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

CASE NO: 1306/22

In the matter between

CHRISTIAN JOHN ADAMS	FIRST APPLICANT
STEENBERGS COVE SMALL SCALE FISHING COMMUNITY	SECOND APPLICANT
AUKATOW SMALL SCALE FISHIRIES COOPERATIVE	THIRD APPLICANT
WILFRED POGGENPOEL	FOURTH APPLICANT
ROSEY SHOSOLA	FIFTH APPLICANT
COASTAL LINKS LANGEBAAN	SIXTH APPLICANT
SOLENE SMIT	SEVENTH APPLICANT
NORTON DOWRIES	EIGHTH APPLICANT
CAMELITA MOSTERT	NINETH APPLICANT
ANTHONY ANDREWS	TENTH APPLICANT
NICOLAAS BOOYSEN	ELEVENTH APPLICANT
REGAN JAMES	TWELFTH APPLICANT
GREEN CONNECTION	THIRTEENTH APPLICANT
WE ARE SOUTH AFRICANS	FOURTEENTH APPLICANT

AND

MINISTER OF MINERAL RESOURCES AND ENERGY FIRST RESPONDENT

MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES SECOND RESPONDENT

SERCHER GOEDATA UK LIMITED THIRD RESPONDENT

SEARCHER SEISMIC (AUSTRALIA) FOURTH RESPONDENT

PETROLEUM AGENCY SOUTH AFRICA (PTY) LTD FIFTH RESPONDENT

BGP ''PIONEER'' SIXTH RESPONDENT

JUDGMENT delivered on 1st March 2022

THULARE J

[1] The applicants sought a two part application. This judgment is in respect of Part A wherein the applicant sought an order on an urgent basis interdicting the third, fourth and sixth respondents from commencing, alternatively continuing their seismic survey along the West and South West Coasts of South Africa in terms of a reconnaissance permit granted by the first respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (the MPRDA) pending the outcome of the applicants' internal appeal against the grant of the reconnaissance permit to the third and fourth respondents in terms of section 96 of the MPRDA and the outcome of part B of this application. The applicants did not seek any relief against the first and second respondent in respect of Part A of the application.

[2] The applicants are individual and collective formations of small scale fishers [applicants 1-12], indigenous communities [applicants 1, 10 and 11] an environmental organisation [applicant 13] and an organisation established to

enhance good governance [applicant 14]. Only the third and fourth respondents (Searcher) delivered a notice of opposition. The other respondents filed notices to abide the decision of the court.

[3] The subject is the seismic survey on the West Coast of the Republic of South Africa in the Western Cape Province. The issue is whether an interim interdict is to be in place pending the decision on Part B.

[4] The structure of the judgment will start with the applicable law, and then continue to deal individually with the points taken, to wit, the alleged unlawfulness of the permit, the illegality of the commencement of the survey, irreparable harm, public interest and the balance of convenience, and will conclude with the remainder of the requisites for an interim interdict.

[5] *"The Law of South Africa,* second edition, volume II, Lexis Nexis, WA Joubert, defines an interim interdict as follows at 401:

"401 Definition An interim interdict is a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."

At 403, the requisites for an interim interdict are set out, and these are:

(a) A *prima facie* right;
(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
(c) That the balance of convenience favours the granting of an interim interdict; and
(d) That the applicant has no other satisfactory remedy.

403 then continued:

"In view of the discretionary nature of an interim interdict these requisites are not judged in isolation and they interact."

THE LAWFULNESS OR OTHERWISE OF THE PERMIT

[6] Section 74(4)(a) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (MPRDA) provided that:

"74. Application for reconnaissance permit. –
(4) If the designated agency accept the application, the designated agency must, within 14 days of the receipt of the application, 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 reports required in terms of Chapter 5 of the National Environmental Act, 1998;"

[7] The survey was a subject in which the applicants were concerned and had an interest and wanted involvement in. They wanted to know about it because it would have an effect on them that had the potential to make a difference to and influence their lives. They are the interested and affected parties referred to in section 74(4)(a) of the MRPDA. The small scale fishers and their communities alleged that they were not consulted.

