The Minister must grant an exploration right if—

(a) the applicant has access to financial resources and has the technical ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme;

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[44] Subsequent to its amendment with effect from 8 December 2014, section 79(4) required the designated agency to notify the applicant in writing to—

"(a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental report is required in terms of Chapter 5 of the National Environmental Management Act, 1998; and

(b) submit the relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998, within a period of 120 days from the date of the notice."

[45] Footnote added.

(b) the estimated expenditure is compatible with the intended exploration operation and duration of the exploration work programme;

(c) the Minister has issued an environmental authorisation;[46]

(d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);

(e) the applicant is not in contravention of any relevant provision of this Act;

(f) the applicant has complied with the terms and conditions of the technical co-operation permit, if applicable; and

(g) the granting of such right will further the objects referred to in section 2(d) and (f).

(2) The Minister may, having regard to the type of petroleum resource concerned and the extent of the exploration project, request that the applicant gives effect to section 2(d).[47]

(3) The Minister must, within 60 days of receipt of the application from the designated agency, refuse to grant an exploration right if the application does not meet all the requirements referred to in subsection (1).

(4) If the Minister refuses to grant an exploration right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons therefor.

(5) An exploration right is subject to prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed three years.

(6) An exploration right granted in terms of subsection (1) comes into effect on the effective date."[48]

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[46] Prior to 7 June 2013, paragraph (c) of section 80(1) read: "the Minister has approved the environmental management programme in terms of section 39(4)". It appears to be common cause that prior to December 2014 the activities authorised by the exploration right did not require an environmental authorisation in terms of NEMA. There is, however, a dispute as to whether the commencement of the exploration activities after 8 December 2014 requires an environmental authorisation in terms of NEMA.

[47] Prior to 7 June 2013, section 80(2) provided that "[t]he Minister after taking into account the need for the and extent of the exploration project may request that the applicant give effect to section 2(d)".

[48] Footnotes added.

[34] Section 81 is entitled "[a]pplication for renewal of exploration right" and, as from 8 December 2014, provides:

> "(1) Any holder of an exploration right who wishes to apply to the Minister for the renewal of an exploration right must lodge the application—
>
> (a) at the office of the designated agency;
>
> (b) in the prescribed manner; and
>
> (c) together with the prescribed non-refundable application fee.
>
> (2) An application for renewal of an exploration right must—
>
> (a) state the reasons and period for which the renewal is required;
>
> (b) be accompanied by a detailed report reflecting the exploration results, the interpretation thereof and the exploration expenditure incurred;
>
> (c) be accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation;[49] and
>
> (d) include a detailed exploration work programme for the renewal period.
>
> (3) The Minister must grant the renewal of an exploration right if the application complies with subsections (1) and (2) and the holder of the exploration right has complied with the—
>
> (a) terms and conditions of the exploration right is not in contravention of any relevant provision of this Act or any other law;
>
> (b) exploration work programme; and
>
> (c) conditions of the environmental authorisation.[50]
>
> (4) An exploration right may be renewed for a maximum of three periods not exceeding two years each.

[49] Prior to its amendment, this particular paragraph required that the application be accompanied by a report reflecting "compliance with the requirements of the approved environmental management programme, the rehabilitation to be completed and the estimated cost thereof".

[50] Prior to its amendment, this particular paragraph read: "requirements of the approved environmental management programme".

> (5) An exploration in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused."[51]

Litigation history

High Court Part A

[35] On 28 December 2021, the SWC applicants approached the High Court to prevent the company respondents from conducting the seismic survey. Relief was sought in two parts. In Part A, the applicants applied for an interim interdict which would prohibit the company respondents from undertaking the intended seismic survey, pending the determination of Part B. In Part B, the applicants sought to have reviewed and set aside the exploration right as well as the two renewals of the right granted to the company respondents.

[36] The High Court found that the applicants' right to meaningful consultation constituted a prima facie (on the face of it) right which deserved to be protected by way of an interim interdict.[52] The High Court found that the consultation process was not meaningful and reasoned:

> "Meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations. The 'King' cannot make representations on behalf of all the community members."[53]

[37] Furthermore, the High Court found that the expert evidence established a reasonable apprehension of real harm to marine life and, even if there were uncertainties

[51] Footnotes added.

[52] *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2021] ZAECGHC 118; [2022] 1 All SA 796 (ECG); 2022 (2) SA 585 (ECG) (HC Part A judgment).

[53] Id at para 26.

about the harm, this was a case where the application of the precautionary principle was justified.[54]

High Court Part B

[38] In Part B, the SWC applicants sought an order reviewing and setting aside the decisions granting the exploration and the renewals thereof; and, in the alternative, sought declaratory relief that the company respondents could not commence exploration activities without an environmental authorisation in terms of NEMA (NEMA issue).[55]

[39] The applicants argued that the impugned decisions were procedurally unfair as there had been no consultation with IAPs. Second, they argued that there had been a failure to take into account relevant considerations, such as the harm to marine and bird life, which called for the application of the precautionary principle; the impact on communities' cultural and spiritual rights; climate change; and compliance with the ICMA. Third, they argued that there was non-compliance with the legal prescripts of the MPRDA to inter alia expand opportunities for historically disadvantaged persons. Importantly, only the first of these review grounds is consultation-dependent. The remaining two are independent legality defects arising from direct statutory and constitutional obligations resting on the Minister.

[40] The High Court, having rejected preliminary defences by the company respondents that the applicants had failed to exhaust internal remedies and had

[54] Id at para 69.

[55] The NEMA issue is briefly this. In terms of section 5A of the MPRDA, which was inserted into the Act with effect from 8 December 2014 (by way of the MPRD Amendment Act), no person may explore for minerals or petroleum without an "environmental authorisation". A definition of "environmental authorisation" was inserted into the MPRDA at the same time. In terms of the definition, this expression has the meaning assigned to it in section 1 of NEMA. The definition in NEMA was also inserted with effect from 8 December 2014 (by way of the National Environmental Management Amendment Act 62 of 2008 (NEM Amendment Act)), where "environmental authorisation", when used in Chapter 5, is defined as meaning "the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act". In terms of a transitional provision contained in section 12(4) of the NEM Amendment Act, an environmental management plan or programme approved in terms of the MPRDA immediately before its amendment on 8 December 2014 "must be regarded as having been approved in terms of the principal Act as amended by this Act". The NEMA issue is whether Impact's EMPr, which was approved in April 2014, is to be regarded as the necessary environmental authorisation.

unreasonably delayed in bringing the application, found in favour of the applicants on all review grounds and set aside the impugned decisions.[56] The High Court found it unnecessary to consider the NEMA issue. It took the view that the success of the review would render the relief sought under NEMA, which had been raised in the alternative to the main relief, redundant. The High Court accordingly set aside the impugned decisions on three independent grounds: lack of meaningful consultation, failure to take into account relevant considerations and non-compliance with the legal prescripts.

[41] In respect of consultation, the applicants sought to review the decisions granting the exploration and the renewals thereof on the basis that the decisions were made without adequate consultation with IAPs. The High Court agreed that the consultation process had fallen short in several respects, and that Impact had not given IAPs proper notice of the nature and purpose of the proposed survey or the information needed to make meaningful representations, nor the opportunity to make such representations.[57] The High Court went on further to hold that "the fact that the communities might have had little or nothing to say regarding whether or not the exploration right should be granted is not germane to the enquiry whether the communities were entitled to meaningful consultation".[58] Ultimately, the High Court found that meaningful consultation consists in "engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus".[59]

[42] On the failure on the part of the Minister to take into account relevant considerations, the High Court identified three relevant considerations that were not

[56] *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] ZAECMKHC 55; [2022] 4 All SA 533 (ECG); 2022 (6) SA 589 (ECMK) (HC Part B judgment).

[57] The High Court identified a number of defects in the consultation process including the following: interested and affected parties were identified by consultants, not through a public process; affected communities did not form part of the stakeholder database despite Impact having been aware of them; when the broader public was informed, it was via advert inaccessible to Dwesa-Cwebe, Xolobeni and Pondoland-area communities; newspaper adverts were in English and Afrikaans; Transkei monarchs and communities were excluded from the consultation meetings; a top-down approach to consultation was adopted despite traditional leaders urging consultants to deal directly with members of the affected communities; and the distribution of information via email and on a website would not be an effective consultation tool within Amadiba community. See id at paras 90-103.

[58] Id at para 102.

[59] Id at para 95.

considered, namely the anticipated harm to bird and marine life; the communities' spiritual and cultural rights and rights to livelihood; and climate change considerations. In relation to the anticipated harm to bird and marine life, the applicants relied on experts[60] who contended that there was a reasonable apprehension of harm and that the mitigation measures proposed would not adequately manage the threat of harm. The respondents, likewise, relied on experts to refute the suggestion of harm and to suggest that to the extent that there might be risk, there would be appropriate mitigating measures. The High Court held that because of the dispute as to the adequacy of mitigation measures, the decision-maker ought to have invoked the precautionary principle.

[43] In relation to the failure to consider the relevant communities' spiritual and cultural rights, the High Court found that there was no evidence that the possibility of harm to ancestral beliefs and practices, or any remedial measures to guard against possible harm, were considered by the Minister.

[44] The final relevant consideration that the High Court identified was the crucial consideration of the climate change impacts of the decision to grant the exploration right and the ICMA. The High Court placed reliance on Murphy J's judgment in *Earthlife Africa*,[61] which found that the absence of an explicit requirement that climate change must be considered does not mean that there is no legal duty to consider climate change and that the absence of an expert report on climate change considerations will be symptomatic of the fact that climate change was not considered. The High Court concluded that climate change was a relevant consideration. Had the decision-maker had the benefit of a comprehensive assessment, a different conclusion may have been reached. In relation to the ICMA, the High Court found that the ICMA considerations are not only triggered in the event that an environmental authorisation is required. The

[60] The applicants relied on the evidence of ten experts. The HC Part A judgment above n 52 provides a useful summary at paras 44-5 and 52-63.

[61] *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP).

High Court also found that the Minister was duty-bound to consider the ICMA, particularly in light of the special legal status of the Wild Coast.

[45] Finally, the High Court briefly dealt with the failure to comply with applicable legal prescripts, and in particular, the failure to consider section 80(1)(g) of the MPRDA, in that the objects referred to in section 2(d) and (f) were not satisfied. Section 2 sets out the objects of the MPRDA. In terms of paragraphs (d) and (f) of that section, the objects include to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources" and to "promote employment and advance the social and economic welfare of all South Africans". The High Court found that the EMPr provided no detail to substantiate its claims that the seismic survey would create jobs, improve socio-economic conditions or increase government revenue.

Supreme Court of Appeal

[46] With the leave of the High Court, the Minister and the company respondents approached the Supreme Court of Appeal seeking to set aside the High Court's judgment and order. The applicants cross-appealed the High Court's refusal to determine the NEMA issue.

[47] The Supreme Court of Appeal[62] upheld the High Court's findings that an internal appeal would not have been effective, and that there had been no delay in launching the review. Turning to the merits, the Supreme Court of Appeal agreed that the public consultation process was "more illusory than real [and] was thus manifestly inadequate".[63] The Supreme Court of Appeal held that the logical corollary to the inadequacy of the consultation process was that, when assessing Impact's application

[62] *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84; 2024 (5) SA 38 (SCA) (SCA judgment).

[63] Id at para 24.

for an exploration right, the Minister had not considered several relevant factors (including harm to communities' spiritual and cultural practices and their livelihoods, and the requirements of the ICMA). Importantly, the Supreme Court of Appeal did not unsettle any of the grounds upon which the High Court found that the impugned decisions were reviewable.

[48] The Supreme Court of Appeal found that once a ground of review under the Promotion of Administrative Justice Act[64] (PAJA) has been established, section 172(1)(a) of the Constitution requires the decision to be declared unlawful. However, held the Supreme Court of Appeal, that was not the end of the matter. It found that the matter must then be dealt with under section 172(1)(b) of the Constitution, and the High Court had failed to do so in not considering the question of just and equitable relief. The Supreme Court of Appeal found that the High Court had erred in not weighing up relevant factors, including the almost eight-year delay between the granting of the exploration right and the review; the company respondents' financial expenditure in the region of R1.1 billion; the fact that there was only one more opportunity to renew the exploration right; the economic and social benefits that would fail to materialise without the exploration; and the fact that a moratorium had since been placed on exploration rights over the entire South African coast, meaning that the company respondents might never again get the opportunity to act on the exploration right.

[49] The Supreme Court of Appeal noted that the company respondents had applied for a third renewal on 21 July 2023 (after the High Court judgment was handed down) and that, in terms of section 81(5) of the MPRDA, an exploration right remains in force until the renewal application has been granted or refused. The Supreme Court of Appeal held that it was within its power to direct that, as part of a proper consideration of the third renewal application, a further public participation process should be conducted to cure the identified defects in the decision-making process. The Supreme Court of

[64] 3 of 2000.

Appeal thus dismissed the appeal but suspended the High Court's order setting aside the impugned decisions pending determination of the third renewal (suspension order).

In this Court

[50] The SWC and NJ applicants separately applied for leave to appeal against the Supreme Court of Appeal's suspension order and against its failure to consider their cross-appeal on the NEMA issue. The company respondents, in turn, lodged a conditional cross-appeal against the setting aside of the decisions to grant the exploration right and its renewals.

[51] On 27 August 2024, this Court dismissed with costs the company respondents' counter-applications to conditionally cross-appeal, holding that there were no reasonable prospects of success. This Court also refused to grant the applicants leave to appeal in respect of the NEMA issue, finding that neither the High Court nor the Supreme Court of Appeal had adjudicated the issue, and it would not be in the interests of justice for this Court to consider it for the first time. Accordingly, the main issue before this Court is the appeal against the Supreme Court of Appeal's suspension order. Since the SWC and NJ applicants raise similar grounds of appeal, their submissions in this Court are dealt with together below.

Parties' submissions

Applicants' submissions

[52] The applicants argue that the matter engages this Court's jurisdiction and that leave to appeal should be granted, since there are strong prospects of success and the issues are of significant public import. They contend that the question of a just and equitable remedy under section 172 of the Constitution triggers this Court's jurisdiction.

[53] The SWC applicants further argue that a constitutional issue arises because the matter raises questions regarding breaches of the right to meaningful consultation, which in turn implicates sections 24, 25, 30 and 31 of the Constitution. The SWC

applicants submit that this matter also triggers this Court's general jurisdiction, because the obligation to consult meaningfully is far-reaching and the Supreme Court of Appeal's order has the potential to undermine the right to meaningful consultation.

[54] The NJ applicants state that the matter concerns just and equitable remedies after unlawful administrative action has been set aside in terms of PAJA. This Court, they say, has previously held that the interpretation of PAJA constitutes a constitutional issue.

[55] On the merits, the applicants argue that the Supreme Court of Appeal's suspension order was not just and equitable because the order does not vindicate the applicants' rights. They contend that the public participation process contemplated by the Supreme Court of Appeal is not curative. This is so, they say, because the factors which the Minister may consider in a renewal application are narrow, and the MPRDA does not provide for a consultation process to be considered in the context of a renewal application. They argue that any consultation would be pointless, since the decision has already been made to grant the exploration right.

