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Mandatory Public Participation Before the Granting of Mining Rights: An Analysis of the Judgment of the Supreme Court of Appeal in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* [2024] ZASCA 84

Moses Retselisitsoe Phooko*
Professor, University of Fort Hare
<https://orcid.org/0000-0002-29398671>.

Abstract

This case note concerns the granting of exploration rights (and their subsequent renewal) to Impact Africa Limited to conduct oil and gas exploration off the Wild Coast. The application for the renewal of exploration rights was submitted to the Minister of Mineral Resources and Energy (the Minister) without adequate notification to the affected persons or communities. The appellants notified the respondents about the proposed project in newspapers in English and Afrikaans. This is despite the fact that the local languages are isiXhosa and isiMpondo. Aggrieved by the lack of

* LLD (University of South Africa); LLM in International Human Rights Law (University of Notre Dame, USA); LLB and Diploma in Human Rights (North-West University, Mahikeng). Head and Chairholder, UNESCO ‘Oliver Tambo’ Chair of Human Rights, University of Fort Hare, Alice. Co-founder, SADC Community Law Research Project. Former Law Clerk, Constitutional Court of South Africa. Member of the Electoral Court of South Africa, and *ad hoc* Judge of the High Court. E-mail: mphooko@ufh.ac.za or phookor@gmail.com.

consultation, the applicants successfully approached the High Court in Makhanda for a decision reviewing and setting aside the decision to grant an exploration right. Not satisfied with the outcome of the High Court, the appellants unsuccessfully appealed to the Supreme Court of Appeal (SCA). In dismissing the appeal, the SCA demonstrated its ability to protect vulnerable communities when it found that in granting the exploration rights, the Minister had failed to consider the input of affected persons or communities. Despite this positive finding, the SCA regrettably held that for the consideration of the subsequent renewal, a further public participation process must be undertaken to address the shortfalls that have been identified in the granting of the original exploration rights. This is unfortunate because the decision to grant the initial exploration right was unlawful as the process failed to comply with the requirement to engage meaningfully with affected communities.

Keywords: mining; affected communities; public consultation; local language; cultural rights

1 INTRODUCTION

In describing certain parts of the Eastern Cape Province, Mbenenge JP in *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*¹ said:

The Eastern Cape coast is not only a haven for marine and bird life, including endangered, threatened and protected species but also a centre of attraction to entities desirous of exploring mineral and petroleum resources from its seabed ...

He went further to state that while some people visit the province for leisure on the coast, to others, it is:

... a home for communities that are steeped in customary rituals. These communities subsist on fishing and other marine resources to supplement their livelihood² [emphasis added].

The foregoing shows the extent to which indigenous communities are culturally and economically dependent on their land.³ There is a continuous “quest for the preservation and flourishing of a culture inextricably, and often spiritually, tied to their ancestral land.”⁴ Therefore, it is important to consult them about decisions that are more likely to affect their stay on their ancestral land.

Indigenous communities are the traditional managers of the local environment, but often find themselves the victims of mining projects that occur within their communities without them having been consulted about the decisions that may impact their livelihoods.⁵ This lack of consultation often leads to tensions between the mining industry and indigenous communities.⁶ The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources*

1 *Sustaining the Wild Coast NPC and Others* para 3 (hereinafter referred to as the *Sustaining the Wild Coast NPC and Others* HC).

2 *Ibid* para 2.

3 Barratt and Afadameh-Adeyemi “Indigenous Peoples and the Right to Culture: The Potential Significance for African Indigenous Communities of the Committee on Economic, Social and Cultural Rights’ General Comment 21” 2011 *AHRJL* 564.

4 Wiessner “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” 2011 *EJIL* 121.

5 See a Report on “A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector” <https://idl-bnc-idrc.dspacedirect.org/server/api/core/bitstreams/33d6624c-a5ca-4c56-ac64-000b37ca97fb/content#:~:text=In%20the%20mining%20sector%2C%20companies,threaten%20corporate%20control%20over%20profits> (accessed 16-02-2024).

6 See, for example, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC), and *Baleni and Others v Minister of Mineral Resources and Others* [2019] 1 All SA 358 (GP).

(Pty) Ltd and Others,⁷ defined the aim of consultation as follows:

... to provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is [are] an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.