[8] The mindset of Jeremy Blood (Blood), an environmental consultant at SLR Consulting (SA) Ltd who oversaw the consultation process and prepared the environmental management plan (EMP) on behalf of searcher, is worrying. According to him, SLR and by extension Searcher did not deem the small scale fisheries along the West Coast as directly affected. SLR relied on its own data base and information received from Sara Wilkinson of Capricorn Marine Environment (Pty) Ltd and Erik Botha in compiling an interested and affected party database for the survey. The database was updated as parties register or provide comments during the process. This simply means only those who were already on the database, known to Wilkinson and Botha or knew about SLR's activities were consulted through this mode.

[9] The newspapers, e-mail notifications, publication on the website and filing hard copies at libraries clearly targeted those with access thereto. This was further limited to English and Afrikaans speakers who could read and in other instances only those with technological devices. The IsiXhosa speaking, although the language is one of the three official languages of the Western Cape Province in terms of policy, were simply disregarded. The illiterate and the poor were by design of the methodology excluded. SLR did not tell what local authorities and ward councilors did to disseminate the notices SLR provided.

[10] The meeting that was held fortified SLR's view and inclination. Only the commercial fishing sector was deemed to be worthy to be properly consulted. In a meeting with SLR, the commercial fishing sector were favoured with an overview of the project proposal and reconnaissance permit process, were presented with key findings from the draft EMP and were provided with an opportunity to raise questions or issues of concern. The importance of this consultation is captured by Robin Sutherland in the answering affidavit of Searcher where he said at para 79:

"79. It should be noted based on this engagement with the commercial fishing sectors, Searcher amended its proposed survey plan by removing the southern inshore survey lines (except one small well tie-in) in order to avoid the key "ring fenced" fishing and spawning areas in the south-east of the reconnaissance permit area (see Figure 8-2 in the EMP). Non well tie-in lines in the northern key "ring fenced" fishing area were also removed. The amended survey plan further mitigates for the potential impacts on commercial fishing (specifically demersal trawl and tuna pole) and fish spawning/recruitment."

[11] A proper consultation has significant material results for fishers. The communication between the South African Deep Sea Trawling Association (SADSTIA) and SLR offered a glimpse. On 30 August 2021 Johan Augustyn, SADSTIA Secretary wrote an email to SLR and said:

"In summary, we have reason to believe that ultimately the seismic surveys and the potential drilling in the site will have negative impacts on the marine environment and the fishing sector, with the disruption to trawl grounds, disturbance to adult fish, and impact on survival of eggs and larvae and that these should be properly quantified through research and mitigated where necessary. Other impacts, some of which are indirect, should also be considered and effectively mitigated."

In reply, SLR said:

"Any potential and further or future activities would be subject to the requisite environmental assessment and authorization process under NEMA, during which, the impacts related to these activities (including a major well blow-out) will be assessed as part of this separate EIA process. This is typical of the lifecycle of a development project."

In simple terms, SLR told SADSTIA, slow down, at the appropriate time we will get an environmental impact assessment and an environment authorization. Searcher does not have an environmental impact assessment (EIA) or an environmental authorization to date. I will return to this point when discussing the legality of the

commencement of the survey. Earlier on 27 August 2021, Robert Landman, and Insights Manager at Irvin & Johnson (I&J), had already scored from SLR a concession on avoiding “ring-fenced” fishing areas, a revised survey area, a revised survey plan and recommended mitigation amongst a number of victories.

[12] Notwithstanding SLR’s view that South Africa had a high level usage of cell phone and that calls, SMS and Whatsapp were available means, no attempt was made to meet with small scale fishers of the West Coast. Sutherland said at the end of para 78 of his affidavit:

“78 … Since the small-scale fishing sector was considered not to be directly impacted by the proposed seismic survey, the focus-group meeting targeted commercial fishing sectors.”

[13] The applicants alleged that they fish up to more than 30 km from the coastline and that their main means of survival and livelihood was snoek. In his reply at the same paragraph 78, Sutherland said the small scale-fishers are unlikely to range beyond 5.6 km (3nm), that snoek is sometimes caught 15 km from offshore and that a small number of catches have been recorded out of the 55km. It must be remembered that in its EMP, in the paragraph that dealt with Social Context and Human utilization, Searcher had said:

“There is no overlap with small-scale fishing sector, which is unlikely to range beyond 3nm (5.6 km) from the coastline.”

In its conclusions the EMP reads:

“The majority of the impacts associated with the normal operation of the project vessels will occur in the vicinity of the 2D and 3D areas, which is the offshore marine environment, more than 20km and 140 km offshore for the 2D and 3D surveys, respectively, removed from sensitive coastal receptors (e.g. key faunal breeding/feeding areas and bird or seal colonies.”