[56] Furthermore, the NJ applicants submit that not only does the MPRDA not provide for consultation to be considered but actually *precludes* it, since section 81 requires the Minister to grant a renewal if certain administrative requirements are met, and consultation is not one of them. In similar vein, they argue that the Minister's failure to take into account relevant considerations (such as the ICMA, or parties' cultural rights) will also not be rectified, since under section 81 the Minister may not consider these factors. The SWC applicants note that section 81 does not compel the Minister to reassess the objectives set out in section 2(d) and (f) of the MPRDA or to re-evaluate the social, cultural and environmental impact of the exploration.

[57] The applicants contend that the Supreme Court of Appeal's suspension order is impermissibly vague as it does not explain inter alia what is required and by whom; the method of consultation; the timeline for further participation; or what the outcome of

the participation should be (that is, whether the already-submitted renewal application should be amended or how the Minister should consider the outcome of the consultations). This, they argue, will make implementation impossible and spawn further litigation.

[58] The SWC applicants argue that the suspension order is not just and equitable, because the MPRDA states that an exploration right remains valid until a decision is made on the renewal application. Since the Supreme Court of Appeal did not order that the company respondents refrain from seismic surveying until the third renewal application has been decided, the company respondents would be permitted to exercise the exploration right pending the decision on the third renewal application.

[59] Apart from the order not being just and equitable, the SWC applicants further argue that the suspension order was legally incompetent, since the exploration right has been set aside, albeit that the setting aside has been suspended pending a decision on the third renewal. A renewal, they say, is an extension or continuation of the initial right and depends on the existence of a valid exploration right. They argue that when the Minister decides the third renewal application, the suspension of the setting aside order will lapse and the setting aside of the exploration right will come into operation. That is, the third renewal, if granted, will purport to extend the exploration right for two years, but the exploration right itself will no longer exist. They argue that regardless of the outcome of the renewal application, the exploration right is invalid and will remain so.

[60] In their written submissions, the SWC applicants also posit that the suspension order was not legally permissible. They argue that the High Court exercised its discretion judicially in deciding to set aside the exploration right, and there was no basis for the Supreme Court of Appeal to interfere.

[61] The NJ applicants claim that the suspension order was made without according the parties the benefit of *audi alteram partem* (hear the other side) (*audi*). This is so,

they state, as the order was neither sought by any party, nor was the possibility of such an order being made canvassed with the parties with a view to seeking their views or inviting them to make submissions on what was being contemplated.

[62] The NJ applicants contend that the factors considered by the Supreme Court of Appeal in coming to its suspension order (the delay, the financial expenditure, the moratorium and the economic and social benefits) were irrelevant, and there was no need to depart from the default position that an unlawful act must be set aside. The NJ applicants submit as follows in this regard:

(a) The delay was caused by the respondents' failure to announce the grant of the right, and in these circumstances, it cannot be a basis for keeping an unlawful right alive.

(b) The company respondents relied on unsubstantiated assertions of financial loss. In any event, any financial prejudice was of Impact's own doing, and financial interests should not undermine the constitutional effectiveness of the relief granted.

(c) The moratorium demonstrates that there is no need to keep the exploration right alive and belies the suggestion that offshore exploration is extremely critical to the country's economic needs. They argue that the moratorium was impermissibly raised by Impact in its heads of argument in the Supreme Court of Appeal for the first time.

(d) The High Court made a factual finding, undisturbed on appeal, that the financial benefits were not substantiated on the papers.

Minister's submissions

[63] The Minister accepts that this Court's jurisdiction is engaged but submits that the applicants have no prospects of success as the Supreme Court of Appeal lawfully exercised a true discretion and it would be inappropriate for this Court to interfere.

[64] On the merits, the Minister argues that the Supreme Court of Appeal was obliged to interfere on remedy, as the High Court failed to exercise its discretion under

section 172(1)(b) of the Constitution. The Minister submits that the applicants have failed to establish a basis that would enable this Court to interfere with the Supreme Court of Appeal's remedial discretion. The Minister also argues that there was no infringement of the *audi* principle, as the Minister raised the issue of suspension in the Supreme Court of Appeal.

[65] The Minister submits that the Supreme Court of Appeal's order is legally competent, as the original exploration right remains in place (but suspended in effect) subject to a proper consultation being undertaken before the renewal is considered.

[66] The Minister agrees that the MPRDA does not make provision for further consultation at the stage of renewal, but submits that there is nothing inappropriate about making such an order. The Minister states that he would be obliged to consider all relevant factors, including the further consultation and the issues raised in the High Court and Supreme Court of Appeal judgments.

[67] The Minister denies that the Supreme Court of Appeal's order is vague and says that the renewal process will be implemented within the applicable statutory parameters and the remedial order.

Impact's submissions

[68] Impact accepts that certain aspects of the matter engage the constitutional jurisdiction of this Court, but states that it is not in the interests of justice to grant leave to appeal.

[69] Regarding the SWC applicants' argument on whether the Supreme Court of Appeal was permitted to interfere with the High Court's order, Impact states that the High Court failed to undertake the mandatory second step of determining a just and equitable remedy, so the Supreme Court of Appeal was justified in interfering with and setting aside the High Court order.

[70] Impact submits that the applicants have not made any arguments warranting this Court's interference with the Supreme Court of Appeal's remedial discretion. Impact argues that the suspension order is just and equitable and effectively vindicates the applicants' rights, as nothing in section 81 of the MPRDA precludes a fresh consultation or precludes the Minister from considering new information. Impact states that a court is empowered to fashion a new remedy and be flexible in getting to the nub of the dispute. Impact states that, on a proper interpretation of the Supreme Court of Appeal's order, a survey cannot occur until the renewal application is determined. In any event, Impact has indicated that it has no intention to proceed with any exploration until the third renewal application is determined.

[71] Impact contends further that the Supreme Court of Appeal's order is not vague and clearly directs a further consultation process to cure identified defects. Impact also disagrees that the Supreme Court of Appeal was misdirected on the facts it considered in imposing its remedial order, and submits that it relied on multiple factors supported by affidavits and expert reports or of which judicial notice could be taken.

[72] In respect of the competency of the suspension order, Impact submits that the Supreme Court of Appeal intended to preserve the exploration right, subject to a consultation to cure the identified defects, and where the Minister is obliged to consider the information obtained.

[73] Finally, Impact submits that the suspension order did not breach the applicants' *audi* rights, as a court may fashion new remedies even if this was not specifically requested. However, Impact submits that it had suggested in its heads of argument in the Supreme Court of Appeal that a further participation process could be undertaken.

Shell's submissions

[74] Shell does not contest jurisdiction, but submits that it is not in the interests of justice to grant leave to appeal.

[75] Shell contends that the Supreme Court of Appeal exercised its remedial discretion appropriately, striking a balance between all parties' interests and without misdirecting itself on the facts, and that there is no basis for this Court to interfere with its remedy. Shell submits that remittal is the default remedy in administrative reviews, and that the Supreme Court of Appeal crafted a remedy which was as close to remittal as possible, given that there would be severe prejudice to the company respondents if the right were simply set aside (that is, they could not apply for a new exploration right due to the moratorium, and would lose all their investment).

[76] Shell argues that the prejudice that was suffered was the unlawful failure to be consulted and the decision-maker's failure to take relevant factors into account. It argues that the purpose of the proposed consultation is to accommodate the interests of affected parties and will rectify the prejudice that was suffered. Shell argues that there was no violation of *audi* rights as the Minister raised the issue of suspension in the Supreme Court of Appeal. Like Impact, Shell states that it has no intention to undertake any exploration activities until a decision is made on the third renewal application.

[77] Shell argues that the applicants' submissions on the validity of the exploration right upon a decision on renewal are wrong. It submits that what was set aside was the decision to grant the exploration right and the first and second renewals, and not the registration of the exploration right. It submits that if the third renewal process corrects the identified defects, the deed of renewal could be registered, and the deeds issued pursuant to the decisions set aside – the deeds in respect of the exploration right and the first two renewals, which were not set aside – could be left intact.

[78] Shell denies that the Minister's hands are tied in a renewal process and contends that section 81 of the MPRDA allows the Minister to renew the right if the "terms and conditions of the exploration right [are] not in contravention of any relevant provision of this Act *or any other law*".[65] It submits the Minister may thus consider compliance

[65] Emphasis added.

with PAJA as part of the renewal process, and the Minister could decline the renewal if PAJA requirements have not been met. Shell contends that the applicants themselves argued in the Supreme Court of Appeal that they would want to make submissions to the Minister in respect of the third renewal. Shell also relies on section 24Q of NEMA and section 12(2) of NEM Amendment Act[66] concerning monitoring and assessment of an EMPr, and the Minister's power to order amendments to an EMPr. Shell argues that these provisions support the Minister's authority to grant renewal conditionally, taking into account new evidence.

[79] Shell denies that the suspension order is vague, as all parties comprehend that the declaration of invalidity is suspended pending a decision on the renewal application and consultation is mandated as part of the renewal process. Shell emphasises that it has a vested interest in ensuring that the consultation process is adequate and meaningful, since a valid third renewal is dependent on proper compliance with the Supreme Court of Appeal's order.

[80] Shell concludes that the application for leave to appeal should be dismissed, but if this Court finds the Supreme Court of Appeal's order unclear, this Court should use its wide remedial powers to clarify the parameters of the future consultation process.

Issues for determination

[81] There are two primary issues for determination. The first is whether this Court has jurisdiction to hear the matters and, if so, whether leave to appeal should be granted. The second is whether this Court would be entitled to interfere with the Supreme Court of Appeal's exercise of its remedial discretion in determining a just and equitable order. At the heart of these issues is the question of whether the Supreme Court of Appeal exercised its discretion judicially when it suspended the High Court's order of invalidity on the basis that the defects could be cured through a further public participation process conducted at the renewal stage.

[66] Above n 55.

Analysis

Jurisdiction and leave to appeal

[82] Having considered the nature of the dispute, the constitutional rights implicated and the public interest considerations, I am satisfied that both this Court's constitutional and general jurisdiction are engaged. The appeal raises significant questions regarding the scope and formulation of just and equitable remedies under section 172(1)(b) of the Constitution, the interpretation and application of PAJA and the vindication of fundamental rights of affected communities under sections 24, 25, 30 and 31 of the Constitution. These considerations trigger this Court's constitutional jurisdiction.

[83] Further, this Court recently held in *Ekapa*[67] that the manner in which courts exercise their true discretion in relation to relief under section 172(1)(b) is a constitutional matter.[68] The issues are of significant public import with reasonable prospects of success and leave to appeal should be granted.

Anterior question of audi

[84] The SWC applicants argue that a question that arises prior to, and separate from, the question of interference with the true discretion of the Supreme Court of Appeal in its choice of a just and equitable remedy is the validity of the Supreme Court of Appeal's order in light of their *audi* complaints. Relying on *Knoop*,[69] *Makate*[70] and section 34 of the Constitution, the SWC applicants submit that the violation of the *audi* principle has the effect of rendering the Supreme Court of Appeal's order void. They contend that even in the context of section 172 of the Constitution, just and equitable discretion is

[67] *Ekapa Minerals (Pty) Ltd v Sol Plaatje Local Municipality* [2025] ZACC 1; 2025 (5) BCLR 505 (CC); 2025 (6) SA 1 (CC).

[68] Id at para 43.

[69] *Knoop N.O. v Gupta* [2020] ZASCA 163; [2021] 1 All SA 726 (SCA); 2021 (3) SA 88 (SCA).

[70] *Vodacom (Pty) Ltd v Makate* [2025] ZACC 13; 2025 (6) SA 352 (CC); 2025 (10) BCLR 1174 (CC); [2025] 11 BLLR 1105 (CC).

not free of the pleadings and the Supreme Court of Appeal's order is voidable on the ground that it granted a remedy it did not canvass with the parties.

[85] There was some debate during the hearing whether the *audi* issue was raised in this Court as a self-standing ground of appeal for rendering the Supreme Court of Appeal's order invalid, or whether it was pleaded in support of the ground that the Supreme Court of Appeal did not exercise its discretion judicially. I am of the view that the issue of just and equitable relief was sufficiently canvassed in the pleadings and that the Supreme Court of Appeal was entitled to introduce relief *mero motu* (of its own accord) without first affording the parties a hearing. This finding on its own is not dispositive of the matter. While it is desirable for a court considering this type of relief to afford the parties an opportunity to be heard, the failure to do so will not always be fatal. A rigid approach in that regard would unduly constrain the exercise of the court's wide remedial powers under section 172(1)(b). Rather, the absence of *audi* may be a factor pointing to the conclusion that the Supreme Court of Appeal misdirected itself and did not exercise its discretion judicially. In *Qwelane*,[71] this Court held that even when exercising a true discretion, the principles of *audi* must be afforded to the parties.[72]

Interference with discretion

Supreme Court of Appeal's interference with the High Court order

[86] In considering and determining a remedy under section 172(1)(b) of the Constitution, a court exercises a true discretion.[73] A true discretion exists when a lower court has a choice of equally permissible options. An appellate court may not interfere unless the discretion was not exercised judicially, or was influenced by wrong principles or a misdirection on the facts, or the lower court reached a decision which could not

[71] *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC).

[72] Id at paras 31-5.

[73] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) and *Ekapa* above n 67 at para 57, relying on *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54; [2022] 2 All SA 626 (SCA); 2022 (5) SA (56) (SCA) (*Central Energy Fund*) at para 43.

reasonably have been made by a court properly directing itself to all the relevant facts and principles.[74]

[87] In their written submissions, the SWC applicants argue that the High Court exercised its discretion judicially and correctly in deciding to set aside the impugned decisions without more, and there was no scope for the Supreme Court of Appeal to interfere. The respondents disagree and contend that the High Court failed to exercise any discretion as it did not engage with the question of just and equitable relief at all.

[88] Apart from the fact that the SWC applicants did not raise this issue in their founding papers in this Court, it is also incorrect that there were no grounds for the Supreme Court of Appeal to interfere with the High Court's remedy. When regard is had to the entirety of the High Court judgment, it is apparent that the High Court simply did not consider just and equitable relief. Once the High Court found that the review grounds had been established, it reviewed and set aside the impugned decisions. It erred in that regard, since it was obliged to consider what a just and equitable remedy would be. This duty is imposed by section 172(1)(b) of the Constitution and section 8(1) of PAJA. If the High Court had done so, it would have taken into account, inter alia, the significant financial investment made by the company respondents and weighed that against the public interest; it would have considered the seriousness of the review grounds that it found had been established; and it would have considered the need to properly vindicate the rights that had been violated in the making of the impugned decisions. In short, the High Court would have considered what was just and equitable, having regard to all the circumstances of the case.

[89] This Court has held that in determining just and equitable relief, a court must balance the interests of all parties and the public interest.[75] In failing to balance the relevant interests of all affected parties, the High Court misdirected itself on the legal

[74] *Trencon* id at paras 88-90.