This demonstrates the need to consult with affected communities so that they may consider the pros and cons of the intended mining project and how it will change their livelihoods. Without a proper understanding of the intended mining project, the community would be unable to apply its mind or weigh the advantages or disadvantages of the intended mining project.

This case note analyses the decision of the SCA in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others*,⁸ in so far as it dealt with the aspect of public consultation of affected communities. I argue that while the SCA made a progressive judgment in finding that there was inadequate consultation with the community in the granting of exploration rights, the decision of the SCA to allow a consideration of the subsequent renewal is unfortunate because the granting of the initial exploration right was unlawful as the process failed to comply with the requirement to engage meaningfully with affected communities.⁹ In my view, the court ought to have set aside the original decision of granting the exploration right in its entirety and not allow the consideration of the subsequent renewal.

This case note has four parts. Part I is the introduction. Part II deals with the facts of the case, questions, and points *in limine* before the SCA. Part III discusses the merits of the case. Part IV is the discussion and conclusion.

2 THE FACTS AND ISSUES BEFORE THE COURT

On 18 February 2013, Impact Africa Limited (Impact Africa) applied for an exploration right from the first appellant (Minister), to conduct oil and gas exploration off the Wild Coast in the Transkei Algoa exploration area. The application was made in terms of section 79 of the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA).¹⁰ The exploration right was to be exercised by Shell Exploration and Production South Africa B.V. and BG International Limited (BG).

On 17 May 2017, Impact Africa applied for a first renewal of the exploration right from the Minister. The renewal was granted on 20 December 2017. Impact Africa applied for a second

7 2011 4 SA 113 (CC) para 66 (hereinafter referred to as *Bengwenyama* case).

8 (58/2023; 71/2023; 351/2023) [2024] ZASCA 84 (hereinafter referred to as the *Sustaining Wild Coast NPC* Case SCA).

9 *Ibid* para 31.

10 Section 79 in part provides:

“(1) Any person who wishes to apply to the Minister for 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.”

renewal of the exploration right on 13 March 2020, and this was granted on 30 July 2021.

Based on the exploration right, Shell Exploration and Production South Africa B.V. (Shell) sought to conduct “seismic surveys off the Wild Coast.”¹¹ However, the respondents who included members of the community and environmental rights associations successfully obtained an interdict from the High Court on 28 December 2021, preventing Shell and Impact Africa “from undertaking seismic survey operations under the exploration right” pending the finalisation of the main application challenging the granting of the exploration right to Shell and Impact Africa based on lack of public consultation.¹²

On 1 September 2022, the High Court ruled in favour of the respondents by, *inter alia*, reviewing and setting aside the exploration right. The High Court further held that the Minister did not inform the interested and affected parties about the decision granting the exploration right and that there was no delay in bringing the review application.¹³ In addition, the High Court reviewed and set aside all subsequent renewals of the exploration right. However, the High Court declined “to declare that Shell and Impact Africa were not entitled to commence any exploration activity without first seeking and obtaining an environmental authorisation in terms of the National Environmental Management Act 107 of 1998.”¹⁴ Aggrieved by the decision of the High Court, the appellants, namely; *Minister of Mineral Resources and Energy*,¹⁵ *Shell, Impact Africa and BG International Limited*, lodged an appeal to the SCA against the whole judgment of the High Court.

2.1 Points *in limine*

First, the appellants contended that the review application that was instituted before the High Court was brought outside the 180-day permissible time limit under section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and, therefore, should have been dismissed on the ground that the respondents unreasonably delayed in launching their challenge. Second, the appellants argued that the respondents failed to exhaust internal remedies in the form of an appeal in terms of section 96 of the MPRDA against the granting of the exploration right and subsequent renewals thereof.

Concerning the delay in instituting the review application, the *appellants* contended that the time started running when the public might reasonably have been expected to have become aware of decisions to grant (and the reasons for such decisions) the exploration right.¹⁶ The appellants argued that the respondents knew in 2013 when the public was notified about the application for an exploration right.¹⁷ The appellants also argued that the respondents knew on 20 May 2020, when an Environmental Compliance Notice was sent to interested and affected persons and the public, alerting them to the grant of the exploration right.¹⁸ The appellants further argued that the public would reasonably have been expected to have become aware of

11 *Sustaining Wild Coast NPC* case HC para 2.

12 *Ibid* para 32.

13 *Ibid* paras 66 and 74.