It is against this background that the applicants argued that Searcher alleged that it was under the impression that small-scale fishers would not be affected by the survey and therefore that it did not have an obligation to consult them. The argument further was that the offer by Searcher to small scale fishers, during the proceedings, of 58.6 km offshore, amounts to a concession that it was required to consult with small scale fishers.

[14] The applicants allege that the community radio stations is where most of the applicants may have heard the notification, if Searcher truly wanted to ensure that they were included in the consultation process. It could have advertised in IsiXhosa, English and Afrikaans in both commercial and community radio stations and in print media. Further, that it could have called community meetings. These were but some of the multiple ways in which Searcher could have reasonably facilitated the process of consultation to make it meaningful. Searcher did none of these. The applicants alleged that Searcher outsourced its obligation to consult to an NGO, simply ticked the box in an attempt to get away with formal compliance with no regard to the substance of the duty to consult. The communities and individuals who were impacted and were likely to be impacted by the survey had a right to be consulted.

[15] What should be of more concern is that most of those alleged to have been consulted by SLR deny this. The seventh applicant, Walter Steenkamp and Hilda Adams, whose names appear on those allegedly consulted, denied this under oath. Mr Jaffer of Masifundise Development Trust denied knowledge of the notification. What is more worrying is that Ms Nangle of Masifundise Development Trust alleged that she received notification on 15 December 2021 that a reconnaissance permit was granted but that the email was immediately recalled. Nico Walden of Abalobi, Roderick Souden and Carisa Souden who also appeared on the table annexed to Blood's affidavit denied receiving notification about the proposed blasting and the possibility of commenting on the EMP. Furthermore, the 13th applicant confirmed that it had never represented small scale fishers and has never sought or received a mandate to do so. It had a different mandate. The notice sent to the 13th applicant went unnoticed and was never distributed, besides that it did not have an obligation nor did it agree to distribute the information. According to the 13th respondent, SLR never communicated its desire nor sought the agreement of 13th applicant, for 13th applicant to distribute the notification to other parties.

[16] The applicants' case was that the survey in the absence of consultation posed the immediate risk to marine and bird life, as well as to the communities who relied on the ocean for their livelihoods and food sources. It was further that the failure to consult rendered Searcher's activities unlawful and called for immediate interdictory

relief to avoid the anticipated harm. Section 75(1)(c) and (2) of the MPRDA provided that:

"75 Issuing and duration of reconnaissance permit. –

(1) Subject to subsection (4), the Minister must issue a reconnaissance permit if –

(c) the reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment and that the environmental authorization is issued;

(2) The Minister must refuse to issue a reconnaissance permit if the application does not meet all the requirements contemplated in subsection (1)."

[17] There must be evidence that the proposed reconnaissance will not result in unacceptable pollution, degradation or damage to the environment, an environmental authorization is mandatory and the Minister would act unlawfully in granting a reconnaissance permit where section 75(1)(c) was not satisfied. It was not possible to establish that the seismic survey blasting would not result in unacceptable pollution, degradation or damage to the environment without engaging meaningfully with all interested and affected parties. The consultation process and its results were an integral part of the fairness of the application process and the decision to grant the permit could not be fair if the Minister of Minerals and Energy did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render his granting of the permit procedurally fair [*Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 66].

THE LEGALITY OF THE COMMENCEMENT OF THE SURVEY

[18] Section 5A of the MPRDA provides:

"5A Prohibition relating to illegal act. –

No person may prospect for or remove, mine, conduct co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –

(a) An environmental authorization."

In section 1 of the MPRDA, "reconnaissance operation" means any operation carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photo geological surveys and includes any remote sensing

techniques, but does not include any prospecting or exploration operation other than acquisition and processing of new seismic data. In the same section, “environmental authorization” has the meaning assigned to it in section 1 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA).

[19] In section 1 of NEMA, “environmental authorization”, when used in Chapter 5, means the authorization by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorization contemplated in specific environmental management Act. Chapter 5 of NEMA begins with the general objectives in Section 23. It provides:

“23. General Objectives. –

(1) The purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management activities.