[75] *Residents, Industry House v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC); 2023 (1) SACR 14 (CC); 2023 (3) SA 329 (CC) (*Residents, Industry House*) at para 114.

principles. The Supreme Court of Appeal's finding that the High Court had "erred in not weighing up the relevant factors"[76] is correct. The Supreme Court of Appeal was thus entitled to assess the question of a just and equitable remedy.

This Court's interference with the Supreme Court of Appeal's exercise of its discretion

[90] Even though the applicants did not frame their challenge within the *Trencon* framework, the basis of their attack, if correct, would justify a finding that the Supreme Court of Appeal did not exercise its true discretion judicially and misdirected itself on the facts.

[91] In considering this part of the challenge, it is worth recalling that the Supreme Court of Appeal explicitly endorsed the substantive findings of the High Court and was required at least to have regard to those conclusions. It accepted that the exploration right and the two renewals had been granted unlawfully. The High Court reviewed and set aside the right and its renewals on three independent grounds. The first was that it fell to be reviewed on the basis of procedural unfairness under section 6(2)(c) of PAJA; the second was that the Minister failed to take into account relevant considerations under section 6(2)(e)(iii) of PAJA; and the third was the failure to comply with applicable legal prescripts under section 6(2)(b) of PAJA.

[92] The Supreme Court of Appeal characterised most of these defects as a logical corollary of the inadequacy of the consultation process. On this basis, it took the view that a further public consultation process could cure the procedural shortcomings in the impugned decisions. It was wrong; the defects in the impugned decisions extended beyond procedural shortcomings.

[93] The Supreme Court of Appeal misdirected itself in granting the suspension order in the following respects:

[76] SCA judgment above n 62 at para 28.

(a) It reckoned that the failure to consult when the exploration right was granted under section 79 could be cured through consultation in a renewal application under section 81. Without making any definitive finding on whether section 81 requires public consultation in all instances, it must be accepted that the section certainly does not provide for consultation of the kind envisaged by the Supreme Court of Appeal (that is, consultation that might have justified the refusal of the initial exploration right). It is not appropriate in law to infuse such a consultation into the renewal process when the MPRDA does not contemplate it and when it does not conform to the sequencing of the MPRDA in relation to the requirements for the grant of an exploration right as opposed to its renewal.

(b) It incorrectly conceptualised the deficiencies in the taking of the impugned decisions as consultation-linked and purported to craft a remedy that was confined to curing those defects. In doing so, it failed to consider all the review grounds that the High Court found to have existed and, in particular, failed to consider how the remedy it ordered would address the review grounds that were not consultation-linked. These include the failure of the decision-maker to take into account climate change considerations and the ICMA; the failure of the decision-maker to apply the precautionary principle; and the failure to comply with applicable legal prescripts.

(c) It contemplated consultation in the renewal process as part of its remedy (even though it did not explicitly order so), but failed to provide guidance on how the consultation would be undertaken and by whom, and how its outcome would be factored into the process of renewal of the exploration right. This ought to have been canvassed since it is difficult to see how consultation could fit into the renewal process when it is not provided for in the MPRDA nor relevant for the decision to renew.

[94] It is for these reasons that the suspension order of the Supreme Court of Appeal lends itself to interference by this Court. The Supreme Court of Appeal misdirected

itself on the law and the facts in ordering suspension of the orders made by the High Court as part of a just and equitable remedy. It did so because the order of suspension contemplated that the consultation that would follow would cure the defects identified by the High Court in the impugned decisions. I have shown that consultation could not remedy those defects.

A just and equitable remedy in general

[95] Having established that there are grounds to interfere with the remedial discretion of the Supreme Court of Appeal, this Court is empowered to consider the question of a just and equitable remedy afresh. Before doing so, it is appropriate to revisit some of the principles that are applicable in the determination of what constitutes a just and equitable remedy.

[96] In *Steenkamp*,[77] this Court confirmed that "every improper performance of an administrative function would implicate the Constitution".[78] When a ground of review under PAJA is proven, sections 38 and 172(1)(b) of the Constitution and section 8 of PAJA are necessarily triggered.[79] These provisions share the goal of providing remedies that effectively vindicate an aggrieved party's violated rights.

[97] Courts enjoy a generous discretion to make orders that are just and equitable; this power is "bounded only by considerations of justice and equity".[80] This Court has previously declined to lay down inflexible rules for a just and equitable remedy once administrative action is found to be invalid.[81] This is for good reason. What constitutes a just and equitable remedy inevitably varies depending on the facts and exigencies of

[77] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

[78] Id at paras 29-30.

[79] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 780. See also *Steenkamp* id.

[80] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) at para 53.

[81] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (3) BCLR 229 (CC); 2011 (4) SA 113 (CC) (*Bengwenyama*) at paras 81-5.

a particular matter. Nevertheless, and mindful that no closed list of factors can be prescribed, the jurisprudence identifies considerations that commonly bear on the exercise of the remedial discretion.

[98] In *Steenkamp*, this Court set out a useful list of considerations when a court is tasked with formulating a just and equitable remedy, which include that—

(a) in each case the remedy must fit the injury;

(b) the remedy must be fair to those affected by it and yet vindicate effectively the right violated;

(c) the remedy must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law; and

(d) the purpose of a public remedy on a broader level is to entrench the rule of law.[82]

[99] Other factors relevant in the enquiry include the extent or materiality of the breach,[83] the interests of all affected parties and the public interest,[84] the conduct of the parties and their contribution to the unlawfulness[85] and practical considerations such as the feasibility of the remedy in light of changed circumstances.[86]

[100] In acknowledgement of the expansive remedial discretion that courts possess, this Court in *Mhlope*[87] and *Black Sash*[88] paved the way for courts to fashion

[82] *Steenkamp* above n 77 at paras 29-30.

[83] *Bengwenyama* above n 81 at para 85.

[84] *Residents, Industry House* above n 75 at para 114.

[85] *Bengwenyama* above n 81 at para 87. See also *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* [2007] ZASCA 165; [2008] 2 All SA 145 (SCA); 2008 (2) SA 481 (SCA); 2008 (5) BCLR 508 (SCA) (*Millennium Waste*) at para 26; *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8; [2009] 2 All SA 513 (SCA); 2009 (4) SA 628 (SCA); 2009 (8) BCLR 813 (SCA) (*Eskom Holdings*) at para 14; and *Central Energy Fund* above n 73 at para 42.

[86] *Trencon* above n 73 at para 51.

[87] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at paras 132-7.

[88] *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) at para 51.

extraordinary remedies in response to extraordinary circumstances. In this respect, Mogoeng CJ, in *Mhlope*, stated as follows:

> "Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are 'any order that is just and equitable'. This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b)."[89]

[101] It must be borne in mind that a just and equitable remedy should focus, where possible, on affording the most effective remedy to the party whose rights have been infringed, and only thereafter consider whether countervailing considerations justify an attenuation of the ordinary consequences of invalidity.[90] Although the interests of all affected parties must be taken into account when deciding on a just and equitable remedy, courts should be cautious that in doing so they recognise that the remedy must vindicate the rights violated – that, after all, is the primary purpose of the remedy.

[102] When determining an appropriate remedy, the starting point should be the default response to unlawful administrative action, which must be determined with reference to section 8 of PAJA and section 172(1)(b) of the Constitution. Section 8 of PAJA provides:

> "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
>
> . . .
>
> (c) setting aside the administrative action and—

[89] *Mhlope* above n 877 at para 132.

[90] What *Bengwenyama* above n 81 at para 85 calls an "amelioration of legality".

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation."

[103] Even though setting aside is coupled with remittal in section 8 (with substitution only occurring as an alternative in "exceptional cases"), and although this Court has said remittal was "almost always" the proper course[91] and that it is the "default remedy",[92] courts are not compelled to order remittal where it would not be just and equitable. In the first place, section 8 expressly provides that the just and equitable orders that a court may make *include*, and are therefore not limited to, the types of orders set out in section 8.[93] The powers granted to a court are wide and permissive, and not limited to the orders set out in that section. Second, under section 172(1)(b), a court is empowered to make *any* order that is just and equitable.

[104] It is correct that, in many cases, remittal will follow the setting aside of administrative action. This is because a court will, under ordinary circumstances, defer to the expertise of the decision-maker and prefer to show comity to the separation of powers doctrine by opting not to make decisions on behalf of other functionaries.[94] In ordinary circumstances, a remittal to the decision-maker is uncontroversial and gives effect to the right to fair administrative action.

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[91] *Trencon* above n 73 at para 42.

[92] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) (*NERSA*) at para 89.

[93] A similar point was made in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) SA 31 (CC); 2023 (2) BCLR 149 (CC) (*Esorfranki*) at para 55, where this Court held that the relief contemplated in section 8 is "exemplary rather than exhaustive", and that undue weight should not be placed on any one remedial form. See also *Trencon* above n 73 at para 90 and *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Nxasana*) at para 68.

[94] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 46-9; *Trencon* id at paras 43-5; and *NERSA* above n 92 at para 90.

[105] That remittal is regarded as the default remedy does not, however, constrain the court's ability to break from that norm. Every remedy is subject to the overarching requirements of justice and equity. As this Court held in *NERSA*, "[a]lthough [remittal] is the default remedy, it remains a *discretionary* remedy. As a result, there are certain instances where setting aside and non-remittal would be appropriate."[95]

[106] If remittal followed *ex lege* (by operation of law) upon setting aside administrative action, it would be unnecessary for PAJA to confer on courts the power to remit the matter for reconsideration. It is true that the powers in section 8(1)(c) and 8(1)(c)(i) of PAJA are framed conjunctively. That is, PAJA says that a court may set aside the administrative action *and* remit it for reconsideration (*or* in exceptional circumstances, substitute the action and correct it; *or* order the decision-maker to pay compensation). However, as I have said, the words "any order" and "including" in section 8(1) clearly do not limit the court to the relief set out in section 8. To treat remittal as mandatory where substitution does not take place would impose a limitation on the court's remedial power that is not supported by the text of section 8 read holistically.

[107] The real inquiry is whether, in the circumstances of the case, remittal would constitute a just and equitable response to the unlawfulness that has been established in the review proceedings. If we were to find that remittal necessarily followed setting aside, absent an indication from a court that it would order substitution or compensation, it would render remittal a non-discretionary remedy in that a court will always have to reckon with why remittal is *not* just and equitable, rather than focusing on whether remittal *is* just and equitable in any particular case. This is contrary to the width of a court's remedial powers in terms of section 172(1)(b), and the injunction to determine

[95] *NERSA* id at para 88 (emphasis added). The second judgment correctly points out that neither *NERSA* nor the cases relied upon involved setting aside and non-remittal. However, the quoted portion accurately captures what must be the correct position in the remedial enquiry. See also the judgment of Maya CJ in *Economic Freedom Fighters v Speaker of the National Assembly* [2026] ZACC 17 at para 116 where it was stated that "[t]ypically, *but not always*, the quashed decision is either then returned to the relevant functionary or replaced by that of the court" (emphasis added). This implies that there are situations in which neither option will be appropriate.

what is just and equitable. If it is just and equitable to set aside unlawful administrative action without remittal or substitution, this Court is empowered to do so, and we have done so in the past.[96]

[108] There is some authority that appears, at first glance, to sit uneasily with the principle that remittal is not always implicit or automatic upon setting aside administrative action. In *Simcha*,[97] the Supreme Court of Appeal endorsed the High Court's finding that, although the Court in earlier proceedings had not expressly remitted the matter to the decision-maker —

> "the legal effect of the setting aside of the [decision-maker's] approval would have been a remittal. This is particularly so where a party has not requested it, and a court has not seen fit to substitute a decision-maker's decision with one of its own."[98]

Relatedly, in *Ad Outpost*,[99] the Supreme Court of Appeal held that once a decision is set aside, it is regarded as if it were never taken and that therefore, the applications preceding it remain pending and awaiting a decision.[100] Both of these decisions suggest that remittal is anchored to the relief of setting aside.

[109] However, these conclusions must be understood in their proper context. In *Simcha*, the City of Cape Town (City) approved Simcha Trust's building plans for a large development. This was challenged by neighbouring property owners, and by agreement between the parties, the approval was set aside. The matter was not expressly remitted to the City for reconsideration. Simcha Trust proceeded to claim costs and compensation from the City for wrongfully approving its plans and causing it financial

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[96] See *Bengwenyama* above n 81. The second judgment finds that in *Bengwenyama*, this Court was effectively recognising that setting aside would have the effect of leaving Genorah Resources (Pty) Limited's (Genorah) application for a prospecting right open for adjudication. There is no indication of this from the judgment, and conjecture as to what was meant is not useful. What is plain is that this Court ordered neither remittal nor substitution, indicating that setting aside without more is a valid remedial option.

[97] *Trustees, Simcha Trust v De Jong* [2015] ZASCA 45; [2015] 3 All SA 161 (SCA); 2015 (4) SA 229 (SCA).

[98] Id at para 25.

[99] *City of Johannesburg v Ad Outpost (Pty) Ltd* [2012] ZASCA 40; 2012 (4) SA 325 (SCA).

[100] Id at para 20.

loss. The High Court noted that although the order setting aside the approval had not expressly ordered remittal, that was its legal effect, and the application remained before the City for determination. As such, the High Court found that compensation was not an available remedy, since the default remedy of remittal had been (implicitly) granted. Crucially, the High Court held that the review court had not found that the application was defective, and none of the parties understood the order to be finally determinative of whether the building plans could be approved. Remittal could occur in *Simcha* because there was no defect in what was served before the decision-maker and because the City had granted the approval in accordance with an inadequate procedure. The application could rightly be returned to the decision-maker for reconsideration under an appropriate procedure for these reasons.

[110] In *Ad Outpost*, the setting aside was again premised on agreement between the parties. In that case, Ad Outpost (Pty) Limited, an advertising agency, had obtained permission from the City of Johannesburg (CoJ) to erect billboards at two locations. A renewal application was refused by the CoJ, and after an unsuccessful internal appeal, Ad Outpost (Pty) Limited approached the High Court. The CoJ conceded that its decision had been invalid under the by-laws that had been applicable at the time but contended that new by-laws contained an absolute prohibition against advertising at certain locations. The High Court considered that the original by-laws would apply when Ad Outpost (Pty) Limited's application was reconsidered. On appeal, the Supreme Court of Appeal held that the later by-laws prohibiting advertising were applicable and, accordingly, it would be an exercise in futility to remit the matter and that it should be simply set aside. Remittal was therefore found to be inappropriate, although the Court did not order substitution.

[111] I do not read these cases as laying down a general principle that a court is bound to choose between either remittal or substitution when setting aside administrative action, or that remittal follows as a matter of course whenever administrative action is set aside unless exceptional circumstances are demonstrated justifying substitution. The remedies in those cases were fact-bound. To the extent that the Supreme Court of

Appeal was enunciating a general principle that remittal follows automatically upon setting aside, that principle cannot be sustained.

