SUSTAINING THE WILD COAST: WHEN CAN AN UNLAWFUL ENVIRONMENTAL DECISION BE REPAIRED?

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The Constitutional Court's recent judgment in *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 is primarily about petroleum exploration off South Africa's Wild Coast, but it has important consequences for administrative decision making generally. It also has practical implications for the right holders of authorisations and for lenders.

The key issue the court had to determine was whether a court can correct defects in an unlawful environmental decision where it was relied on and substantial commercial investment was made on the strength of it.

The facts are briefly these: In 2013, Impact Africa Limited applied under the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) for an exploration right to undertake offshore oil and gas exploration along the Wild Coast. The right was granted in 2014 and subsequently renewed twice. In 2021 Shell acquired a 50% participating interest, and later that year announced its intention to commence a three-dimensional seismic survey. This resulted in litigation in the High Court.

The Makhanda High Court reviewed and set aside the original exploration right and its two renewals. It identified three grounds of unlawfulness, namely, inadequate consultation; the failure to consider relevant matters (including potential harm to marine and bird life, the cultural, spiritual and livelihood interests of affected communities and climate change); and non-compliance with socio-economic provisions of the MPRDA.

Importantly, on appeal, the SCA did not overturn those findings of unlawfulness, but found that the High Court had failed to properly consider a just and equitable remedy under s 172(1)(*b*) of the Constitution. Among the considerations identified by the SCA were the lengthy delay in challenging the original right and the approximately R 1.1 billion which the companies had spent because they relied on the rights in question. The SCA suspended the High Court's order, pending determination of a third renewal application which required further public participation as part of that process.

The Constitutional Court found (unanimously) that the SCA had been entitled to revisit the High Court's remedy;however, the majority and differed on whether the original decision was capable of being remedied through a subsequent public participation process.

The majority found that the original decision-maker had failed to consider matters including climate change, the requirements of National Environmental Management: Integrated Coastal Management Act, 24 of 2008; the precautionary principle and the cultural, spiritual and livelihood interests of affected communities. It was also found that there had also been failures to comply with applicable statutory requirements.

Importantly, the majority found that the use of the renewal process (provided for in section 81 of the MPRDA) to remedy deficiencies in the original decision was inconsistent with the MPRDA. Although the majority did not find that consultation could never remedy the defects of the original decision, it held that section 81 did not contemplate the kind of consultation envisaged by the SCA, that is, whether consultation is capable of revisiting whether the exploration right should have been granted in the first place.

Most importantly, the majority found that meaningful consultation is not merely an opportunity for affected people to express their views in the hope of influencing an administrative outcome. It held that meaningful consultation affirms human dignity because it gives people whose lives and livelihoods may be affected by a decision, a seat at the table and confirms the agency of affected communities and their status as participants rather than obstacles in decisions that affect their land, culture and livelihoods.

Put differently, public participation should occur at a stage at which it can genuinely inform the decision, rather than after the applicant has obtained its rights, incurred substantial expenditure and acquired a powerful practical interest in preserving the authorisation.

The majority identified another difficulty with remitting the matter to the original decision maker. The original application and environmental management programme were prepared and approved in 2013. By 2026, the factual and legal landscape had changed substantially. A reconsideration would therefore require significant new information. What was nominally reconsideration of an old application could in substance become a new application, allowing the proponent to improve retrospectively a case which had been deficient when originally presented.

The majority were reluctant to permit this where the beneficiary of the unlawful decision itself had materially contributed to the defects (even if not in bad faith). It considered Impact Africa Limited's role in the inadequate consultation significant and distinguished between an innocent recipient of an unlawful administrative benefit and a party which had contributed to the unlawfulness.

With regards to the expenditure of approximately R 1.1 billion, the majority did not regard this as irrelevant but held that commercial expenditure could not dominate the enquiry or outweigh serious constitutional violations.

The minority accepted that communities had not been genuinely consulted and that important cultural, religious and environmental considerations had not properly been addressed, but differed regarding the remedy. They held that original exploration application had been validly lodged and accepted in 2013. Its preferred solution was to return the parties to the position following acceptance of the original application. Proper consultation could then occur, and the competent authority could reconsider the matter lawfully, taking the relevant environmental, cultural and other considerations into account.

The minority regarded that approach as better accommodating both sides: it would recognise and remedy the serious infringements suffered by affected communities while avoiding the complete loss of the companies' substantial expenditure if lawful reconsideration ultimately favoured exploration.

In short, the majority and minority disagreed not about whether the original administrative process was lawful, but what the consequences of established unlawfulness should be, and what the proper limits of judicial remedial powers are.

For administrative lawyers, the lessons are these: meaningful public participation must occur at the right time and interested and affected parties must be afforded the opportunity to make meaningful [own emphasis] representations. Where communities' customary, cultural, spiritual or livelihood interests are at risk, consultation cannot safely be reduced to a notice and comment formality.

Also important is that decision-makers must take into account legally relevant environmental considerations, which presuppose that the information before them permits that. Additionally, renewal and amendment procedures may not provide a mechanism for curing defects in an original authorisation – that will depend on the governing statute.

From a practical perspective, the judgment has implications for project proponents' and lenders' legal due diligence and project risks. Developers cannot assume (as is often the case) that substantial sunk expenditure will preserve an authorisation subsequently found to be unlawful. This is particularly so where the proponent itself was responsible for, or participated in, the defective process (even if not in bad faith). Ensuring that consultation, environmental assessment and statutory compliance are sound is therefore not merely good environmental governance; they are important aspects of project risk management because there may be no lawful way to repair defective approvals later.

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