(2) The general objective of integrated environmental management is to-

(a) Promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;

(b) Identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimizing negative impacts, maximizing benefits, and promoting compliance with the principles of environmental management set out in section 2;

(c) Ensure the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

(d) Ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

(e) Ensure the consideration of environmental attributes in management and decision-making which may have significant effect on the environment; …”

[20] Section 24 of NEMA provides for environmental authorisations. Subsection (1) and 1(A) read as follows:

“24. Environmental authorisations. –

(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on

the environment of listed activities or specified activities must be considered, investigated assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorization in terms of this Act.

(1A) Every applicant must comply with the requirements prescribed in terms of this Act in relation to –

(a) Steps to be taken before submitting an application, where applicable;
(b) Any prescribed report;
(c) Any procedure relating to public consultation and information gathering;
(d) Any environmental management programme;
(e) The submission of an application for an environmental authorization and any other relevant information; and
(f) The undertaking of any specialist report, where applicable.

[21] Section 24C(2A) identified competent authorities for granting authorisations in respect of applicable activities. It provides:

"24C. Procedure for identifying competent authorities. –

(2A) The Minister responsible for mineral resources must be identified as the competent authority in terms of subsection (1) where the listed or specified activity is directly related to-

(a) Prospecting or exploration of a mineral or petroleum resource; or
(b) Extracting and primary processing of a mineral or petroleum resource."

Section 24(2)(a) and 24F(1)(a) provides that:

"24. –

(2) The Minister, or an MEC with the concurrence of the Minister, may identify –
(a) Activities which may commence without environmental authorization from the competent authority;" …

24F. Prohibition relating to commencement or continuation of listed activities. –

(1) Notwithstanding any other Act, no person may –
(a) Commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the ace may be, has granted an environmental authorization for the activity;"

[22] Searcher's application for a reconnaissance permit was submitted on 30 April 2021. On 18 May 2021 the application was accepted on condition Searcher developed an environmental management plan. The EMP was submitted in

September 2021. On 11 June 2021 the Department of Environment, Forestry and Fisheries (DEFF) issued amendments to the Environment Impact Assessment Regulations, Listing Notice 1, Listing Notice 2 and Listing Notice 3 of the Environmental Impact Assessment Regulations, 2014 in GN R517 Government Gazette 44701. In the new Regulations, applicants for a reconnaissance permit submitted on or after 11 June 2021 were required to obtain an environmental authorization, issued in terms of section 24 of NEMA and the 2014 EIA Regulations. Searcher is correct that an application for a reconnaissance permit made before 11 June 2021, according to the new Regulations, had to be finalized in terms of the law as it stood when the application was made. The transitional provision in the new Regulations are clear that they relate to applications for the permit.

[23] The applicants' case was that Parliament had the law that no person shall commence a seismic survey in South African waters unless the Minister of Minerals and Energy had granted such person an environmental authorization for the activity [section 24F(1)(a) of NEMA and section 5A of the MPRDA]. The applicant's case was that the law as it stood at the commencement of the survey on 24 January 2022, required Searcher to have been granted an environmental authorization by the Minister of Mineral Resources and Energy, which Searcher does not have. Searcher's case rests on the procedural and substantive effects of amendments to the Regulations and their interpretation. The basis upon which Searcher relied can ably be determined after hearing Part B which includes hearing the first, second and fourth respondents who Searcher implicated and who have a right to be heard before a pronouncement is made.

IRREPARABLE HARM

[24] The applicants' apprehension of harm related to marine and bird life, food security, their livelihoods and their cultural rights. It has to be stated at the outset that both parties on this aspect rely in the main on expert opinions. What makes matters more challenging is that the independence and neutrality of most of the experts is in doubt. Some of the experts for the applicants work to promote the rights of small scale fishers or work directly with them. Some of them are signatories to the so-called open letter dated 2 December 2021 to the President of the Republic of South

Africa, His Excellency Cyril Ramaphosa, the Minister of Minerals and Energy, the Honourable Gwede Mantashe and the Minister of Forestry, Fisheries and the Environment, the Honourbale Barbara Creecy. It would have sounded better if the learned authors had sought an audience with the two Ministers to pursue their concerns.