[112] I have read the judgment of my Colleague, Rogers J (second judgment). It finds that *Ad Outpost* and *Simcha* were laying down an "obvious" principle that when a decision on an administrative application is set aside, the application remains pending. As such, says the second judgment, courts are constrained to choose between remittal or substitution when exercising their remedial discretion when a decision is set aside in an administrative application. I disagree. To view a court as being confined to a binary choice of either remittal or substitution upon setting aside would unduly fetter its discretion to make "any" order that is just and equitable. Similarly, to conceive of a pending, unresolved administrative application when a decision granting it is set aside would force a court to order remittal if exceptional circumstances for substitution were not present, even if remittal would be unjust and inequitable. Doing so would undermine the carefully developed jurisprudence of this Court articulating that its remedial discretion is wide and flexible, and bounded only by the requirements of justice and equity.[101] To treat remittal as an automatic consequence of setting aside would mark a retreat from that jurisprudence and convert a discretionary enquiry into a rigid rule. This Court has already stated that courts should not place the remedial enquiry into a "conceptual straitjacket".[102] In my view, the second judgment does just that.

[113] There are cases where setting aside is required, but remittal is not possible or appropriate, and substitution is not warranted. This may be, for instance, where a decision-maker lacked the power to act,[103] as there could be no remittal to a decision-maker with no authority to make the decision in question and there could be no substitution of a decision that cannot be taken. It is not useful or possible to set out all the circumstances that would warrant setting aside but not substitution or remittal,

[101] *Nxasana* above n 93 at para 68.

[102] *Bengwenyama* above n 81 at para 82.

[103] Section 6(2)(a)(i) of PAJA.

but this example demonstrates that, in certain instances, setting aside alone is a competent remedy when a ground of review under PAJA is established. If a court's order simply sets aside the unlawful administrative action, the order means exactly what it says. It does not mean that, in addition, the matter is implicitly remitted for reconsideration. Court orders must be clear and unambiguous,[104] and parties must be able to establish on the face of the order if there is a remittal or not.

[114] Remittal may also be inappropriate where a party has contributed to the unlawfulness, and where it would entitle them to cure defects of their own making. Remittal is not a mechanism to afford an errant applicant a second bite at the cherry to cure defects in its own case by introducing new material that was not before the decision-maker at the time of the impugned decision.[105] Our law recognises that a party's own role in the defects of an administrative process is relevant to the shaping of an appropriate remedy. In *Millennium Waste*, it was observed that where a party is complicit in the irregularity, setting aside may follow for that reason alone.[106] If a matter is automatically remitted, notwithstanding unlawfulness by a party who stands to benefit from the process, remittal would have the anomalous effect of allowing an applicant, as a matter of course, an opportunity to cure those deficiencies and re-present its case. Such party would only need to correct its defect if a successful review of the decision was brought. That would invite non-compliance and allow parties to escape the consequences of their non-compliance, even in instances where they knowingly did not comply, which would not be just and equitable.

[115] However, in finding that remittal is not automatic, we are confronted with the dicta from *Ad Outpost* that once a decision is set aside, there is still a pending administrative application upon which the decision-maker can, and must, make a

[104] *Sithangu v Capricorn District Municipality* [2023] ZASCA 151 at para 16.

[105] Of course, such supplementation may be permitted if the applicant acted in good faith, or fairness so requires, and if a cogent case is made out for the right to supplement the record before the decision-maker.

[106] In *Millennium Waste* above n 855 at para 26, the Supreme Court of Appeal held that "[t]here is no suggestion that the consortium was complicit in some way in bringing about the exclusion of the tender – had that been shown it would have been appropriate to set the decision aside for that reason alone".

decision.[107] If we hold that neither substitution nor remittal follows upon setting aside, does that mean that the application preceding the administrative decision remains extant, forever unresolved? I think not.

[116] To hold that an application, tainted by an irregular process or by its own substantive defects, must necessarily be decided upon when a decision is set aside, even in the absence of an express remittal would undermine administrative finality. It would introduce uncertainty and potentially allow for perpetual supplementation and reconsideration of the application indefinitely. In this case, for instance, it would permit the company respondents to refine and augment the documentation Impact initially submitted for consideration by the decision-maker. If that reconsidered decision were again reviewed and set aside, the same reasoning would afford them yet another opportunity to cure the defects that contributed to the unlawfulness in the first place. Because the rule of law requires certainty,[108] and because of the public interest in the finality of administrative processes, we cannot countenance an administrative process that remains indefinitely open, allowing a party to correct defects in that process which they contributed to, without a court expressly ordering so. An express order of remittal (with or without directions) would be the signaling by the review court that in those circumstances the administrative application preceding the decision that was set aside requires adjudication. This is the most reasonable interpretation in the circumstances that not only takes into account the wide just and equitable discretion of the court but also ensures administrative finality and efficiency.

[117] Unlike the stance taken in the second judgment, I do not hold the view that setting aside absent remittal or substitution must always mean that there is an undecided application or that a legal vacuum is created. Instead, a court setting aside a decision has a discretion, anchored in section 172(1)(b), to determine what becomes of the administrative process that gave rise to the decision, based on the nature of the defect

[107] *Ad Outpost* above n 99 at para 20.

[108] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) BCLR 28 (CC); 2016 (1) SA 621 (CC) at para 38.

identified and what would be just and equitable in the circumstances. Where, for example, the defects permeate the entire process, and/or where steps in a process are so interlinked, a court may conclude it is just and equitable for the process to be undone. In this way, there would be no pending application.

[118] Unlike the second judgment, I do not believe that an order setting aside the decision to grant the exploration right and its renewals should mean that the process must be rewound to when the application was accepted by the Petroleum Agency of South Africa (PASA) under section 79. The second judgment finds that this must be so, as the PASA acceptance was a distinct exercise of public power which was not impeached on review. In *Normandien Farms*,[109] this Court did not determine whether the acceptance by PASA constituted a separate administrative decision. The Supreme Court of Appeal's judgment in that case[110] did, however, consider that the acceptance of an application by PASA does not result in prejudice and was therefore not reviewable and that the review in that matter was premature.

[119] This Court need not resolve the question of whether PASA's acceptance constitutes administrative action.[111] Even if it were administrative action, this Court would be empowered to set it aside if it were just and equitable to do so. However, for present purposes, it is sufficient to proceed on the basis that the acceptance of an application under section 79 is a stage in a composite administrative process culminating in the decision made under section 80. It is the same application under section 79 that serves before the decision-maker in terms of section 80, and it does not have a separate legal existence per se once the application for a right advances to the stage when it is laid before the ultimate decision-maker. On that assumption, once a decision is taken on an administrative application in terms of section 80, the application

[109] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* [2020] ZACC 5; 2020 (4) SA 409 (CC); 2020 (6) BCLR 748 (CC).

[110] *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd* [2019] ZASCA 88; 2019 (6) SA 400 (SCA) (*Normandien Farms SCA*).

[111] It was not challenged in this case, nor was PASA's other decision, to recommend the granting of the right under section 71(c) of the MPRDA.

process under section 79, which culminates in the decision under section 80, is subsumed into the final decision itself. This is so because of the inextricable connectedness between sections 79 and 80 in the scheme of the MPRDA.[112] Therefore, upon setting aside the impugned decisions, it does not follow that there is a pending application which requires determination.

[120] It is significant that none of the parties contended that the automatic consequence of setting aside is a return to the section 79 process. The second judgment points out that counsel for the applicants in both cases submitted in oral argument that it might be a just and equitable remedy to return to the section 79(4) process, for the consultation to be re-run. I point out that both counsel premised those positions only on the basis that if the Court were minded to consider remittal, it would be just and equitable to remit to the section 79 process and not the section 81 process. A few points emerge from this.

[121] First, the applicants never supported remittal as their primary argument but only engaged the Court as to where in the process remittal should occur if the Court were of the view that remittal was just and equitable. It was in that particular context that those submissions were made and the Court is, in any event, not bound by the parties' characterisation or understanding of what would be a just and equitable remedy. That determination rests with the Court, and to this end, the Court may even go so far as to depart from what is requested by the parties.[113]

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[112] This may not be the case in all administrative application processes. For example, in a decision-making process which consists of various administrative decisions, setting aside the final decision would not automatically result in previous administrative acts within the process being set aside unless a court makes such an order. Another example would be where, as in *Simcha* above n 97, the review court had not found that the application was defective. In such an instance, there would be no need for the application itself to fall when the decision is set aside.

[113] In *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at para 211, this Court stated:

> "The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution."

[122] Second, the parties were not engaged on whether the setting aside of a decision made under section 80 inexorably means a return to the section 79 process. Rather, their submissions proceeded on the footing that this Court could, in the exercise of its discretion, order a return to the section 79(4) process,[114] instead of granting an order along the lines of the order made by the Supreme Court of Appeal. What they did not contend was that a return to section 79 followed as a matter of course. In fact, the parties appear to have proceeded from the opposite premise. Had they understood revival of the section 79 process to be the automatic consequence of setting aside, there would have been little reason to advance submissions on the appropriateness of remittal at all. The respondents, too, could have simply sought reinstatement of the High Court's order. That is not how the parties understood the effect of setting aside. In any event, the apparent consensus on the effect of setting aside cannot determine the legal position.

[123] For the reasons set out above, the proposition that remittal is either automatic or implicit upon setting aside, in general and in this specific case, cannot be sustained. Remittal remains a discretionary remedy that must be justified on the facts. However, even if it were supposed that remittal is the automatic consequence of setting aside unlawful administrative action, there is certainly no automatic entitlement of a party involved in the administrative process to supplement the information it submitted prior to a decision being taken.

What is the just and equitable remedy in this case?

[124] Arising from the above, I have given consideration to some of the possible remedies that arise and were canvassed in the hearing. The first is an order along the lines of the suspension order of the Supreme Court of Appeal, but with the consultation process and the consideration of its outcomes properly spelt out. Another option, mooted at the hearing, would be to remit the impugned decisions for a fresh decision in terms of section 79, and a third option is an order setting aside the impugned decisions *in toto* (as a whole) without any suspension or remittal.

[114] But as I will explain, a return to the section 79(4) process would not be just and equitable.

[125] As is apparent from the discussion above, there are serious shortcomings in an order along the lines of that granted by the Supreme Court of Appeal, in the main that the MPRDA does not contemplate consultation that was lacking in the process leading to the granting of the right taking place in the renewal stage. Notionally, this Court *could* use its wide remedial powers to require the applicants to be consulted, in the context of a renewal application, on whether the right should have been granted in the first place. This Court has the power to depart from the statutory scheme when exercising its remedial powers, as was affirmed in *Mhlope*[115] and *Nxasana*,[116] but I do not think this power should be exercised here. Serious separation of powers concerns would arise if courts were free to routinely depart from legislation when determining a just and equitable remedy. Such power should be used only exceptionally,[117] and no exceptional circumstances are present in this case. A court should not depart from the statutory scheme simply because financial interests may be adversely affected and because there is a remote prospect of public good that may eventuate.

[126] Furthermore, if this Court were to make an order allowing this type of public consultation in the renewal stage, it would set a precedent that a flawed consultation under section 79 can later be "cured" during renewal under section 81. Other courts have already started adopting this position following the Supreme Court of Appeal's judgment.[118] Allowing such reasoning undermines the separation of powers, as it effectively rearranges the process and requirements of granting and renewal of rights as determined by the Legislature, and risks encouraging future applicants to bypass proper consultation as required under section 79 by deferring it to the renewal stage under section 81.

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[115] *Mhlope* above n 87.

[116] *Nxasana* above n 93 at paras 68-74.

[117] Id at para 86. This could be, for example, pursuant to a constitutional injunction, as was the case in *Mhlope* above n 87.

[118] See *Green Connection NPC v Minister of Forestry, Fisheries and the Environment* [2025] ZAWCHC 349 at paras 217-33.

[127] Clearly, an order mandating consultation in the renewal process is not just and equitable. There are two other options – an order remitting the decision to the decision-maker, or an order along the lines of the High Court order that set aside the impugned decisions, with no order of remittal or suspension. I have already explained the consequences of the latter remedy. Since there are considerations common to both, I will deal with them together. There was not much time spent during oral argument on the option of remittal but that should not stand in the way of its proper consideration, as there is no impediment to the Court's consideration of a just and equitable remedy.

[128] As stated, while remittal is often the default remedy, a court must be satisfied that, in each instance and regard being had to the facts and circumstances, it would constitute a just and equitable remedy. A court must consider a number of factors in deciding whether it would be just and equitable to remit, which includes: whether remittal can cure all the defects; the conduct of the parties; the passage of time between the original decision and the decision to be made on remittal; the ongoing relevance of the material that may serve before the decision-maker and any changes in the factual and legal matrix; and whether remittal is in line with the corrective principle.[119]

[129] I do not understand a remittal to always be just and equitable when what is contemplated is in fact a fresh application with new information to be sourced or supplied and then a fresh decision taken on the application. This would be particularly so when the cause of the invalidation can be substantially attributed to the party whose application stands to be remitted.

[130] Mindful that a just and equitable remedy must consider the public good and the rule of law, vindicate the rights of the aggrieved party and be fair to all the parties, I pose the following question: can it be said that remittal 13 years after the impugned decision is just and equitable in respect of a fatally flawed application for a right under

[119] See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179; 2014 (6) BCLR 641 (CC) (*AllPay II*) at paras 29-32 for a discussion on the corrective principle.

circumstances when the applicant for the right must have or ought to have known that the application was so flawed? I am of the view that remittal would not be a just and equitable remedy, after considering the factors above, and those which follow.

(a) Consultation followed by remittal cannot cure the defect

[131] I am not convinced that ordering a fresh consultation at this juncture (which is what would need to precede a remittal) would fully vindicate the violation of the applicants' rights. It might conceivably rectify the procedural unfairness and the failure to consider the applicant communities' spiritual, cultural and livelihood rights. However, consultation is not merely about the opportunity to express a view or influence an outcome. On a more fundamental level, regardless of whether input has any effect, it is a process which affirms human dignity by affording a seat at the table to those whose lives are impacted by decisions. It affirms the agency of affected communities and their status as participants rather than obstacles in decisions that profoundly affect their land, culture and livelihoods.

[132] In the context of extractive industries, the enquiry cannot be reduced to a formal balancing exercise that treats cultural, religious, spiritual and environmental concerns as merely competing interests against economic development. It is also ahistorical to place these interests on equal footing, given the long history of dispossession and marginalisation of coastal communities whose relationships with land and sea have often been subordinated to commercial extraction. Although job creation is a legitimate consideration, it cannot be assumed to be inherently beneficial without asking who receives those jobs, how secure they are and what social, ecological and cultural costs the affected communities are expected to bear. In this context, the communities' constitutionally enshrined and protected rights are given practical force through procedural duties of meaningful consultation, participation and respect for their cultural and spiritual relationship with the environment. A just and equitable remedy should therefore not allow speculative or corporation-centred economic benefits to outweigh procedural justice where communities' livelihoods, cultural identity and environmental interests are directly at stake.