14 *Ibid* para 4.

15 The Minister of Mineral Resources and Energy’s appeal was only limited to the effect that “the public at large would reasonably have been expected to have become aware of the grant of the exploration right around 29 April 2014, some seven years before the institution of the review.” However, the SCA found that there was no evidence “adduced that the Minister or his delegates gave the public notice that the exploration right had initially been granted or later renewed.” This ground of appeal failed. See *Sustaining the Wild Coast NPC and Others* SCA paras 9, 12 – 13.

16 *Sustaining the Wild Coast NPC and Others* SCA paras 8–9.

17 *Ibid*.

18 *Ibid* para 8.

the grant of the exploration right around 29 April 2014.¹⁹ This is some seven years before the institution of the review proceedings.²⁰

However, the respondents argued that they became aware of the grant of the exploration right in late October or early November 2021,²¹ and that they had launched the review application in January 2022 after the High Court granted an interim interdict on 28 December 2021. Consequently, the respondents argued that the review application was brought within the 180-day time limit.

The appellants argued that the High Court erred in applying the test under section 3 of PAJA which applies to administrative action affecting a person, as opposed to section 4 of PAJA, which relates to administrative action affecting the public. In other words, the appellants argue that the High Court focused on “when the individual applicants actually obtained knowledge of the decisions sought to be reviewed rather than the question of when the public at large might reasonably be expected to have knowledge of the administrative action.”²² The SCA found that the aforesaid distinction was irrelevant because there was no evidence before it indicating that the Minister “gave the public notice of the decisions prior to October 2021” to the effect that the exploration right had initially been granted or later renewed.²³ Consequently, the court rejected the appellants’ assertions that the public would have become aware of the grant of the exploration right before April 2014 or October 2021.²⁴

Regarding the appellants’ assertion that the public was informed about the granting of the exploration right via emails, four newspapers, and three public meetings, the SCA found that “these processes gave notice of ... application for an exploration right, not of the grant of the exploration right or the renewals thereof.”²⁵ The SCA further held that the “grant of ... exploration right occurred on 29 April 2014 after the above notices were given and meetings held.”²⁶ According to the SCA, the appellants’ focus on sections 3 and 4 of PAJA was misplaced because the Minister of Mineral Resources and Energy “should have given clear notice of his decision to grant the exploration right and its renewals and informed all affected persons ... of their right to appeal the decisions or request reasons.”²⁷ The SCA, therefore, held that in “the absence of a clear announcement of the decisions, the public could not reasonably have known of their existence.”²⁸ The SCA further held that it was only after 29 October 2021, when SLR Consulting (acting on behalf of Shell) “gave notice of Shell’s intention to commence with the seismic survey” that the issue was picked up by the media.²⁹ According to the SCA, this is when “the public at large might reasonably have become aware of the decisions”.³⁰ Finally, the SCA held that “it could thus never be that the public could reasonably be expected to have knowledge that an exploration right had been granted merely because the general public had knowledge that a right had been applied for.”³¹ Therefore, the SCA ruled that the appellants had no basis “to claim that the public might reasonably have been expected to become aware of

19 *Ibid* para 9.

20 *Ibid*.

21 *Ibid* para 7.

22 *Ibid* para 10.

23 *Ibid*.

24 *Ibid*.

25 *Ibid* para 13.

26 *Ibid*.

27 *Ibid*.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

31 *Ibid*.

the decisions prior to late October 2021.”³² The SCA also held that the that the “180-day time period only began running in October 2021.”³³ Consequently, there was no basis to allege that the respondents were late in launching the review proceedings.

On the issue of exhaustion of internal remedies, the respondents argued that their initial approach to the High Court was for an urgent interdictory relief as the commencement of the seismic survey was imminent.³⁴ Accordingly, the seismic survey would have likely been “concluded prior to the resolution of any appeal, thereby rendering nugatory any internal appeal process.”³⁵ The SCA noted that the Minister “did not engage at all with the reasons advanced [...] for not pursuing an internal appeal.”³⁶ In addition, the SCA observed that it was not disputed that the public was not “given notice of the decisions or informed of their right to appeal or to ask for reasons.”³⁷ Therefore, the SCA found that the appellants had failed to explain to it as to why they (appellants) did not give notice of the decisions or inform the respondents of their right to appeal or to ask for reasons. According to the SCA, the appellants’ failure to inform the respondents was “subversive of the procedural entitlements of the respondents.”³⁸ Furthermore, the SCA observed that after the respondents had learnt of the existence of the exploration right, they requested copies of the decision that granted the exploration right and the reasons for such decisions.³⁹ The SCA also noted that the respondents had asked “for an extension of the period within which to bring an appeal” from the appellants.⁴⁰ However, the respondents’ request was ignored.⁴¹