[25] The mode of engagement, which is generally a "critical public emotional outburst", and the content thereof, suggest that they may be pursuing an agenda that amounts to elevating themselves to an alternative monopolistic policy power house if not some parallel government for fauna and flora in South Africa. This is moreso if regard is had to the position they advance, which is that all planned seismic surveys be halted. To their credit, they argue for seismic surveys to be allowed if there are environment management programmes which underpin the granting of the permit by independent assessors including those with marine biological training, taking into account new marine ecological and social impacts evidence, including to species and systems in the marine environment. On the other hand, many of the experts relied upon by Searcher were part of the development of Searcher's EMP and the survey that is in dispute in this litigation, while others work for corporate-aligned entities and not independent institutions. They are in favour of, and in the main make a living from, surveys and ancillary activities. The challenges notwithstanding, individually and collectively, to the extent that they were helpful and could be relied upon, the court appreciates the input of the experts.

[26] The cumulative impact of seismic surveys has not been studied in South Africa. Physical damage to marine animals has been directly linked to the kind and level of sound emitted during the nature of seismic survey that Searcher is undertaking. This is the reason why Searcher has to mitigate the damage. Some species show physiological stress responses and behavioural changes like moving away rapidly and this increased energy consumption and energy costs which reduced time for foraging and the ability to protect itself. There was a specific concern for beaked whales who were particularly sensitive to anthropogenic noise. The cumulative impact of the explosion of explorations on the West Coast was not considered. Searcher's EMP did not explain how the cumulative impacts were assessed and did not specifically mention other activities in the area. Since October 2021, thousands

dead seals have washed up along the South and West Coasts. The cause was unknown and additional stress at this time was not advisable. It is not known if this was linked to surveys.

[27] The impact on fish assemblages was difficult to interpret and there was lack of research on confounding effects and multiple stressors were a key concern. Marine Mammal Observers (MMO) efficiency was very low due to the nature of offshore marine environmental survey area particularly at night. The PAM technology and MMO's had "shortfalls", they were the industry practice and the best way available. This Passive Acoustic Monitoring technology worked primarily for cetaceans and whales but did not detect fish that did not emit sound whose vocalisations were highly directional.

[28] In most cases it reduced the risk of deliberate injury to marine mammals to negligible levels. It was only undersea earthquakes and volcanic eruptions that were louder that a seismic airgun. Visual observers were relied upon to add to technology monitoring during the day as a mitigating measure. They could not work at night. Searcher's position is that it would not be cost effective not to work at night. The mitigation measures that searcher had put in place were at best partially effective and in certain circumstances not effective at all. Turtles, whales, dolphins, seals and elasmobranchs are species that stabilize the ecosystem yet alarmingly little is known about the direct and indirect effects of the survey on them.

[29] Large pegalic fish such as tuna and snoek followed distribution of their prey and these behaviours were at risk of disruption by the survey. Very little information was provided in Searcher's EMP on demersal fish species, mainly hake and snoek. Hake and snoek were both known to habitat the survey area and to a depth of 500m well within the survey depths. The EMP failed to interrogate the secondary effects associated with fish behavioural disruption. The EMP failed to acknowledge that hake and snoek perform rhythmic diel foraging migrations off the seafloor at night and onto sea floor during the day. This meant that they will be within distances from the scurvey that may expose them to direct injury and mortality impacts that the EMP identified for other species.

[30] The West Coast was one of the World's most productive marine environments. The region fertilized on a large scale and almost continuous by transport of water rich nutrients. It thus had several nursery grounds for fishes and supported top predator populations such as seabirds and marine mammals. Just to focus on zooplankton which represents all marine groups. It has life stages from eggs, larvae, juveniles to adults. Zooplankton was the reason the West Coast contained important fish nursery grounds. As a result, impacts on zooplankton could propagate to other groups. Very little was known about the impact of seismic surveys on zooplankton. Existing observations suggested damage to larval and juvenile lobsters of up to 500-1.2 km from the survey sound source and that zooplankton mortality increased up to three-fold within the survey area.

[31] Snoek will be impacted and the experts proposed no seismic survey there in late summer early autumn. The EMP and Searcher reports did not acknowledge or interrogate the centrality of snoek to small scale fishers of the West Coast and glossed over the potential impact to them. Searcher's EMP understanding of the small scale fishers was flawed. There was a wealth of recent data available on the small scale fishers sector. Searcher's EMP was not based on the most recent available data. Snoek was central to the food security of the West Coast fishers, including small scale fishers.

