IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 95261/15

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	YES/~~NO~~
2.OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
3.REVISED	
16/05/2018	
DATE	**SIGNATURE**

In the matter between: 16/5/18

TREASURE KAROO ACTION GROUP	First Applicant
AFRIFORUM	Second Applicant
and	
DEPARTMENT OF MINERAL RESOURCES	First Respondent
MINISTER OF MINERAL RESOURCES	Second Respondent
THE HEAD OF THE DEPARTMENT OF MINERAL RESOURCES	Third Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fourth Respondent

JUDGMENT

EF DIPPENAAR, AJ:

Introduction

[1.] This application concerns the review and setting aside of Regulations for Petroleum Exploration and Production, made by the second respondent, the Minister of Mineral Resources,on 3 June 2015 in terms of Government Gazette 38855 ('the regulations').

[2.] The first applicant is a non-profit organisation. The second applicant is, on its version, an active non-governmental organisation involved in the protection and development of civil rights. The applicants launched the application in the public interest.

[3.] The first to third respondents representing the Minister and Department of Mineral Resources, opposed the application. The fourth respondent, the Minister of Environmental Affairs was joined to the application as an interested party and also opposed the application. The respondents are referred to by name where appropriate.

[4.] This application does not concern the merits or demerits of the contentious issue of hydraulic fracturing, colloquially known as 'fracking'. The decision to allow hydraulic fracturing is a policy decision by Government. This application primarily centres around whether the Minister of Mineral Resources was authorised to make the regulations.

[5.] The applicants' case as pleaded is that after the amendment of the Mineral and Petroleum Resources Development Act [1]('MPRDA') by the 2008 amendment, the MPRDA, as read with the National Environmental Management Act [2]('NEMA') the Minister of Mineral Resources was deprived of the power to make regulations because they are or include extensive environmental regulations.

[6.] The founding papers attack various regulations on the grounds that they constitute environmental regulations and/or are vague. The regulations are also attacked on the basis that they are not suitable for South African conditions and that relevant considerations were not taken into account whereas irrelevant considerations were taken into account and that there was no appropriate public participation process. The founding papers squarely place reliance on PAJA as the basis for the review application.

[7.] In argument, the applicants conceded that their challenge to certain of the regulations in their founding papers were based on the draft rather than the final regulations and abandoned reliance on the ground that the regulations were vague.

[8.] In considering the matter it should be borne in mind how the pleaded case deviated from the case as argued and which case the respondents were called upon to meet, as the answering papers focused on defending the various regulations attacked by the applicants.

[9.] During oral argument, the applicants deviated from their pleaded case and heads of argument, abandoned reliance on PAJA and based their argument squarely on the principles of a review under the doctrine of legality.

[10.] The respondents understandably took issue with this change of stance, considering the case they had to meet on the papers. It is trite that a party must make

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[1] Act 28 of 2002
[2] Act 107 of 1998

out its case in its founding papers[3] and that in application proceedings, the affidavits constitute both the pleadings and the evidence[4].

[11.] This of itself constitutes an additional hurdle to the applicants as various of the relevant issues raised were not fully dealt with in the papers and no factual evidence was presented in substantiation of the contentions made in argument.

[12.] In light of the applicants' abandonment of their reliance on PAJA as a basis for the review, it is not necessary to determine whether the making of regulations constitutes administrative action for purposes of PAJA, an issue raised on the papers.

[13.] The onus in this review rests on the applicants to prove on the papers that there was a lack of authority and the other grounds relied on to review the regulations.[5]

Unreasonable delay

[14.] The first issue which must be determined is whether there was an undue delay in instituting these proceedings as contended by the Minister of Environmental Affairs as the common law delay rule applies[6]. This devolves into a two stage enquiry. Firstly, whether there has in fact been an undue delay and secondly, if so, whether such delay must be condoned.[7]

[15.] The regulations were published on 3 June 2015 and the present application was launched on 30 November 2015, some six months or 180 days later.