In light of the above, the SCA concluded that the details of the impugned decisions were seen by the respondents for “the first time when the rule 53 record in the review” proceedings was made available to them.⁴² Consequently, the SCA confirmed the decision of the High Court and held that:

[t]his is a classic case of an internal remedy that would not have been objectively implemented and which would have rendered nugatory the values of administrative justice enshrined in the Constitution and upheld by PAJA.⁴³

The SCA proceeded to indicate that the test for interference with the exercise of discretion by the High Court had not been met because the High Court had a wide discretion to exempt the respondents from the relevant framework for internal remedy if it was in the interests of justice to do so.⁴⁴ According to the SCA, the High Court exercised its discretion judicially when it exempted the respondents from exhausting internal remedies.⁴⁵ It, therefore, ruled that the test for interference with such discretion on appeal would require it to be “satisfied that the

32 *Ibid* para 14.

33 *Ibid*.

34 *Ibid* para 15.

35 *Ibid* para 15.

36 *Ibid*.

37 *Ibid* para 17.

38 *Ibid*.

39 *Ibid*.

40 *Ibid*.

41 *Ibid*.

42 *Ibid*.

43 *Ibid*.

44 See s 7(2)(c) of PAJA which provides that: “A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal 30 remedy if the court or tribunal deems it in the interest of justice.”

45 *Sustaining Wild Coast NPC Case SCA* para 18.

discretion was not exercised judicially or was influenced by wrong principles or wrong facts.”⁴⁶ The SCA found that the appellants failed to show that the High Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts.⁴⁷

Therefore, the SCA agreed with the High Court ruling, dismissing both points *in limine*.

3 MERITS OF THE CASE

The SCA dealt with the right to a procedurally fair administrative action as provided for in section 33 of the Constitution. Additionally, the SCA held that the grant of an exploration right constitutes administrative action and that “when administrative action materially and adversely affects the rights of any person, their right to procedural fairness is triggered.”⁴⁸ To this end, the SCA stated that the appellants were required to “meaningfully consult with the communities and individuals” whose rights could be affected by the seismic blasting.⁴⁹ According to the SCA, section 79(4) of the MPRDA and section 3 of PAJA impose a duty on the appellants to consult with communities and individuals entitled to existing customary rights, such as fishing, because they would be adversely affected by the seismic blasting.⁵⁰

Section 3 of PAJA provides that “in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person ...” whose rights are materially and adversely affected by administrative action, adequate notice of the nature and purpose of the proposed administrative action, and a reasonable opportunity to make representations.⁵¹

The SCA held that, in the context of exploration and mining, PAJA must be read together with the MPRDA. When an application for an exploration right is made, the MPRDA imposes an obligation on the applicant to consult with any affected party. To emphasise the need to consult with affected parties, the SCA relied on the *Bengwenyama* case in which it was held that interested and affected persons must be sufficiently informed about the proposed mining activities so that they may make informed representation to the decision-maker.⁵²

The SCA noted that the consultation process adopted by the appellants was subject to criticism that ranged from the allegation that the language used was technical and inaccessible as some of the projects were described as “Airborne geophysics acquisition” and that the geographic location proposed for mining was described as the “Transkei/Algoa area off the Eastern Cape Coast of South Africa” and “the proposed Exploration area (45 838km²) extends from the coast out to a maximum water depth of approximately 4000m.”⁵³ According to the SCA, these descriptions made it impossible for “communities to know if the notice was applicable to them.”⁵⁴

The SCA further observed that the appellants had only published the notices about the intended mining activities in four newspapers, three of which were written in English and one in

46 *Ibid.*

47 *Ibid.*

48 *Ibid* para 19.

49 *Ibid* paras 21 and 31.

50 *Ibid* para 25.

51 Section 3(2)(b)(i) and (ii) of PAJA.

52 Paragraphs 66–67.

53 *Sustaining the Wild Coast NPC and Others* SCA para 22.