[133] The extent and seriousness of the breach in this case, which is a relevant factor in determining a just and equitable remedy,[120] was profound. Thousands of community members were excluded from the decision-making process and wholly deprived of any opportunity to present information concerning a decision which would impact their livelihood and cultural and spiritual practices. Although I make no finding on whether, as the company respondents contend, consultation is required at the renewal stage, on their own argument, the consultation failures were repeated in the subsequent two decisions to renew the right and remained uncorrected for many years. To tell communities, more than a decade after the fact, that they may now be consulted, is not curative. It says to them that the violation of their rights was not a matter of substance but rather a matter of process. Requiring a consultation to be conducted now does not vindicate the right to be consulted at the outset and does not vindicate the infringement of the applicant communities' right to dignity.

(b) Relevance of material before the decision-maker and changed factual and legal matrix

[134] The original application for an exploration right and the EMPr were submitted in 2013 and approved on 29 April 2014. The legal landscape has changed significantly since then. The MPRDA has been amended with the introduction of the OES.[121] It now provides that no person may inter alia explore for any mineral or petroleum or commence with any work incidental thereto on any area without an environmental authorisation in terms of the NEMA.[122] Since this Court declined to adjudicate the issue

[120] *Bengwenyama* above n 81 at para 85.

[121] The OES is a regulatory framework implemented on 8 December 2014, which sought to integrate and harmonise aspects of the environmental management and licensing of mining, environmental authorisations and water use into one efficient system. See South African Government "Government on rollout of 'One Environmental System'" (8 December 2014), available at https://www.gov.za/news/media-statements/government-rollout-"one-environmental-system"-08-dec-2014.

[122] Section 5A of the MPRDA. In turn, section 24F(1)(a) of NEMA, read with NEMA's definition of "listed activity", provides that no person may commence a listed activity unless the Minister has granted an environmental authorisation for that activity. Item 18 of the EIA Regulations Listing Notice 2 of 2014 includes as a listed activity "any activity including the operation of that activity which requires an exploration right as contemplated in section 79 of the MPRDA".

of whether the company respondents also required an environmental authorisation in terms of NEMA in addition to its EMPr,[123] I take the point no further than mentioning that there is uncertainty as to the legal requirements that would be applicable if this court were to order remittal.

[135] Beyond the changed legal matrix, the factual matrix has also changed. The detailed and specific information contained in the EMPr would have been generated in 2013.[124] If this Court were to order remittal, it is difficult to see how the EMPr prepared some 13 years ago would have much relevance or be of assistance to the decision-maker. We may fairly conclude that over a decade later, the assumptions in the EMPr underlying the proposed operations, the projected impacts, the state of scientific knowledge, the budget and possibly the financial and technical position of the applicants have changed in the intervening years. While the MPRDA does provide for an EMPr to be amended, the substantive changes needed would in all likelihood go beyond a mere amendment and require the preparation and approval of a substantively new EMPr.

[136] And so, an order of remittal would be of little value and certainly not enable a fresh decision to be taken. For a fresh and properly considered decision to be taken, a new application, including a fresh consultation process and a new EMPr, would be required. It is clear that the decision-maker's failure to take into account relevant considerations cannot be rectified by sending the original application back for reconsideration. There would really be nothing to remit given the scope of what a proper consideration of the remitted application would require. In substance, what will happen is that a substantively fresh application will have to serve before the decision-maker under the guise of an "amended" or "updated" application. Calling this a remitted application would be inaccurate because, as I have pointed out, there is nothing

[123] See [51] above.

[124] This information includes inter alia, the nature and extent of the proposed operations; the proposed budget; the likely environmental impacts; the financial and technical capacity to undertake the proposed activities; measures to mitigate and rehabilitate environmental harm; and details of the consultation with interested and affected parties.

to remit except an outdated 13-year-old application and consultation and environmental management reports that go with them that have no currency.

[137] It should be noted that the High Court made a factual finding, terse though it may be, that the EMPr submitted after the PASA stage simply made unsubstantiated statements that the seismic survey would create jobs and increase government revenue. This was not disturbed on appeal to the Supreme Court of Appeal. While the decision-maker was required to consider whether the grant of the right would meet the objects referred to in section 2(d) and (f) of the MPRDA, the company respondents were, for their own part, required to ensure that the application contained sufficient information to satisfy the MPRDA's transformative and beneficiation objectives. This is not a tick-box exercise but goes to the heart of economic transformation and is rendered even more pressing in this matter as it involves the use of natural resources of our country whose ownership vests collectively in its people. This too was a serious shortcoming of substance in the 2013 application, and one must be cautious in messaging that such shortcomings may simply and invariably be remedied by a remittal. The public good, the rule of law and the imperatives of transformation may not sit comfortably with such an approach.

[138] There are instances in our law, particularly in the context of procurement, where courts have determined that an unlawful decision should be set aside and the process should be re-run as a result of changed circumstances.[125] While it is accepted that a fundamentally flawed process may, in appropriate circumstances, be re-run, this is not a general rule where the defect lies not only in the decision-maker's conduct, but also in the failure of a party to place a compliant or complete case before the administrator. To allow a process to be re-run in such circumstances risks affording that party an opportunity to improve its position *ex post facto* (after the fact). I see little reason to

[125] See the cases cited in Hoexter and Penfold above n 79 at 785-6: *AllPay II* above n 119; *Minister of Social Development v Phoenix Cash & Carry-Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA); and *South African National Roads Agency Ltd v Toll Collect Consortium* [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA).

afford parties who contribute to the unlawfulness an opportunity to make out a case it failed to properly advance in the first instance.

[139] Second, a new process is inappropriate here because it would have the effect of *de facto* (as a matter of fact) requiring a new application and in fact side-stepping the moratorium. The applicants have argued that the moratorium ought not to have been taken into account by the Supreme Court of Appeal as it was not raised before the High Court. I disagree. An appellate court, in assessing a just and equitable remedy, is not precluded from having regard to material that was not before the court of first instance. That would unnecessarily constrain the court's powers to grant a remedy that is just and equitable. The question is one of fairness and whether the matter has been sufficiently ventilated. In my view, the moratorium has been sufficiently canvassed in this Court for us to take it into account in our remedial enquiry.

[140] The moratorium carves out an exception to its effect by allowing the processing of applications for reconnaissance permits, technical co-operation permits, exploration and production rights that had already been received before the date of the moratorium (being 28 June 2018). If this Court refuses remittal, the company respondents would not be covered by this exception. The moratorium is an independent policy decision of the Executive ostensibly taken in the public interest, and we must be careful in crafting a remedy that has the effect of bypassing the moratorium, and in my view, remittal would do precisely that.

(c) Conduct of the parties

[141] It may have been a different matter if the company respondents were innocent beneficiaries adversely impacted by a defective decision-making process. However, this is not the case. The application for an exploration right was seriously and indeed fatally flawed if regard is had to the findings of the High Court. Impact contributed to the unlawfulness of the decision. The High Court found that it did not undertake investigations to find out who the affected parties were, published notices in newspapers which were inaccessible to affected communities and published those notices only in

English and Afrikaans when communities in the area are predominantly isiXhosa-speaking. Most disturbingly, the record before the High Court shows that Impact's consultants were expressly informed by the monarchs that engagement with the broader affected communities was required, but no steps were taken to engage directly with the affected community members. In these circumstances, Impact could not reasonably have believed that meaningful consultation had occurred.

[142] Shell's contentions that it is an innocent party since it did not itself conduct the unlawful consultation process cannot be sustained. When Shell acquired 50% of the rights, it also took on responsibility for any legal vulnerabilities associated with the actions of Impact. Tellingly, however, even in the face of the compelling findings of the High Court, in this Court, Shell maintains that the consultation process was "entirely reasonable". Its stance evidences a view that consultation is a secondary and procedural consideration capable of being easily remedied. I have explained why this cannot be so. And so, I see little reason for distinguishing the conduct of Shell from that of Impact simply because it was a late entrant to the process.

[143] The interests of the beneficiaries of the impugned decision must be considered when formulating a just and equitable remedy. The Supreme Court of Appeal was correct to factor in the substantial financial expenditure (said to be in the region of R1.1 billion) by the company respondents, but was wrong in the weight it ascribed to it. Financial interests should not be unduly elevated to overrule other factors in the enquiry into what is just and equitable. As Bloem J correctly held in Part A of the High Court proceedings, "[t]he financial loss that Shell and Impact Africa are likely to suffer cannot be weighed against the infringement of the constitutional rights in question".[126]

[144] Additionally, a distinction must be drawn between parties who contribute to unlawfulness (even if not with any *mala fides* (in bad faith)) and those who are innocent

[126] HC Part A judgment above n 52 at para 68.

recipients of an unlawful benefit and have had no hand in the unlawfulness.[127] The enquiry should not be inverted by unduly focusing on what is fair for the defaulting party. Where a party has played a role in contributing to the unlawfulness, their interests necessarily carry lesser weight. This is implicit in *Bengwenyama* where this Court held that Genorah had been aware from an early stage of the community's interest, and stated that "[a]ny further prejudice it suffered, it suffered knowingly".[128] The High Court in *Adams*[129] put it more pithily in another context where there was improper notification and consultation: "*Uzenzile akakhalelwa*" which the Court translated as "self-inflicted harm deserves no sympathy".[130] Another interpretation would be "you take responsibility for the consequences of your actions". In *Bengwenyama*, the right was set aside, without any remittal or suspension. I see no reason why this Court should not make a similar order here. The distinguishing factor is the moratorium, and in my view, undue weight should not be ascribed to the moratorium.

[145] As already explained, the conduct of the beneficiary of the unlawfulness in the unlawfulness of the impugned decision is a relevant consideration. To allow the company respondents to lodge what is essentially a fresh application would place them at an advantage by allowing a side-stepping of the moratorium. It would also grant the company respondents a windfall by permitting them, if a decision is made to grant the exploration right, to three more renewals. This would have the anomalous result of conferring a tangible advantage on those who benefited from, and were complicit in, an unlawful process.

[146] There is limited public interest in making such an order. The High Court made a factual finding that transformative and socially beneficial objects of the MPRDA had not been fulfilled. Investment without benefit to those who are most vulnerable and most affected is not in the public interest. Rather, the public interest points the other

[127] *Central Energy Fund* above n 73; *Millennium Waste* above n 85; and *Eskom Holdings* above n 85.

[128] *Bengwenyama* above n 81 at para 87.

[129] *Adams v Minister of Mineral Resources and Energy* [2022] ZAWCHC 24.

[130] Id at para 41.

way, in the direction of deterring future unlawfulness. An order that permits substantive defects to be "fixed" years later without consequence risks non-compliance with the statutory framework by future applicants who know that their defects can simply be rectified at a later stage, if it is challenged at all. As this Court put it in *Esorfranki*, there are some cases where the public interest bends to the interests of the individual, and others where it will prevail over the individual.[131] This case is the latter.

[147] Further, we have no information on the rationale behind the moratorium or the length of time for which the moratorium will subsist. What we do know is that the moratorium is a valid executive decision, which restricts the filing of new applications in offshore areas. A remedy that would in effect require a substantively different application to be adjudicated would constitute a circumvention of the separation of powers. Such a remedy would require strong justification, and none exists here. It should also be noted that the existence of the moratorium also does not mean that the company respondents can never apply for an exploration right again.

[148] Despite what the second judgment holds, in setting aside the decisions, this judgment would not be making an order substituting the decision to grant the exploration right with one which says that the exploration right should not or may never be granted. While both setting aside without remittal and substitution lead to finality in the process, there is an important conceptual difference. By setting aside a decision, a court does not assume the role of the decision-maker and make the decision that the decision-maker was empowered to make on the assessment of the merits. The second judgment collapses the distinction between setting aside an unlawful decision and positively determining the outcome of an underlying application on its merits. Setting aside simply quashes the unlawful administrative action and removes its effect.

[149] Setting aside in this case means that if and when the moratorium is lifted or challenged, the company respondents may re-apply for a technical co-operation permit

[131] *Esorfranki* above n 93 at para 48.

afresh,[132] in the same position as any other party. There is no reason why they should be treated differently. They brought a flawed application which was unlawfully granted. That decision was properly reviewed and set aside and placed them in the same position as everyone else affected by the moratorium. No special considerations exist for them to be exempt from the moratorium which is what a remittal would result in. Remittal would have the effect of undermining the objective of the moratorium.

Weighing up the factors

[150] Taken together, the financial prejudice to the company respondents from setting aside the decisions while a moratorium is in place cannot outweigh the gravity of the unlawfulness in this case, especially where there is no demonstrable public interest in preserving the unlawful right or allowing the application for the right to be re-considered on substantively new grounds.

[151] Therefore, having considered the extent and materiality of the breach; the interests of all affected parties and the public interest; the conduct of the parties and their complicity in the unlawfulness; and practical considerations that go with the feasibility of remitting an application that is 13 years old and where circumstances would have changed quite considerably, I am of the view that remittal would not constitute a just and equitable remedy, and that the corrective principle would demand that we set aside the impugned decisions. In this case, it would be just and equitable to also set aside the entire administrative process which preceded the impugned decisions. Any other remedy would allow financial investment to outweigh grave constitutional violations and would signal that the rights of affected parties are subordinate to commercial interests. That is not what our Constitution envisages.

[132] Under the MPRDA, a technical co-operation permit is valid for a period not exceeding 1 year. If an application for an exploration right is made during that period, the permit remains in force until a right is granted or refused. As the decisions and application have been set aside, the technical co-operation permit has long since expired.

Remedy and costs

[152] In sum, the *Trencon* factors are met for this Court to interfere with the Supreme Court of Appeal's suspension order because that Court misdirected itself on the facts and legal principles and did not exercise its discretion judicially. This is so in that it made an order that did not vindicate the parties' rights and violated *audi*.

[153] For the reasons articulated above, the Supreme Court of Appeal's order must be set aside and the High Court's order setting aside the granting of the exploration right reinstated. As far as costs are concerned, the opposing respondents must, jointly and severally, pay the costs of the applicants in this Court, including the costs of two counsel where so employed.

[154] The costs in respect of the NEMA issue were reserved for determination at the hearing. The NEMA issue was never canvassed by the courts *a quo* and this Court dismissed this ground of appeal as it would not have been in the interests of justice to decide this issue as a court of first instance. It is not the fault of either party that the NEMA issue was not decided on its merits. As such, it would be just and equitable for each party to bear its own costs in respect of this issue.

[155] One final matter must be considered. In November 2024, the SWC applicants filed an application in terms of rule 20(1) of this Court's Rules seeking directions on the content of the record to be filed due to disagreement between the parties on the documents to be included. On 30 January 2025, this Court directed the filing of a main record which included certain documents that Shell said were relevant, and a supplementary record containing further documents that the company respondents said were relevant. The directions provided that the determination of the costs arising from the rule 20 application, the inclusion in the main record of the additional documents by Shell, and the preparation of the supplementary record would stand over for determination at the hearing of the applications for leave to appeal. The content of the record filed pursuant to the SWC applicants' rule 20(1) application was of benefit to

this Court in disposing of this matter. For that reason, each party must bear its own costs arising from the rule 20 application.