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[3] Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464D
[4] Hart supra, 469C-E; Massstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd 2017 91) SA 613 (CC) 625I-J
[5] MEC for Public Works, Roads and Transport, Free State v Morning Star Minibus Hiring Services (Pty) Ltd 2003 (4) SA 429 (O) par [7.1]; Davies v Chairman, Committee of the JSE 1991 (4) SA 43 (W); Momoniat v Minister of Law and Order; Naidoo v Minister of Law and Order 1986 (2) SA 264 (W) 273F; Administrator, Transvaal and Firs Investments (Pty) Ltd v Johannesburg City Council 1971 (10 SA 56 (A) 86A-C; Johannesburg City Council v Administrator, Transvaal and Mayofis 1971 (1) SA 87 (A) 100A-B; Geidel v Bosman NO 1963(4) SA 253T 255H; Union Government v Fakir 1923 AD 466 at 470..
[6] Beweging vir Christelik-Volkseie Onderwys v Minister of Education [2012] 2 All SA 462 (SCA) par [34]
[7] WolgroeiersAfslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13(A)

[16.] The Minister of Environmental Affairs contended that the applicants were already in a position to launch the application in June 2015 considering the history of the regulations, as they were at that time already armed with the relevant knowledge, information and arguments to launch any review application and had been involved in the process since well before 2015.

[17.] The applicants explained that the delay occurred consequent to protracted written and other engagement with the Minister of Mineral Resources, the departure and replacement of one of their consultants and the unavailability of counsel.

[18.] I agree with the Minister of Environmental Affairs that the explanation tendered is tersely stated and in various respects does not fully explain the delay. However, the contention that the review application could already have been launched in June 2015 by virtue of the applicants' involvement in the process, is in my view unrealistic.

[19.] Considering all the relevant circumstances, including the importance and relevance of the regulations to the public interest, any prejudice to the respondents and the fact that the application had been launched under PAJA and within the time limits prescribed therein, it cannot be said that the delay was unreasonable.

[20.] Even if I am wrong on this issue, it would in any event be in the interests of justice[8] to exercise the discretion afforded the court to grant condonation to the applicants in all the circumstances and to determine the application on its merits, rather than to bar them from relief on the basis of delay.

The Merits

[8] Considering by way of analogy factors such as those stated in The Camps Bay Ratepayers and Residents' Association v Harrison 2010 JDR 0099 (SCA) par [54]

The Applicants' case

[21.] The applicants' primary challenge to the regulations is that the Minister of Mineral Resources was not empowered to make the regulations at all. Reliance is placed on section 107(1) of the MPRDA read with section 14 of the Interpretation Act[9].

[22.] The applicants' case is that, in line with the provisions of the One Environmental System Agreement ('OESA') and after subparagraph (a) had been deleted from section 107 (1) of the MPRDA[10] by section 77 of the MPRDA Amendment Act[11], the Minister of Mineral Resources did not have the power to make regulations regarding the matters which were listed in paragraph (a) of section 107 (1). These provisions, specifically in section 107 (1)(a)(i), (ii), (iii) and (iv). had authorised the second respondent to make regulations regarding, inter alia, the management of the environmental impacts of petroleum exploration and production.

[23.] Their case is based on three propositions.

[23.1] First proposition: that pursuant to the repeal of section 107(1)(a), the said Minister was not authorised to make regulations regarding the management of the environmental impacts of the exploration for or production of petroleum. The applicants contended that subsection 107(1)(a) was the only subsection that authorised the Minister of Mineral Resources to make regulations regarding the management of the environmental impacts of mining and prospecting including petroleum exploration and production. It was argued that the deletion of section 107(1)(a) is consistent with the legislative scheme contemplated by OESA and that the only inference to be drawn is that the legislature intended to remove any regulatory power from the Minister of Mineral Resources as regards the matters listed in that subsection.