54 *Ibid.*

Afrikaans.⁵⁵ The SCA further noted that there were few people in the respondent communities, as the Amadiba community, who could read English, and that nobody speaks Afrikaans.⁵⁶ According to the SCA, “the majority of residents along the Wild Coast speak isiXhosa or isiMpondo” and listen to the radio as opposed to reading newspapers.⁵⁷ The SCA held that the notices were published in a language that was inaccessible to many members of the respondent communities.⁵⁸ The Court highlighted that if the appellants had sought meaningful engagement with the respondents, they ought to have prepared the notices in isiMpondo.⁵⁹ Furthermore, the SCA indicated that newspapers are not delivered in Amadiba or in the communities of Dwesa-Cwebe. Consequently, the SCA found that the newspaper advertisements were not going to reach the aforementioned communities even if they were written in isiMpondo or isiXhosa.⁶⁰ The respondents contended that if the notices of the proposed seismic blasting had been made on the radio, the affected communities would have submitted their comments.⁶¹ Based on this, the SCA found that “the choice of print media was plainly ill-advised”, including the “choice of English and Afrikaans language newspapers.”⁶² This, therefore, rendered the entire consultation process inadequate.⁶³

The SCA further held that when the granting of exploration rights to the appellants occurred, several relevant factors, such as the impact of surveying activities on the spiritual and cultural practices of the affected communities, were not considered.⁶⁴ Based on this, the SCA found that there was, therefore, a failure on the part of the appellants to take relevant considerations into account as per section 6(2)(e)(iii) of PAJA, and this rendered their decision reviewable.⁶⁵

The SCA stated that where a ground of review has been established under PAJA, section 172(1)(a) of the Constitution requires the court to declare such a decision to be invalid to the extent of its inconsistency and make an order that is just and equitable as per section 172(1)(b) of the Constitution. To this end, the SCA concluded that the High Court failed to consider the question of a just and equitable remedy.⁶⁶ In addition, the SCA found that the High Court had also concluded that:

[a]uthorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.⁶⁷

According to the SCA, the above conclusion was a “far-reaching finding which has a sterilising effect and for which there can be no warrant, cannot be endorsed.”⁶⁸ The SCA indicated that section 172(1)(b) of the Constitution conferred courts with wide discretion to order what they

55 *Ibid* para 23

56 *Ibid.*

57 *Ibid.*

58 *Ibid* paras 23–24.

59 *Ibid.*

60 *Ibid.*

61 *Ibid* para 24.

62 *Ibid* para 24.

63 *Ibid.*

64 *Ibid* 25.

65 *Ibid* para 26.

66 *Ibid* para 27.

67 *Ibid* 26.

68 *Ibid.*

deem as just and equitable.⁶⁹ Relying on *Electoral Commission v Mhlope & Others*⁷⁰, the SCA held that “it is disproportionate to set aside an entire project as a consequence of an imperfect process.”⁷¹ Therefore, there was a need for courts to “be pragmatic in crafting just and equitable remedies” that are fair and just in each case.⁷² According to the SCA, the High Court erred by “not weighing up the relevant factors.”⁷³ Consequently, the SCA opined that it was empowered to correct what the High Court had failed to do because there was an:

eight-year delay between the granting of the exploration right and the review and, acting in reliance on the validity of the decisions, there has been significant financial expenditure in the region of R1.1 billion, dating back to 2012 when Impact [Africa] applied for its technical co-operation permit.⁷⁴

Furthermore, the SCA stated that “two renewals of the exploration right have been granted”, and that “there will be only one more opportunity to renew the exploration right” (which preceded the exploration right).⁷⁵ Finally, the SCA held that there is a moratorium on exploration rights on the entire South African coast and that the appellants “may never get the opportunity to exercise the right.”⁷⁶

The SCA considered the appellants’ contention to the effect that the High Court had “failed to consider the adverse consequences for the public in whose interests the decision-maker purportedly acts.”⁷⁷ The SCA observed that the appellants presented proof of the societal and financial advantages that will not materialise unless the exploration is carried out.⁷⁸ It is observed that the public’s interest in the finality of administrative decision-making, the degree or materiality of the irregularity, and the possibility that a protracted delay and a lack of legal certainty could deter foreign investment cannot be overlooked.⁷⁹ The SCA further considered the appellants’ argument that all the aforesaid factors could be addressed by an order to conduct further public engagement.⁸⁰ Consequently, the appellants submitted that the principles of justice and equity “dictate that the harshness of the exploration right being set aside, can and should be ameliorated.”⁸¹