[32] Snoek was a source of food for the impoverished communities of the West Coast, and also provided an income to sustain the small-scale communities. It was a solution for food security and malnutrition. It had macro and micro nutrients and was a source of protein. It was vital for growth and underdeveloped digestive systems of children who often could not process staple food with more starch. It was essential for human health needs, including essential vitamins. The survey's impact on food security for the small scale fishers was a regressive measure in that it would diminish the existing enjoyment of the right to food as envisaged in section 27(1)(c) of the Constitution.

[33] Very little is known about the differential impact of seismic activity on young and smaller fish, turtles and cetaceans and this could impact fish assemblages, abundances and availability. A precautionary approach was necessary. The impact

of behavioural avoidance was understated because the survey area of influence overlapped with forging habitat of threatened seabird species. The timing and duration of the survey coincided with the onset of the breeding season which starts in April/May and with the post-moult periods in which they must regain body condition. Many of the mitigation measures will be ineffective in reducing the impacts as the noise of the airguns themselves caused the impacts. The surveys should not be conducted within the foraging ranges of sensitive seabird species.

[34] Searcher did not contend that exceptional circumstances existed in this case to meet the prohibition on regressive measures. As things stand, the survey will be at the expense of the livelihoods of impoverished communities of small-scale fishers, which Searcher had deliberately marginalized. Climate change had changed the ability to catch fish and the survey will further impact the ability to catch and the small-scale fishing will collapse. The heritage of fishing, from the Khoi and San traditional communities and later joined by the Malay slaves, had been a definitive feature and part of the culture of the communities on the West Coast. The traditional "fish curry" during Easter weekend, now adopted as a central tradition in the Western Cape, is a proud tradition of the indigenous communities of the West Coast. Currently big business, including main chain stores like Checkers, Pick n' Pay and others order and sell bulk fish during this period. The advancement of this tradition has economic spin-offs.

[35] The small scale fisher families and communities live fishing. It is in their veins and in their blood. Men go to fish, women "vlek" the snoek and the children are taught from a young age how to be guardians of the marine resources. They know each rock and reef. From "vlekking" women can tell when the snoek run is coming and if it os going to be a good run. "*Ons het uit die see gekom"* is their belief. For the Khoi and San communities, who are reclaiming their identity from the apartheid classification as "Coloured", the sea is not only important for their food security and livelihood. They believe it to have healing powers and it is also a spiritual place for them. The applicants are of the view that a meaningful consultation would address the issues that have arisen in this matter.

PUBLIC INTEREST

[36] This matter has drawn public interest, as the interests of the public was hugely affected. It is not only the small scale fishers, the indigenous communities who draw their livelihood from the West Coast waters, organisations involved in good governance especially around our waters and an environmental organization that have an interest in the issues that the applicants have raised. As earlier indicated in this judgment, SLR in order to allay the fears and concerns of commercial fishers, specifically told I&J on 27 August 2021, which SADSTIA accepted as well on 30 August 2021, that an environmental impact assessment and an environmental authorization will, at the appropriate time, be constructed and sought respectively.

[37] I understand that to mean that I&J and SADSTIA labored under an impression that Searcher would in accordance with section 24(1A)(e) of NEMA submit an application for the environmental authorization to the Minister of Minerals and Energy. The question arises because in this application, Searcher's position is that no environmental authorization was required alternatively that its EMP constituted an environmental authorization. Furthermore, in this application Searcher's position is that the EMP over which it consulted I&J and SADSTIA is in effect what it deemed to be an EIA. This is not what SLR told I&J and SADSTIA to get their buy-in into the survey. Having read the issues raised by commercial fishers, I doubt if they would have accepted the case that Searcher now advanced, to wit, that the EMP that they were discussing constituted both the environmental impact assessment and the environmental authorization for which they specifically asked. It is clear that the environmental impact assessment and the environmental authorization are measures that mitigate harm to the fishing industry. The survival of the industry is a matter of national importance. It must be borne in mind that Searcher's offer of 58.6 km still leaves the environmental impact assessment of the survey unattended.

BALANCE OF CONVENIENCE

[38] The harm caused by the infringements of constitutional rights cannot be quantified, measured or weighed. The *status quo* ensures that the small scale fishers have food security, livelihoods, and can enjoy their cultural rights. The South African experts on the other hand, warn that without further research, an environmental

impact assessment and evidence of a proper environmental management programme, the blasting will result in the indignity of poverty, work, culture and the indignity of being disregarded in matters involving their rights for small scale farmers. The harm is irreparable.