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[9] No 33 of 1957
[10] With effect from 7 June 2013
[11] Mineral and Petroleum Resources Development Amendment Act 49 of 2008

[23.2] Second proposition: that the regulations could not have been made in terms of any other provisions in section 107 of the MPRDA, considering that the substance of the regulations deal with the management of the environmental impacts of petroleum exploration and production and were thus made under the powers conferred by section 107(1)(a)(i)-(iv).

[23.3] Third proposition: that section 50A of NEMA positively constrains or limits the power of the Minister of Mineral Resources to make such regulations.

[24.] The applicants further contended that the main purpose of the regulations is to regulate environmental issues. This contention underpins their propositions.

Substance of the regulations

[25.] Before dealing with these propositions it is necessary to ascertain the substance of the regulations.

[26.] In order to characterise the regulations it is necessary to determine its main substance, which depends not only on its form but also its purpose and effect.[12] As part of this enquiry the title or preamble and legislative history are relevant considerations as they serve to illuminate the subject matter[13].

[27.] Functional areas must be purposively interpreted in a manner which would enable the respective functionaries to exercise their respective legislative powers and functions effectively.[14]

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[12] Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) paras [61]-[63]
[13] Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another 2001 (1) SA 500 (CC) paras [36] and [38]
[14] See fn 32

[28.] As a general principle, regulations must where possible be construed consistently with the empowering Act under which they are made.[15]

[29.] Underpinning the analysis are two Constitutional injunctions: first the injunction on all organs of state under section 27 as read with section 7 of the Constitution[16] to pursue sustainable development; and second the injunction on a court under section 39(2) to interpret any legislation to promote the spirit, purport and objects of the Bill of Rights[17] and to examine the objects and purport of an act, so far as possible, in conformity with the Constitution.

[30.] It is first necessary to shortly analyse the development of environmental legislation and OESA.

Development and history of environmental legislation.

[31.] When NEMA[18] commenced on 29 January 1999, mining operations were excluded from its scope. Environmental management provisions in relation to mining activities were contained in the MPRDA. In the case where an activity would disturb the environment there was a lack of integration between the processes contained in NEMA and the MPRDA.

[32.] The Minister of Mineral Resources and the Minister of Environmental Affairs, later joined by the Minister of Water Affairs and Sanitation, concluded the One Environmental System Agreement. To give effect to this agreement various pieces of legislation had to be amended.

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[15] Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) Para [211], 395A-B
[16] Act 108 of 1996.
[17] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) para [22].
[18] Act 107 of 1198

[33.] In short, OESA entails[19]:

[33.1] That all environmental related aspects would be regulated through one environmental system which is NEMA and that all environmental provisions would be repealed from the MPRDA[20];

[33.2] That the Minister responsible for environmental affairs would set the regulatory framework and norms and standards, and that the Minister responsible for mineral resources would implement the provisions of NEMA and the subordinate legislation as far as it related to prospecting, exploration, mining or operations;

[33.3] That the Minister responsible for mineral resources would issue environmental authorisations in terms of NEMA for prospecting, exploration, mining or operations, and that the minister responsible for environmental affairs would be the appeal authority for these authorisations; and

[33.4] That the Ministers responsible for water affairs, mineral resources and environmental affairs respectively agreed on fixed time frames for the consideration and issuing of the authorisations in their respective legislation and agreed to align the time frames and procedures.

[34.] By 2008, the functional area of mineral resources development was regulated by a suite of legislation of which the MPRDA was the core. It regulated two broad functional areas, being the area of authorisation to develop mineral resources and the area of environmental impacts pertaining to the authorised development of mineral resources. In addition, the MPRDA entrusted the power to deal with these two functional areas to designated officials from the Department of Mineral Resources, as it is now known.

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[19] As set out in section 163A(2) of the National Water Act 36 of 1998
[20] Act 28 of 2002

[35.] By 2008 NEMA and other legislation, entrusted for their implementation to the Department of Environmental Affairs (or its predecessors) existed as a suite of general environmental legislation alongside the MPRDA but were entrusted to the Department of Mineral Resources for administration, thus creating an overlap of functions and jurisdiction between the two departments.