Order

[156] The following order is made:

In Case CCT 194/24 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*:
On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Eastern Cape Division, Makhanda):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "The appeal is dismissed with costs, including the costs of two counsel, to be paid jointly and severally by the appellants."
4. The first to fifth respondents jointly and severally must pay the applicants' costs in this Court.
5. Each party must bear its own costs in relation to the application in so far as it relates to the Supreme Court of Appeal's failure to determine the applicants' cross-appeal in that Court.
6. Each party must bear its own costs in relation to the application in terms of rule 20.

In Case CCT 196/24 *Natural Justice and Another v Minister of Mineral Resources and Energy and Others*:
On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Eastern Cape Division, Makhanda):

1. Leave to appeal is granted.

2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "The appeal is dismissed with costs, including the costs of two counsel, to be paid jointly and severally by the appellants."
4. The first to fourth respondents jointly and severally must pay the applicants' costs in this Court.
5. Each party must bear its own costs in relation to the application in so far as it relates to the Supreme Court of Appeal's failure to determine the applicants' cross-appeal in that Court.
6. Each party must bear its own costs in relation to the application in terms of rule 20.

ROGERS J (Savage J concurring):

Introduction

[157] I have had the benefit of reading the judgment of my Colleague Kollapen J (first judgment). I agree that we have jurisdiction and that leave to appeal should be granted. I disagree with his conclusion that there are grounds for interfering with the Supreme Court of Appeal's exercise of its remedial discretion. More importantly, if there are grounds for interference, I disagree with the first judgment's conclusion on remedy. It would be just and equitable to allow the Director-General[133] to determine whether Impact and Shell (collectively, the oil companies) should be granted a final three-year period for exploration. This could be achieved in one of two ways. There could be a judicially modified procedure for determining the application for a third renewal, along the lines envisaged by the Supreme Court of Appeal. Alternatively,

[133] Although the MPRDA refers to the Minister as the decision-maker, the Minister is empowered to delegate this authority. In the present case, the impugned decisions were taken by the Director-General, and so I shall throughout refer to the latter as the relevant decision-maker.

there could be a re-adjudication of the original application for an exploration right, but with a judicially-imposed prohibition on renewals.

[158] Some of the complexities in the first judgment's reasoning in support of its remedy are, in my view, the result of failing to appreciate that what it is in fact doing – notwithstanding statements to the contrary – is granting a substituted decision refusing the applications for an exploration right and the two renewals. In so doing – and in relation to matters entrusted by Parliament to the Minister or his delegatee, not the courts – the first judgment does not, I fear, hold the scales of justice fairly between the competing interests. It fails to appropriately balance the equally important but differing interests that arise, placing blame squarely on the oil companies.

[159] Quite clearly, important cultural, religious and environmental concerns were disregarded in the consultation process. At the same time, given our country's pressing need for economic development and job creation, the interests of the oil companies cannot simply be disregarded. Economic development and the oil companies' interests are not more important than the applicants' cultural, religious and environmental concerns. What is important is that all relevant factors and interests be given due regard.

[160] A just and equitable remedy in this case need not be a binary choice wholly in favour of or wholly against the applicants. The interests of both sides can, and should, in my view, be accommodated. This the first judgment does not do. It grants the applicants everything and the oil companies nothing. It crafts what I regard as an unprecedented remedy, the effect of which is to foreclose the possibility of the oil companies salvaging anything from their expenditure of approximately R1.1 billion.

[161] The High Court, having decided that the grant of the exploration right and the two renewals was unlawful, failed to exercise a remedial discretion at all. It set the decisions aside without further reasoning. The Supreme Court of Appeal was thus entitled to exercise a remedial discretion in place of the High Court. On further appeal to this Court, the usual constraints apply to interference with the exercise of a true

discretion. Although I doubt the existence of grounds for interference, I prefer to begin this dissent on the assumption that this Court is entitled to interfere. I shall focus on the application for an exploration right (exploration application), since the two renewals were dependent on the grant of the exploration right.

The first judgment's remedy is in substance a substituted decision

The unadjudicated exploration application

[162] If the grant of the exploration right (impugned decision) is set aside, the exploration application remains pending before the Director-General. In terms of section 79(2) of the MPRDA, PASA accepted the exploration application as compliant. Contrary to the stance taken in the first judgment,[134] this was a distinct exercise of public power with legal consequences.[135] It has never been impeached on review. Quite apart, however, from this act of acceptance, the applicants have not alleged that the application was invalidly lodged. And contrary to what the first judgment repeatedly says,[136] it was not a "flawed" application. The flaws crept in after the lodging of a valid application.

[163] The exploration application came before the Director-General for a decision. He granted it. The setting aside of that decision will be confirmed by this Court. When the courts in *Simcha* and *Ad Outpost* said that the setting aside of a decision on an administrative application results in the application remaining pending before the relevant administrative actor,[137] they were only stating the obvious.

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[134] See the first judgment at [119].

[135] See *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* [2019] ZACC 5; 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) (*Aquila Steel*) at paras 51-2, where Cameron J, without finally deciding the point, expressed a view consistent with mine. The issue was not discussed by this Court in *Normandien Farms* above n 109. In *Normandien Farms SCA* above n 110, the Supreme Court of Appeal did not state that a decision in terms of section 79(3) is not in principle subject to review but found against the review applicant on the basis of an absence of prejudice. Whether absence of prejudice goes to reviewability is an open question. I am inclined to think that parties such as the applicants in the present case could indeed consider themselves prejudiced if a non-compliant administrative application were accepted when it should have been rejected, since the acceptance of the application paves the way for future steps, including the potential grant of the application. The simple point, though, in the present case is that nobody has ever contended that the application should not have been accepted.

[136] See the first judgment at [130], [141] and [149].

[137] *Ad Outpost* above n 99 at para 20 and *Simcha* above n 97 at paras 21 and 25.

[164] This is borne out by PAJA's structure. Where the just and equitable remedy chosen by the court is a setting aside of the administrative action, section 8(1)(c) dictates that the setting aside be accompanied by either a remittal or, "in exceptional cases", a substituted decision or compensation. In other words, the court directs the appropriate consequence of setting aside the administrative action: either the administrative actor must decide the matter afresh pursuant to remittal or – in exceptional cases – the matter is taken out of the administrative actor's hands through a substituted decision or a compensation order.

[165] So there is no getting around the conclusion that, with the setting aside of the impugned decision, the exploration application remains pending. Either it must be remitted to the Director-General to decide it or this Court must grant a substituted decision refusing it.

The two alternatives: remittal or substituted decision

[166] I accept that the remedies listed in paragraphs (a) to (f) of section 8(1) of PAJA are not exhaustive of the just and equitable remedies that may be granted. However, where the chosen remedy is a setting aside of the administrative action, paragraph (c) of section 8(1) sets out the possibilities: remittal, substituted decision or compensation. In cases where decisions on administrative applications have been set aside on review, all of them will, I think, be found in substance to fall into one of only two categories: remittal or substituted decision (I leave aside the rare instances of compensation). This is unsurprising, because otherwise the unadjudicated administrative application would be left hanging. Section 8(1)(c) itself lays these down as the alternatives (together with the further possibility of a compensation order) where an administrative decision is set aside.

[167] Sometimes courts do not show the same care in formulating their orders as they do in their reasoning. Where neither remittal nor a substituted decision is expressly incorporated in the order, the reasons for the decision may nevertheless show what was

intended. Where the reasons do not elucidate the matter, the default position will apply – remittal will be assumed, since otherwise there is no way in which the unadjudicated administrative application can be finalised. It must either be decided by the administrative authority or, exceptionally, by the court.

[168] This accords with the understanding in *Aquila Steel*. The setting aside of an administrative decision simply reorganises the legal position into the one that would have existed but for the existence of the decision. In *Aquila Steel*, this logic led to the conclusion that Aquila Steel (S Africa) (Pty) Limited's application for a mining right, which was incompetent only for as long as the grant of a prospecting right to ZiZa Limited (ZiZa) existed as a fact, could be validly adjudicated once ZiZa's prospecting right was set aside.[138] *Seale*[139] illustrates the converse case: the setting aside of the first administrative act nullified the second administrative act, because in that case the second act depended for its validity on the factual existence of the first act.[140]

[169] The logic of *Aquila Steel* and *Seale*, which is concerned with the effect on a later administrative act of setting aside an earlier administrative act, manifests itself in its simplest form when only one administrative act is at play: the setting aside of a decision on an administrative application leaves that application pending but unadjudicated. *Seale*, which has been cited with approval in this Court,[141] was one of the authorities cited by the Supreme Court of Appeal in *Ad Outpost* when it said:

> "However, as this Court has regularly stressed, an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made. Accordingly, if the decisions of the appellants are to be set aside, as all parties are agreed should occur, the matter is to be considered on the basis that no valid decisions

[138] *Aquila Steel* above n 135 at para 102.

[139] *Seale v Van Rooyen N.O.; Provincial Government, North West Province v Van Rooyen N.O.* [2008] ZASCA 28; [2008] 3 All SA 245 (SCA); 2008 (4) SA 43 (SCA).

[140] Id at para 13.

[141] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 102 and fn 74 and *Nxasana* above n 93 at para 32.

> in respect of the respondent's renewal applications were ever taken. Those applications must therefore still be regarded as still awaiting a decision."[142]

[170] What I have just said applies to decisions on administrative applications. Not all administrative action is of this kind. Statutes sometimes give officials the power to act of their own accord. In such cases, if the decision is set aside, there is no unadjudicated administrative application that needs to be finalised. In other words, there is no member of the public entitled to a decision. By setting the decision aside, however, the court cannot prevent the official from exercising the statutory power afresh. In the case of administrative applications, by contrast, the setting aside of an impugned decision must either allow the official to re-adjudicate the application or the court may in exceptional circumstances adjudicate it by making a substituted decision, since otherwise the applicant never gets a decision on the application.

[171] In considering the cases on review remedies, we must look at the substance of the matter in the light of the reasons given in the relevant judgment. In *Ad Outpost*, the Supreme Court of Appeal in its order set aside a decision on an administrative application without either expressly remitting or substituting. It is clear, however, from the Supreme Court of Appeal's reasons that this was a substituted decision. The by-laws which the Supreme Court of Appeal found to be applicable contained an absolute prohibition against the granting of the administrative application. Thus, said the Supreme Court of Appeal, it would be pointless to direct the administrative actor to reconsider the administrative application.[143] This is a classic situation in which a substituted decision is appropriate: the end result is a foregone conclusion.[144] In substance, therefore, the order in that case was a substituted decision refusing the administrative application.

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[142] *Ad Outpost* above n 99 at para 20.

[143] Id at para 22.

[144] Hoexter and Penfold above n 79 at 793.

[172] *Simcha*, by contrast, was one where the setting aside, although unaccompanied by an express remittal order, was treated by the later courts as having that effect. Although the setting-aside order had occurred by agreement without a reasoned judgment, the review application culminating in the agreed order had not justified a departure from the usual remedy of remittal, and there was no reason why the application for building plan approval should not have been reconsidered.[145]

[173] The first judgment cites *Bengwenyama* as an instance of a setting aside without either remittal or substitution.[146] *Bengwenyama* does not in my view support this conclusion, and the first judgment's finding that it does reads more into the judgment than is warranted. The debate in that case was whether the impugned decision should be allowed to stand or whether it should be set aside. There is nothing in this Court's reasoning to suggest that, pursuant to the setting aside, the application by Genorah for a prospecting right could not be reconsidered by the Minister after curing the deficiencies set out in the judgment and taking into account the preferent right of the relevant community. In stating that the public interest in finality had to yield to the principle of legality,[147] this Court was, I think, recognising that its setting-aside order would have the effect of leaving Genorah's application for a prospecting right, and those of competing claimants, still to be adjudicated.

[174] The first judgment cites this Court's statement in *NERSA* that, although remittal is the default remedy, it remains a discretionary one, and that there may be circumstances "where setting aside and non-remittal would be appropriate".[148] One must not lose sight of the context of that statement. Sasol Gas (Pty) Limited (Sasol) argued that the National Energy Regulator of South Africa's (NERSA) decision, even if invalid, should be allowed to stand. After making the statement I have just quoted,

[145] *Simcha* above n 97 at para 21 (quoting from paragraph 29 of the High Court's judgment: *De Jong v Trustees, Simcha Trust* 2014 (4) SA 73 (WCC)) and para 25.

[146] See the first judgment at n 96, [107] and [144].

[147] *Bengwenyama* above n 81 at para 87.

[148] See the first judgment at [105].

this Court gave illustrations where this had occurred: *JFE Sapela*[149] and *Millennium Waste*.[150] Those were not cases where there was a setting aside and non-remittal. They were cases where decisions, despite being invalid, were allowed to stand in whole or in part. This also explains this Court's statement in *NERSA*, with reference to *Oudekraal*,[151] that legality on occasion may be overridden by considerations of finality, pragmatism and practicality.

[175] In short, this Court was not suggesting some halfway house where a decision could be set aside without either a remittal or substituted decision. It was saying that a court is not always obliged to set aside an invalid decision; it may allow the decision to stand. This Court, however, declined to allow the invalid decision in *NERSA* to stand and also explained why it was not in a position to make a substituted decision. Although the order granted by the Supreme Court of Appeal as varied by this Court did not contain an express remittal order, it was clearly contemplated that NERSA would need to make a fresh determination on Sasol's application for the setting aside of a tariff of maximum prices for piped gas.[152]

[176] *Esorfranki* likewise does not advance the first judgment's reasoning.[153] In the passage referenced in the first judgment, this Court was considering the circumstances in which the remedies listed in section 8(1) might be granted cumulatively, despite the section's disjunctive formulation. In particular, this Court considered whether compensation might be granted even though remittal or a substituted decision was ordered. This Court said that the granting of compensation in addition to remittal or substitution was likely to be warranted only in rare cases, "because remittal or

[149] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90; [2005] 4 All SA 487 (SCA); 2008 (2) SA 638 (SCA).

[150] *Millennium Waste* above n 85.

[151] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).

[152] See *PG Group (Pty) Ltd v National Energy Regulator of South Africa* [2018] ZASCA 56; [2018] 3 All SA 52 (SCA); 2018 (5) SA 150 (SCA) at paras 57-8 and para 2(b) of the order and *NERSA* above n 92 at paras 87-91.

[153] See the first judgment at n 93.

substitution will often suitably vindicate all relevant interests".[154] Compensation aside, the Court did not identify any possible orders apart from remittal or a substituted decision.

[177] The first judgment suggests that a setting aside without either remittal or a substituted decision may be an appropriate outcome if a court finds that the administrative actor lacked the power to act.[155] That is far removed from the present case. When a court finds that the administrative actor granted an administrative application which the actor had no power to consider or grant, the court's setting-aside order establishes what the actor should have done when confronted with the administrative application: the actor should have declined to consider it. The court in that situation is not preventing the actor from making a decision which the actor would otherwise have the power to make; the court is determining that the actor does not in law have the power to make a decision on the application at all.