In response to the SCA’s enquiry about whether the relief sought by the appellants would have any practical effect or result, the appellants submitted that before the end of the second renewal period, they timeously applied to the Petroleum Agency of South Africa (PASA) on 21 July 2023 to enter a third renewal period as permitted by section 81(4) of the MPRDA. The SCA highlighted that “an exploration right in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until the application has been granted or refused” as per section 81(5) of the MPRDA.⁸² In light of the foregoing observations, the SCA held that “despite the current expiration date of 26 August 2023, the exploration

69 *Ibid* para 27.

70 [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) para 132.

71 *Sustaining the Wild Coast NPC and Others* SCA para 26.

72 *Ibid*.

73 *Ibid* para 28.

74 *Ibid* para 28.

75 *Ibid*.

76 *Ibid*.

77 *Ibid* para 29.

78 *Ibid*.

79 *Ibid*.

80 *Ibid*.

81 *Ibid*.

82 *Ibid* para 31.

right remains in force until the third renewal application” is approved or declined by PASA.⁸³ Consequently, the SCA held that it was within its powers to direct a holistic consideration of the third renewal application and a further public participation process to cure the identified defects in the process already undertaken, as the parties who claim to have an interest in the matter have now been identified.⁸⁴ Therefore, the SCA dismissed the appellants’ appeal with costs, but amended the High Court order by suspending the setting aside of the exploration right and renewal decisions in their entirety pending the determination of the third renewal application.⁸⁵ Furthermore, the SCA held that a further public participation process be conducted to cure the identified defects in the process already undertaken. The basis for this was that the initial public consultation was inadequate.

4 DISCUSSION

The SCA correctly observed that the appellants used an inadequate consultation process when applying for and renewing the permit for exploration rights. Before it endorsed the decision of the High Court in so far as it relates to inadequate consultation, the SCA relied on the principles of consultation that were laid down in the *Bengwenyama* case in which the Constitutional Court found that “any administrative process conducted or decision taken in terms of the Act must be taken in accordance with the principles of lawfulness, reasonableness and procedural fairness.”⁸⁶ Indeed, the appellants had overlooked the concept of procedural fairness when they opted to invite inputs through the English and Afrikaans languages when many local people speak isiMpondo or isiXhosa. Additionally, the mode of communication via newspapers was defective because many people mostly listen to the radio. It is submitted that for the consultation process to allow the affected community the opportunity to make input, the procedure “must ... allow reasonable opportunity to both sides ... to communicate effectively and achieve the purpose for which prior consultation is prescribed.”⁸⁷ In my view, the “essence of consultation is a communication of ideas on a reciprocal basis.”⁸⁸ Without a clear invitation to the affected parties, there would be no reciprocal communication. Consequently, the SCA endorsed the High Court judgment in finding that the consultation process was inadequate, because “the choice of print media was plainly ill-advised” as many people listened to the radio and that the choice of using newspapers in English and Afrikaans as a platform to invite communication from affected parties failed to accommodate people, as the local language was isiXhosa or isiMpondo.⁸⁹ The SCA found that the aforementioned process was inadequate. What can be deduced from the court’s reasoning is that the language and method of consultation play a key role in determining whether there was a meaningful consultation and whether the affected community understood the message that was being conveyed to them.

Unfortunately, the SCA declined to set aside the exploration right and renewal decisions and expressed the need for the courts to be “pragmatic in crafting just and equitable remedies.”⁹⁰ It expressed concern about the potential “chilling effect on foreign investment” and what it called

83 *Ibid.*

84 *Ibid* para 31.

85 *Ibid* para 32.

86 Paragraphs 61 and 69. See also Sobikwa and Phooko “An Assessment of the Constitutionality of the COVID-19 Regulations against the Requirement to Facilitate Public Participation in the Law-making and/or Administrative Processes in South Africa” 2021 *LDD* 317–318.

87 *Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck) 491 E.

88 *Sustaining the Wild Coast NPC and Others* SCA para 32.

89 *Bengwenyama* case para 24.