[39] As things stand, all that the applicants were asking for was a proper identification, prediction and evaluation of the actual and potential impact of Searcher's survey on the environment, socio-economic conditions, their cultural heritage, the risks and consequences and alternatives and options of mitigation of the survey, with a view to minimize the negative impacts, maximizing the benefits and compliance with the principles of environmental management. They ask for no more than what the principles applicable in this business provide. They are asking that the effects of the survey on the environment, appropriate public participation in decisions that may affect them and their environment receive consideration as provided by law. In essence, they are asking the court to uphold the Rule of Law, and bring to a screeching halt and force a u-turn by causing a cul-de-sac for the Law by the Rulers. The Afrikaans language expresses the prayer better in simple terms: "Searcher, gaan terug." The drawing board and the negotiation table is calling your name.

[40] There are sound reasons why the courts had the period 15 December to 15 January declared as a *dies non* in the Republic, inclusive both days, except for urgent matters, in respect of court proceedings. This period has for years been a window for unscrupulous persons to become highly active, well aware that the rest of commercial activity has ceased and most people are away from their work stations and on holiday and will not access the information to intelligibly engage with serious matters that have an impact on their lives, sometimes even changing their status.

[41] *"Uzenzile akakhalelwa" (*self-inflicted harm deserves no sympathy). It was Searcher's choice to use the days on which no legal business could be done or which did not count for legal purposes, to pursue consummation of its activities for the survey. Whilst warned by the applicants of the issues around its survey when the festive season ended, Searcher made a conscious election to disregard the applicants again and sent the vessel, BGP Pioneer, into the sea and commenced

with its survey on 24 January 2022, without an environmental authorization in their hands, and having not consulted with the small scale fishers. The applicants had warned Searcher about the constitutional implications of its conduct and the apprehended impact that its conduct would have. Searcher refused to not commence with the survey until the issues raised by the applicants were ventilated. Searcher cannot be heard to complain of the labour pains of the birth of the consequences of it not showing approval of the applicants' plea.

[42] Searcher took a calculated risk for its operational costs, loss of profit and possible contractual breaches if any. Be it as it may, Searcher did not set out any evidence to demonstrate how it arrived at its costs and why it is classified as a cost. I could not even estimate that cost and I am unable to appreciate harm, if any, arising out of the interdict, especially where there is evidence that Searcher is carrying out the survey in the West Coast outside the South African waters contemporaneous with the period of the interim interdict. Searcher outsourced its responsibilities to SLR and it was the decision of SLR not to consider the small scale fishers as deserving a proper consultation. It was a deliberate choice not to ensure a proper environmental management regime and not to secure an environmental authorization before it commenced with the survey.

[43] Before I revert back to the analysis of the other requisites on the law on interdicts, I consider it necessary to refer to the brief history of the matter for the sake of completion. On 7 February 2022 the matter served before me and only the applicants' papers were filed. I was satisfied about its urgency. Searcher was represented but had not filed its answering papers. I was satisfied that the harm that the applicants apprehended would manifest if I did not intervene. It was within my jurisdiction not to maintain the apprehended harm caused by the continued survey and to restore the *status quo*. I used my discretionary powers and granted an interim interdict pending the hearing of this Part A of the matter, and made an order of court including a timeframe which the applicants had provided, which provided the 7th of March 2022 as the date of the hearing of Part A of the application. Searcher prepared its answering affidavit and approached the court on 14 February 2022 to reconsider its interim interdict including its order on time frames. I was amenable to reconsider the matter and heard the parties on the reconsideration. I was not

satisfied that there was reason for me to set aside the interim interdict, but I reconsidered the time frames and made an order which included the date of the hearing of Part A on 24 February 2022.

[44] Rule 6(12)(a) provides as follows:

"6 Applications

(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit."

[45] In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A-B it was said: (the following interpretation is accepted from the Afrikaans version)

"It is of importance to state what the effect of this Rule is. In the case of an urgent application, an applicant is permitted to act by way of notice of motion without taking into account the rules which are usually applicable. The applicant is, in a certain sense, taking into account the circumstances of the case, permitted to make his own rules but "as far as practicable: in accordance with the existing rules. Rule 6(12) therefore makes provision for a process subject to rules different from the usual and when an applicant appears before the judge in such a procedural manner he must ask the judge to disregard the rules applicable to ordinary adjudication."