[178] The first judgment argues that it would have been unnecessary for the Legislature in section 8(1)(c)(i) to expressly confer a power of remittal if this were, in the absence of anything more, the automatic consequence of setting aside an administrative decision.[156] The reason for the express reference to remittal is, however, apparent from the architecture of section 8(1)(c). The Legislature was setting up the contrast between the ordinary consequence of setting aside a decision – remittal – and the alternatives that could be granted "in exceptional cases". The Legislature was listing the possibilities, with a special test applicable to substitution or compensation.

So what is the first judgment doing in substance?

[179] Accordingly, if this Court holds that it may set aside an administrative decision without either remitting or making a substituted decision, but on the explicit basis that

[154] *Esorfranki* above n 93 at para 56.

[155] See the first judgment at [113].

[156] Id at [106].

no further decision may be made on the administrative application, it will be a first. There is no authority for it. The fact that something is unprecedented does not mean that it is impermissible, but it should give one pause for thought.

[180] In my view, the first judgment has not in substance come up with a new remedy, even though in its formulation it appears to be novel. In truth, the first judgment is granting a substituted decision refusing the exploration application and consequentially the renewal applications. It is doing so without such a remedy having been sought or canvassed in the papers and without addressing the exceptionality test in section 8(1)(c)(ii).

[181] As I said earlier, one must look at substance, not form. The first judgment intends its order, when read with its reasons, to convey that the Director-General may not grant the exploration application. If the Director-General may not grant it, its only fate can be its rejection. It is sophistry to say that this does not amount in substance to a substituted order by this Court refusing the exploration application. Certainly its effect is exactly the same, yet it is an outcome reached without the exceptionality discipline of section 8(1)(c)(ii). On the first judgment's approach, courts that wish to achieve substituted decisions refusing administrative applications will, in future, not need to have recourse to section 8(1)(c)(ii). They can simply make non-remittal orders together with reasoning – or an order – to the effect that the administrative application in question may no longer be decided.

[182] Although this conclusion flows from the very nature of the matter, it can be demonstrated with reference to the first judgment's reasons in support of its conclusion. The reasons are aimed at showing that, pursuant to the setting aside of the impugned decisions, the unadjudicated exploration application would inevitably have to be refused. The first judgment's key considerations are these:

(a) Given the lapse of 13 years, it would not be just and equitable to allow the exploration application to be adjudicated afresh.[157]

(b) Fresh consultation would not fully vindicate the applicants' rights, including the right of the relevant communities to dignity.[158]

(c) One must be cautious about allowing serious shortcomings to be remedied upon remittal.[159] To do so may allow an administrative applicant to improve its position after the event. There is little reason to afford parties who have contributed to the unlawfulness an opportunity to make the case they initially failed to do.[160]

(d) By allowing the exploration application to remain open for adjudication, the Court would place the oil companies at an advantage by allowing them to sidestep the moratorium.[161]

(e) Impact was not an "innocent" beneficiary of a defective administrative decision; it contributed to the unlawfulness. Shell, although it came on the scene afterwards, must take responsibility for the vulnerabilities of Impact's conduct.[162]

(f) An order permitting substantive defects to be fixed years later invites a culture in which the statutory framework can be disregarded in the belief that shortcomings can be rectified at a later stage if challenged.[163]

[183] What the first judgment is saying, in short, is this. For a variety of reasons, it would not be just and equitable to allow the missing consultation to take place now or to allow shortcomings in the information supplied by Impact in 2013-2014 to be supplemented now. Well, if that is so, a remittal would be pointless: if there can be no

[157] Id at [130].

[158] Id at [131] to [132].

[159] Id at [137].

[160] Id at [138].

[161] Id at [139] to [140], [145] and [147].

[162] Id at [141] to [142] and [144].

[163] Id at [146].

further consultation or supplementation of information, the application for an exploration right, if remitted, would have to be refused, because its grant would suffer from the same defects that invalidated the original grant. The first judgment is saying, in substance, that the grant of the exploration application must be replaced with a refusal of that application, given that no opportunity should be given to permit defects of process to be remedied.

[184] For a review court to foreclose the possibility of the granting of an administrative application is in substance to order the dismissal of the administrative application. In terms of section 8(1)(c)(ii) a court may only do so in "exceptional cases". The first judgment, by concluding that it is not doing so, eschews the exceptionality requirement. This in my view is impermissible.

[185] It is impermissible for another reason. Even if the first judgment were to acknowledge that its order is in substance a substitution order, there is the difficulty that the applicants did not ask for it in their notice of motion. The subject was not canvassed in the affidavits. It would be unfair and prejudicial in the circumstances to grant a substitution remedy. The first judgment speculates on matters that might have been dealt with in affidavits had a substitution remedy been sought. For example, my Colleague states that "[w]e may fairly conclude" that assumptions in the EMPr, projected impacts, the state of scientific knowledge, the budget "and possibly the financial and technical position of the applicants have changed in the intervening years".[164] We don't know that this is true. We also can't know how much truly new information will be elicited by further consultation, or what the DMRE's attitude is towards supplementation.

The parties' arguments relevant to remittal

[186] The first judgment, while acknowledging that this Court is not bound by the parties' characterisation or understanding of the remedy, says that it is significant that

[164] Id at [132].

none of them contended that the appropriate consequence of setting aside was a return to the section 79 process. As shall appear, this is incorrect insofar as oral argument is concerned. In their written arguments the parties respectively attacked or defended the Supreme Court of Appeal's remedy, which grafted consultation onto the third renewal process. They were not dealing with the ordinary consequence of the High Court's order, which was simply a setting aside of the grant of the exploration right and the two renewal decisions.

[187] What the applicants did contend in written argument is that a party that seeks a departure from the default remedy needs to substantiate it, and this was also emphasised in their oral argument. The Supreme Court of Appeal's remedy – suspending the setting-aside pending the outcome of the third renewal process – was a departure from the default remedy. In the applicants' submissions, this had not been pleaded or substantiated. This criticism applies equally to the first judgment's departure from the default position: setting aside and remittal.

[188] During oral argument, members of the Court engaged counsel extensively on the various options for a just and equitable remedy. Among the outcomes raised with counsel was the default remedy of remitting the exploration application for consultation afresh followed by reconsideration by the Director-General. None of the parties said that this was not possible.

[189] Counsel for the NJ applicants submitted that it would not be just and equitable to remit the exploration application to the Minister if the latter were merely required to reconsider his decision; the clock would have to be set back to a time before the previous inadequate consultation process began. The clock would indeed be rewound, as counsel proposed, if a remittal remedy were granted in which the oil companies were placed in the same position as they were immediately after PASA's acceptance of the exploration application.

[190] In a similar vein, counsel for the NJ applicants stressed that a just and equitable remedy had to allow for factors such as the ICMA considerations to be taken into account. "No" had to be a permissible outcome, he said – something which in his view could not be achieved in terms of the Supreme Court of Appeal's remedy. Once again, taking the oil companies back to the position that prevailed immediately after the acceptance of the exploration application would indeed have "no" as a permissible outcome following consultation afresh.

[191] When asked why such remittal should not occur, Impact's counsel asked rhetorically why it was necessary for the oil companies to re-do the things that Impact got right during the consultation process, adding that in this Court we had only a fraction of the paper generated in the full record. This answer conveys that there would be no obstacle in principle. However, the oil companies evidently wished to avoid having to consult afresh with stakeholders with whom there was adequate consultation in 2013-2014.

[192] In an important passage in his replying argument, counsel for the SWC applicants dealt with remittal of the kind I have been contemplating. He said that if the matter were remitted to be dealt with under section 79(4), the oil companies would not lose their exclusive right to seek an exploration right, because that subsection sets out what happens "if the agency has accepted the [exploration] application". There was no need, he said, to "disrupt the acceptance of the application" because exclusivity flowed from such acceptance. The real issue was one of consultation, something which – in counsel's submission – the oil companies were still seeking to avoid by supporting the Supreme Court of Appeal's remedy.

[193] His clients, counsel stressed, did not have the NJ applicants' "ideological position against a particular form of a source of energy". He articulated their concern thus: "this is our land, and we want to be consulted about our livelihood". It was, he submitted, "outrageous" for the community to be told that this could be done in the context of a section 81 renewal. Because of section 79(4), the oil companies would not

lose their exclusivity, but they should be told to go back to do what they refused to do in 2013 – this would be a lesson for those who "ride roughshod over" community interests. The default remedy, he emphasised, was remittal: "[i]f you want a different remedy, you then bear the onus to show why [that] remedy should be granted".

[194] In replying argument, counsel for the NJ applicants was invited to comment on the preservation of the Supreme Court of Appeal's remedy but with a rider that, if the information forthcoming in the context of the third renewal was information which would have caused the Minister to refuse an exploration right, he would be obliged to refuse the third renewal. Counsel's rhetorical response was to ask what benefit there would be in this formulation if it was possible simply to go back to section 79(4). While the rider on which he had been asked to comment was "elegant", he submitted that the "more elegant order is simply to go back to section 79(4)", because then it would be unnecessary to "legislate . . . from the bench" about what had to happen in the third renewal process.

Why the first judgment's remedy is not just and equitable

[195] If, despite what I have just said, we were at large to consider a substituted decision, I do not regard this as an exceptional case warranting such an outcome. And if exceptionality is not the test, I still disagree that the first judgment's outcome is just and equitable.

Delayed consultation

[196] The communities' right to be genuinely consulted was undoubtedly neglected; the oil companies were refused leave by this Court to contest this finding by the High Court and the Supreme Court of Appeal. However, if the oil companies were put back to square one, where all they have is an accepted exploration application, this Court would be making clear that the lack of consultation was sufficiently serious that belated consultation with the communities cannot merely be tacked on to the consultation that already occurred with other stakeholders. This would fully

acknowledge the harm done to the communities' dignity, and they would be given exactly the same right and opportunity to be consulted, and to affect the eventual outcome, as they would have had if things had been done correctly in 2013-2014. Suppose that the moratorium were lifted, and the oil companies now applied (and were entitled to apply) for an exploration right afresh (a possibility foreshadowed in the first judgment):[165] the consultation that would then take place with the applicants (and others) would be no different from the consultation that would occur pursuant to remittal.

Lapse of time

[197] The lapse of time is not in itself a reason to foreclose the possibility of granting the exploration application. Since the point was not canvassed, the evidence does not show that this is no longer possible or that the factual and technical landscape would be so changed as to involve the adjudication of a practically new exploration application.

[198] The delay, moreover, cannot be laid at the feet of the oil companies. The defective grant of the exploration right occurred in April 2014. The applicants only launched their review application in December 2021, seven and a half years later. They are not to blame, but neither are the oil companies. Subsequent to the launching of the review, the oil companies did not drag their heels. All parties appear to have been diligent in filing affidavits. The High Court gave judgment against the oil companies in September 2022 but granted leave to appeal in December 2022.

[199] There was then the inevitable delay while the oil companies prosecuted to finality their appeal to the Supreme Court of Appeal. That Court delivered judgment in June 2024, this time partially in favour of the oil companies, since the remedy held open the prospect that the third renewal of the exploration right might still be granted. There has then been a further delay of slightly more than two years while the applicants have

[165] Id at [149].

prosecuted to finality their appeal in this Court. Throughout this latter period the oil companies have had a remedy with which they were content to live.

[200] Neither the applicants nor the oil companies should be penalised for inevitable litigation delays where both sides were pursuing with due diligence their respective positions at first instance and on appeal.

Oil companies' roles in unlawfulness

[201] As to the oil companies' contribution to the illegality of the grant of the exploration right, I am of the view that no criticism can be levelled at Shell. Shell acquired its 50% interest in the exploration right in June 2021, shortly before the second renewal was granted, and some six months before the review was launched. The first judgment does not explain why, in the consideration of a just and equitable remedy, Shell should be made to bear the consequences of criticisms that can be levelled only at Impact. Shell in good faith acquired a 50% interest in an exploration right that it understood to be valid and which had already been extended once. No principle of agency or vicarious liability taints Shell.

[202] Turning to Impact, while the defects of consultation were material, it is a relevant consideration that Impact, a company incorporated in the United Kingdom, was guided through the process by an expert South African consultancy, Environmental Resources Management Limited (ERM), and in all likelihood by lawyers and other professionals. Invitations for comments were published in four newspapers. Following the receipt of comments, a draft EMPr was distributed to potential IAPs, including government authorities, non-governmental organisations, community-based organisations and industry groups, a list expanded after further feedback and suggestions. The list of IAPs attached to the final EMPr ran to more than 160 names. One of them was an environmental firm of attorneys representing 55 organisations and businesses and 22 individuals. There were meetings to which all IAPs were invited.

[203] There was consultation with the monarchs of the relevant communities. The mistake on the part of ERM, at the meeting with the monarchs, was to say that ERM did not envisage engaging in further consultation directly with the communities and expected that, if necessary, the monarchs and their traditional councils would take the project information to the communities.

[204] Pursuant to consultation, a wide range of views was elicited, some of them critical of, or expressing concerns about, the proposed exploration. This was included in the final EMPr, a document running to 586 pages and incorporating expert reports on marine fish, fauna and archaeology. Impacts on poor rural subsistence fishers were addressed.

[205] While comparisons may not be particularly helpful, this is not a case such as *Bengwenyama*, where the communities who owned the land on which prospecting was to occur were not consulted at all. And yet, as I have said, this Court did not state that that Genorah's administrative application should no longer be open for consideration pursuant to the setting aside of the grant of the right.

[206] It is implausible that Impact, or those advising it, deliberately refrained from consulting directly with the communities despite knowing that, if they failed to do so, the grant of the exploration right would be liable to be set aside on review. Impact would be spending a lot of money, and would hardly run that risk. Its conduct was not so egregious that the door should be closed to the possibility of the grant of its exploration application if that is otherwise still possible.

[207] Although a measure of blame may be laid at the feet of Impact, criticism can also be directed at the decision-makers, whose duty it was to take relevant considerations into account and to require deficiencies to be remedied. The authorities' conduct would have led Impact, and later Shell, to believe that they had done what was necessary.

A bad precedent?

[208] For the reasons just mentioned, it is fanciful, in my view, to suppose that a judgment from this Court remitting the present matter to the Director-General will be seized upon by future administrative applicants to cut corners in the belief that they will always be able to put things right afterwards if a review succeeds. Acting on rights conferred by the MPRDA typically involves a lot of money and effort. Administrative applicants would not put this at risk in the hope of "getting away with it". Moreover, a remedy must be just and equitable on the particular facts of the case. The first judgment's approach is the antithesis of this case-sensitive approach: it advocates a strict non-remittal rule to discourage future rule-breaking, and does so in circumstances where there is no evidence that Impact and its advisers deliberately followed a course that they knew would invalidate the grant of the exploration right.

The moratorium

[209] Regarding the moratorium ("restriction", in the language of section 49(1) of the MPRDA), in November 2012 the DMRE invited representations on a proposed moratorium,[166] but it seems that this did not concern offshore areas. In February 2014 a moratorium was imposed pursuant to the invitation of November 2012,[167] and representations were invited on a further proposed moratorium that would include offshore areas.[168] In June 2018 a moratorium was imposed pursuant to the invitation of February 2014, and this appears to have applied to all offshore areas.[169] In

[166] Invitation for Representations from Relevant Stakeholders on a Proposed Restriction under section 49(1) of the Mineral and Petroleum Resources Development (Act No. 28 of 2002) on the Granting of any new application for a Reconnaissance Permit, Technical Co-operation Permit, Exploration Right and Production Right in terms of sections 74, 76, 79 and 83 of the Act, GN 932 *GG* 35866, 16 November 2012.