90 *Sustaining the Wild Coast NPC and Others* SCA para 27.

the “sterilising effect” of the High Court’s ruling.⁹¹ According to the SCA:

Not only did the high court fail to consider the question of just and equitable relief under section 172 of the Constitution, but it went so far as to hold that: ‘[a]uthorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments.’ On any reckoning such a far-reaching finding, which has a sterilising effect and for which there can be no warrant, cannot be endorsed⁹² [Own emphasis].

The ruling by the SCA entails that while some decisions may be granted in a manner that was not compliant with the law such as the failure to consult with the affected communities, not all such decisions will be set aside, but the court will consider each case based on its own merit. The SCA adopted the approach in *Joubert Galpin Searle Inc and Others v Road Accident Fund*⁹³ and decided to “suspend the order reviewing and setting aside [the granting of exploration right] ... so that something remains in place, imperfect as it may be.”⁹⁴ The basis for this was that since there was a moratorium on exploration rights on the entire South African coast, the appellants may never have the opportunity to exercise their renewal right, as they have already done so twice before.⁹⁵ The SCA directed that, in relation to the third renewal application, a further public participation process be conducted to cure the identified defects in the process already undertaken because the parties who claim to have an interest in the matter were now identifiable. This is unfortunate because it is unclear how a renewal process will correct the original exploration right that was granted outside a consultation process. It has been argued elsewhere, albeit in the context of the law-making process, that “the views obtained from those who are likely to be affected should have an influence in the outcome.”⁹⁶ Consequently, it is submitted that where a renewal of the exploration right process is allowed to proceed based on an initial flawed process, this amounts to another irregularity. However, it is conceded that the court was placed in a difficult position and had to weigh various competing interests, such as the extended delay of about eight years between the granting of the exploration right and the review application, among other factors.⁹⁷

While the SCA judgment is progressive from a human rights perspective by upholding the High Court’s decision, recognising and respecting the rights of affected community members, it is disappointing that the SCA granted the appellants an opportunity to seek a renewal of an invalid exploration right that was obtained without following due process in the form of adequate public consultation. It is conceded that the SCA somehow observed that not every wrong decision should automatically be set aside, especially where doing so would defeat the interests of justice and fairness. However, it is unclear how the renewal of a permit, ten years after it was first granted, would cure a procedural defect.

Despite these shortcomings, the dismissal of the appellants’ appeal demonstrates the SCA’s ability to utilise the well-developed principle of consultation to safeguard the interests of

91 *Sustaining the Wild Coast NPC and Others* SCA paras 26, 27, and 29. See also discussion by *Greenpeace Africa and Partners* “South Africa: Supreme Court of Appeal Dismisses Shell’s Appeal but Extends Shell a Lifeline” (3 June 2024) <https://allafrica.com/stories/202406040048.html?cv=1> (accessed 10-02-2025).

92 *Sustaining the Wild Coast NPC and Others* SCA para 26.

93 [2014] 2 All SA 604 (ECP).

94 *Sustaining the Wild Coast NPC and Others* SCA para 30.

95 *Ibid* para 28.

96 Phooko “What Should Be the Form of Public Participation in the Law-Making Process? An Analysis of South African Cases” 2014 *Obiter* 58.

97 *Sustaining the Wild Coast NPC and Others* SCA para 28.

the affected community and consideration of environmental impact and cultural rights.⁹⁸ However, the suspension of the setting aside of the exploration right by the High Court pending determination of the application for the renewal of the exploration right arguably undermines the well-established community's right to be consulted in a decision that is likely to affect their lives.⁹⁹ Notwithstanding this observation, the decision of the SCA demonstrates that decisions to grant exploration rights and its renewals are subject to procedural fairness, which includes the right to be consulted and consideration of the views of those who are likely to be affected.

98 See also discussion by Greenpeace Africa and Partners "SCA Dismisses Shell's Appeal but Extends Shell a Lifeline" (3 June 2024) <https://www.greenpeace.org/africa/en/press/55662/press-release-sca-dismisses-shells-appeal-but-extends-shell-a-lifeline/> (accessed 10-02-2025).

99 See Netshithuthuni "A South African Constitutional Jurisprudential Duty to Consult Affected and Interested Parties before Awarding Mining and Prospecting Rights" (1 August 2019) <https://www.derebus.org.za/a-south-african-constitutional-jurisprudential-duty-to-consult-affected-and-interested-parties-before-awarding-mining-and-prospecting-rights/> (accessed 10-02-2025).