At 782C-D it was said:

"If an applicant acts in terms of this Rule and informs the respondent that he regards the application as urgent, it follows, in my view, that the respondent is obliged, in the sense that he runs the risk of an order against him by default, and entitled to provisionally accept the rules which the applicant has Adopted. When the matter comes before the Judge he can object, but in the meantime, he dare not ignore the Rules which the applicant has made for himself."

THE *PRIMA FACIE* RIGHT

[46] If Searcher did not consult with the small scale fishers, the indigenous communities, Non- Governmental Organisations and other interest groups and individuals in the fishing sector in the West Coast, this would be sufficient to

conclude that there was no adequate and appropriate opportunity for public participation in decisions that affected the public and the may affect the environment. If Searcher failed to construct an environmental impact assessment, this may lead to a conclusion that Searcher failed to ensure that the effects of its activities on the environment, especially for snoek and other fish on which the small scale fishers relied, but on marine and bird life in general, received adequate consideration of the impact of its activitiy in South African waters. The failure to obtain and environmental authorization may mean that the Minister for Minerals and Energy had no opportunity to ensure the consideration of environmental attributes in the management and decision making which may have significant effects on the environment.

[47] Central to this case, is the Constitutionally guaranteed right to Equality as set out in section 9(1), Chapter 2, Bill of Rights, in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) which reads:

"Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

The *audi alteram partem* is a legal principle of our law which is at the core of our principles of justice. This principle, which is accepted to mean that you listen to the other side or let the other side be heard as well, enjoined SLR not to pass judgment that the small scale fishers and communities of the West Coast were not interested or affected persons without affording the fishers a fair hearing in which they were allowed to respond on the evidence upon which it relied and afforded an opportunity to state their own case on the issue. In *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) it was said at para 43:

"[43] … What also appears from those cases is that an obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right. Only if that right is denied is the obligation to consult breached.".

[48] Against the background of these principles, informed by the writing of some of the leading academics on the marine environment, it is clear that an adequate and appropriate consultation, especially around the construction of the environmental impact assessment, would have enriched that report for the benefit of the Minister of Minerals and Energy's decision, and to bring into being an informed environment

management regime upon which the environment authorization would have been considered. A joint report by the experts and the appointment of a referee where they differed, is but one avenue that would have enriched the Minister's process, especially its leg on the environmental impact assessment studies. The right to equal protection and benefit of the law, assumes compliance with prescripts by actors in any assignment and not cynical disregard thereof. I deem it not necessary to discuss the right to food, livelihood and culture further than I have already done in this judgment as in my view the rights of the applicants are perfectly clear. From my understanding of Searcher's Heads of Arguments at para 12, these rights are not contested. At best it contests *prima facie* rights as regards Part B (para 33 of its Head of Arguments), which is not the subject of this judgment, Suffice to state that the apprehension of harm by the applicants is well founded.

NO ALTERNATIVE REMEDY

[49] There is an internal appeal remedy provided for in section 96 of the MPRDA. Section 90 also provided for the suspension of the permit. The applicants have lodged an internal appeal. They are not the only party that has lodged an internal appeal. The Western Cape Provincial Government has also lodged an internal appeal according to the papers. The time periods provided by the prescripts for the Minister to consider the appeal outrun the period envisaged for the survey. This means that by the time that the Minister considered the appeal, the harm apprehended by the applicants would have manifested. The appeal, as a result, does not meet the apprehended harm. It is an impractical remedy as there are no adaptations for its use, and therefore insensible to rely on as it is impossible to provide the urgent relief sought by the applicants.

[50] For these reasons I make the following order:

1. The third, fourth and sixth respondents are interdicted from continuing the seismic survey of the West and South-West Coast of South Africa in terms of a Reconnaissance Permit granted by the First Respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) pending-

1.1. The outcome of the applicants' internal appeal against the decision to grant the Reconnaisance Permit to the third and fourth respondents in terms of section 96 of the MPRDA; and

1.2. The outcome of Part B of this application.

2. The third and fourth respondents, jointly and severally, the one paying the other to be absolved, to pay the costs of Part A of this application, including the costs of three counsel.
3. The third and fourth respondents, jointly and severally, the one pay paying the other to be absolved, to pay the costs of 7 February 2022, including the costs of three counsel.
4. The third and fourth respondents, jointly and severally, the one paying the other to be absolved, to pay the costs of 14 February 2022, including the costs of three counsel.

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DM THULARE

JUDGE OF THE HIGH COURT

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