[167] Restriction in terms of section 49(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) on Granting new applications for Reconnaissance Permits, Technical Co-Operation Permits, Exploration Rights and Production Rights in terms of sections 74, 76, 79 and 83 of the Act, GN 71 *GG* 37294, 3 February 2014.

[168] Invitation for Representations from Relevant Stakeholders on a Proposed Restriction under section 49(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) on the Granting of Reconnaissance Permits, Technical Co-Operation Permits, Exploration Rights and Production Rights in terms of sections 74, 76, 79 and 83 of the Act, GN 72 *GG* 37294, 3 February 2014.

[169] Restriction in terms of section 49(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) ("The Act") on the Granting of new applications for Technical Co-Operation Permit, Exploration Right and Production Right in terms of sections 76, 79 and 83 of the Act, GN 657 *GG* 41743, 28 June 2018.

December 2019 the moratorium of June 2018 was uplifted in part, but this did not relate to offshore areas.[170] The relevant notice thus seems to be the one promulgated in June 2018. The notice stated that the restriction did not affect the processing of applications for various types of rights, including exploration rights, "received before the date of publication".

[210] Impact's exploration application was accepted by PASA in March 2013. If, pursuant to the setting aside of the exploration right, the exploration application is to be regarded as still pending, the moratorium will not preclude the Director-General from granting it pursuant to fresh adjudication, since the exploration application was received before 28 June 2018. As I have explained, that would be the usual consequence of setting aside the grant of an administrative application unless the court's remedy included a substituted decision dismissing the administrative application.

[211] If the first judgment were to acknowledge that it is granting a substituted decision dismissing the exploration application, and were to make such an order, the 2013 exploration application would be at an end. The moratorium would bar any new exploration application lodged by the oil companies. That is the first judgment's exact effect: the oil companies can't go further without being hit by the moratorium.

[212] This is not the result intended by the moratorium notice, which lays down that a person who applied for an exploration right before 28 June 2018 is entitled to a decision on that application without being hindered by the moratorium. To prevent this outcome, the first judgment seeks to make sure that the 2013 exploration application cannot be decided in the oil companies' favour. To allow a remittal would not, as the first judgment says, permit the oil companies to "sidestep" the moratorium. On ordinary administrative law principles, the oil companies ought not to be hit by the moratorium. It is the first judgment that is doing the "sidestepping": it sidesteps the moratorium

[170] Notice in terms of section 49(3)(a) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) ("The Act"): To lift a Restriction or Prohibition on the Granting of Applications for Reconnaissance Permits, Technical Co-Operation Permits, Exploration Rights and Production Rights, GN 1664 *GG* 42915, 20 December 2019.

notice's carve-out in respect of applications lodged prior to 28 June 2018. It does this by consigning Impact's exploration application to a twilight zone – supposedly neither granted nor refused. This unprecedented remedy – assuming it is anything other than a substituted decision by another name – is not just and equitable.

The oil companies' expenditure

[213] There is no reason to make light of the oil companies' expenditure to date of approximately R1.1 billion, which was set out in some detail in one of Shell's affidavits in the High Court. It is a very large sum of money. It may be that, pursuant to remittal and re-adjudication, an exploration right (or third renewal) will be refused, in which case the oil companies will have achieved nothing for the outlay. But it is definitely not just and equitable for this Court to pre-empt the possibility of a favourable outcome for the oil companies, in circumstances where (a) the conduct of Impact is not so egregious as to warrant, in effect, imposing on the oil companies a "fine" of nearly R1.1 billion; and (b) where the interests of the applicants can be adequately vindicated through a requirement of fresh consultation, even if to do so requires putting the oil companies back to the position that pertained immediately after the exploration application was accepted in March 2013.

[214] Also relevant is that, prior to lodging its exploration application, Impact had been granted a technical co-operation permit for one year. In terms of section 78(1), this gave Impact the exclusive right to apply for an exploration right for the same areas. Impact duly lodged an exploration application. The effect of the first judgment is that Impact will have lost the benefit conferred by its technical co-operation permit, including its exclusive right to seek an exploration right. Although it duly made an exploration application, the first judgment renders the application a dead letter, supposedly finally adjudicated without either having been granted or refused. And without the prospect of the exploration application being granted, the oil companies also lose the prospect of an exclusive right in terms of section 82(1)(a) to apply for a production right.

Defects apart from lack of consultation

[215] The first judgment states that an absence of consultation was not the only defect in the grant of the exploration right. Deficiencies such as the Director-General's failure to take relevant considerations into account (climate change, the ICMA, the precautionary principle) cannot, so the first judgment says, be rectified by remitting the exploration application for reconsideration.[171] This proposition is unsound. In most review cases, where the defect lies in failing to consider relevant considerations or taking into account irrelevant considerations, the usual remedy is indeed remittal. The matter goes back to the administrative actor so that he or she may decide the matter afresh after taking into account the relevant considerations and disregarding the irrelevant ones. This Court's judgment in *Fuel Retailers*, cited in my Colleague's judgment in relation to a different point,[172] affords an example in the environmental setting. It is only exceptionally that the review court will substitute its own assessment in such cases.

[216] The reason that consultation has, in this case, assumed such prominence in the remedy debate is not because consultation is the only reason for remittal but because of the perceived need to regulate the process of further consultation. If the defects were only about the Director-General's failure to take relevant considerations into account, simple remittal ought to be uncontroversial in the absence of a substituted decision.

Non-compliance with "legal prescripts"

[217] The first judgment emphasises that the High Court made a factual finding that Impact's claims in regard to section 2(d) and (f) of the MPRDA were unsubstantiated.[173] The first judgment acknowledges that the finding was "terse". Indeed it was. It was contained in a single sentence without any reasoning. It was not mentioned by the Supreme Court of Appeal. We are not bound by it. The oil companies' application for

[171] See the first judgment at [93] and [136].

[172] Id at [9] to [10].

[173] Id at [137].

leave to appeal to this Court had to fail because there were no reasonable prospects of overturning the decisions of the courts below on the absence of adequate consultation and the related failure to consider aspects that would or might have come out of such consultation. This Court did not need, for that purpose, to consider the High Court's terse statement about section 2. The oil companies were, of course, not able to appeal that specific finding, since an appeal lies only against an order, not against reasons.

[218] In terms of section 80(1)(g), the Minister must grant an exploration right if, among other things, the granting of such right "will further the objects referred to in section 2(d) and (f)". Those provisions state that the objects of the MPRDA include to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources" and to "promote employment and advance the social and economic welfare of all South Africans".

[219] The High Court said that there were statements in the EMPr that the exploration project would "create jobs and increase government revenues" but that these claims were unsubstantiated. In truth, the EMPr did not make any extravagant socio-economic claims or say anything about government revenue.[174] One must distinguish between job creation and revenue generation brought about by the exploration project as against that brought about by exploiting a subsequent production right. Section 80(1)(g) is concerned only with the former. The question of whether the granting of a production right will further the objects in section 2(d) and (f) is the subject of separate assessment if and when the production right is sought – see section 84(1)(i).

[220] In regard to revenue generation, the EMPr said that direct revenues would relate to operations such as refuelling, vessel and gear repair, port duties, helicopter services, hire of local vessels for chase and support vessels and employment of environmental

[174] The socio-economic impact assessment covered eight pages of the EMPr.

services. Due to the short duration and small amounts of additional revenue generated, the exploration programme was predicted to have "a negligible positive impact on the macroeconomy of the region". As to negative impact, and after mitigation, the effect on fisheries was expected to be negligible and short-term. Negative impacts on tourism were predicted to be of low significance, even prior to mitigation.

[221] As to job creation, the opportunities would, according to the EMPr, be limited, given the short duration of exploration activity. Moreover, most of those involved would be specialists, typically foreign nationals engaged full-time in similar work around the world. There would be limited short-term employment opportunities for locals: to provide environmental management support (at a professional level) and crew for support vessels and aircrafts. While new direct and indirect job opportunities represented a positive impact, they would only be short-term and limited in nature: "[a]s a result, the overall positive impact of the proposed project on job creation is judged to be of negligible significance".

[222] This appears to be a modest and candid assessment. It was in the nature of the proposed exploration that it would not generate substantial additional revenue for the economy or jobs for locals. This does not mean that, within the limitations inherent to the scope of the exploration project, the Director-General could not properly find that the benefits were positive for purposes of section 2(d) and (f). Given the modest claims made – with positive socio-economic impacts being regarded as "negligible" – it escapes me why further substantiation was needed. If, of course, pursuant to remittal the Director-General wished to have more information about this, he could ask for it. It is far-fetched, however, to say that the exploration application had to fail because the information in support of the socio-economic analysis was unsubstantiated.

[223] In recommending the grant of the exploration right, PASA reminded the Director-General that in 2009 it had brought to the Minister's attention that South Africa's geological petroleum potential was still in its infancy – a high-risk venture. During exploration phases, PASA had adopted a flexible approach in which

the participation of historically disadvantaged South Africans was not insisted upon, provided the other requirements of section 80(1) were met. An exploration right-holder was, however, obliged to contribute to PASA's Upstream Training Trust (UTT) to fund skills development at various levels, and this was one of the ways in which the objects mentioned in section 2(d) and (f) were furthered. It appears from the affidavits in the High Court that the oil companies duly made their annual contributions to the UTT.

[224] The main socio-economic benefits for employment and the economy would be those that would flow if the outcome of the exploration led the oil companies to seek and be granted a production right. The first judgment closes the door on the possibility of these socio-economic benefits being reaped. Of course, it is not the courts but the relevant statutory functionaries that would need to determine whether the grant of a production right was justified.

Conclusion on just and equitable remedy

[225] For these reasons, if we are entitled to interfere, the just and equitable remedy would be of the kind foreshadowed in the first paragraph of this judgment.[175] The simplest remedy would be to require the process of consultation to be run afresh from the date on which the exploration application was accepted in March 2013. This would require consultation afresh with all IAPs, including but not limited to the present applicants. The consultation might or might not significantly affect the content of the currently approved EMPr. Factually, and but for the setting aside, the oil companies would only be entitled to one more period of three years for exploration. By supporting the Supreme Court of Appeal's remedy, the oil companies have signalled their acceptance that they should only have three more years. In these circumstances, and in any event, the very broad remedial powers conferred by section 172(1)(b) of the Constitution and section 8(1) of PAJA would make it appropriate to decree that, if pursuant to re-adjudication, the exploration right is granted, it should be limited to a three-year term, with no right to seek any renewals.

[175] See [157].

[226] The Supreme Court of Appeal appears to have had in mind a remedy with substantially the same effect. That Court's order might require some elaboration, but in principle it would be feasible. However, since this judgment does not enjoy majority support, there is no point in working out the details.

Are there grounds to interfere with Supreme Court of Appeal's remedial discretion?

[227] Finally, to come back to a question that is logically anterior to those I have already considered, is this Court entitled to interfere with the Supreme Court of Appeal's exercise of its remedial discretion? We must distinguish between the outcome which the Supreme Court of Appeal intended and criticisms of the formulation of the resultant order. The fact that the Supreme Court of Appeal's order has gaps calling for supplementation does not mean that the Supreme Court of Appeal did not exercise its remedial discretion judicially. It is the substantive outcome, as apparent from the order read with the reasons, that needs to pass muster as a proper and judicial exercise of the remedial discretion.

[228] Approached in this way, I do not consider that the Supreme Court of Appeal failed to exercise its discretion properly and judicially. That Court plainly intended to reach a substantive outcome that would keep open the possibility of a final three-year period of exploration, the granting of which would have to be preceded by proper consultation and by a consideration of the factors which were identified as having not been taken into account when the exploration right was initially granted.

[229] The first judgment identifies three misdirections by the Supreme Court of Appeal, which are in summary these:

(a) It was not appropriate in law for the Supreme Court of Appeal to impose a requirement of consultation at the renewal stage when the MPRDA does not contemplate it.

(b) The Supreme Court of Appeal incorrectly conceptualised the deficiencies in the grant of the exploration right as consultation-linked, so the remedy

was only directed at this deficiency. The remedy did not cater for other deficiencies, such as a failure to take relevant considerations into account and non-compliance with legal prescripts.

(c) The Supreme Court of Appeal failed to provide guidance on how the consultation would be undertaken and how the outcome would be factored into the renewal process.[176]

[230] As to the first criticism, a court's broad remedial powers would permit a judicial requirement for consultation at the stage of the third renewal, even though the MPRDA does not require it. The Supreme Court of Appeal's judgment does not disclose an erroneous belief that such consultation is required as a matter of law when the renewal of an exploration right is sought. The Supreme Court of Appeal intended to graft a consultation requirement onto the renewal process in order to remedy the absence of consultation prior to the grant of the exploration right.

[231] Later in his judgment, contradictorily I would suggest, my Colleague accepts that a court's broad remedial powers would indeed permit it to do what the Supreme Court of Appeal did, but he adds, "I do not think this power should be exercised here".[177] The fact that my Colleague would not have exercised the power in the same way is not a basis for interfering with the Supreme Court of Appeal's decision. Contrary to his view, there are no "[s]erious separation of powers concerns".[178] The State parties in this case have not raised any objection. The requirement of consultation for the grant of an exploration right is laid down in the MPRDA, and it is that consultation which must occur, albeit belatedly.

[232] As to the second criticism, the Supreme Court of Appeal's order does not say that the Director-General must not take matters such as the ICMA, climate change and the precautionary principle into account when deciding whether to grant the third

[176] See the first judgment at [93].

[177] Id at [125].

[178] Id.

renewal. After all, we know that the present applicants press points of that kind. Pursuant to the consultation ordered by the Supreme Court of Appeal, those considerations would have to be taken into account by the Director-General. The Supreme Court of Appeal did not envisage consultation in a vacuum; the consultation was intended to have an output that would feed into the renewal decision in the same way as consultation and relevant output would have featured in a decision to grant the exploration right itself. Otherwise the consultation ordered by the Supreme Court of Appeal would have been pointless, and we should not suppose that Court to have granted a pointless order.

[233] As regards non-compliance with legal prescripts, the Supreme Court of Appeal did not find that there had been any such non-compliance, and I have explained why the High Court's terse statement in that regard cannot be accorded weight.

[234] The third criticism goes to the formulation of the order rather than the substance of the outcome intended by the Supreme Court of Appeal. The intended outcome is clear enough, and deficiencies in the formulation of the order could be rectified. Those deficiencies do not show that the substance intended by the Supreme Court of Appeal was not a proper and judicial exercise of its remedial discretion.

Conclusion

[235] For these reasons, I would have granted one or the other of the remedies foreshadowed in the first paragraph of my judgment.[179] I would have ordered the parties to pay their own costs in this Court.

[179] See [157].

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