[36.] To address this overlap of functions and jurisdiction, amending statutes were enacted: the MPRDA Amendment Act 49 of 2008[21] ('the MPRDA Amendment Act') and the NEMA Amendment Act 62 of 2008[22] ('the NEMA Amendment Act'). The amendment acts were part of the process of implementing OESA.

[37.] The stated objectives of the MPRDA Amendment Act were to make the Minister of Mineral Resources the responsible authority for implementing environmental matters in terms of NEMA and specific environmental legislation insofar as it pertains to the topic of environmental impacts related to the authorised development of mineral resources and to align the MPRDA with NEMA to provide for OESA.

[38.] Thus, the Department of Mineral Resources would in essence retain its functions and jurisdiction over the functional areas, but its empowering legislation would derive from two different statutes:

[38.1] The regulatory power to deal with the functional area of the granting of authorisation to develop mineral resources from the MPRDA; and

[38.2] The regulatory power to deal with the functional area of environmental impacts related to the authorised development of mineral resources from NEMA.

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[21] Assented to on 19 April 2009 per GN 437 in Government Gazette No 322151 dated 21 April 2009
[22] Assented to on 5 January 2009 per GN 22 in Government Gazette No 31789 dated 9 January 2009

[39.] The stated objectives of the NEMA Amendment Act were to empower the Minister of Mineral Resources[23] to implement environmental matters in terms of NEMA insofar as it pertained to the topic of environmental impacts related to the authorised development of mineral resources and to align the environmental requirements in the MPRDA with NEMA by providing, inter alia for the use of OESA.

[40.] Both the MPRDA Amendment Act[24] and the NEMA Amendment Act[25] provided for general[26] and special amendments, albeit that the formulation in the two acts were different and provided for a transitional period of eighteen months[27] before the special amendments would come into operation.

[41.] The special amendments envisaged by the MPRDA Amendment Act pertained to the migration and relocation of the functional area of environmental impacts related to the authorised developments of mineral resources from the MPRDA to NEMA.

[42.] The special amendments envisaged by the NEMA Amendment Act pertained to the functional area of environmental impacts related to the authorised development of mineral resources. Because of the descriptive method adopted in section 14(2) of the NEMA Amendment Act, none of the special amendments to NEMA came into operation on 7 June 2013 so that there could be no migration of any of the provision related to the development of mineral resources from the MPRDA to NEMA before the expiry period of the transitional period on 8 December 2014.

[43.] The listing method adopted in section 94(2) of the MPRDA Amendment Act resulted therein that various of the provisions of the MPRDA dealing with the functional

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[23] Then known as the Minister of Minerals and Energy
[24] Section 94, which in section 94(2) listed its special amendments by reference to the individual sections affected
[25] Section 14, which in section 14(2) described the class of its special amendments as any provision related to the development of mineral resources.
[26] The general amendments of the MPRDA came into effect on 7 June 2013 per R14 of 2013 in Government Gazette No 36512 of 31 May 2013. The general amendments of the NEMA came into effect on 1 May 2009 per R27 of 2009 in Government Gazette No 32156 of 24 April 2009
[27] The transitional period would thus commence on 3 June 2008 and endure until 8 December 2014

area of environmental impacts pertaining to the authorised development of mineral resources[28] were formally deleted in the MPRDA on 7 June 2013[29], without their counterparts in NEMA being made operational at the same time.

[44.] Prior to their deletion sections 38 and 39 provided as follows:

> "38 *The holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit-*
> *(a) must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act, 1998;*
> *(b) must consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment as contemplated in section 24(7) of the National Environmental Management Act, 1998);*
> *(c) must manage all environmental impacts-*
> *(i) in accordance with his or her environmental management plan or approved environmental management programme, where appropriate; and*
> *(ii) as an integral part of the reconnaissance, prospecting or mining operation, unless the Minister directs otherwise;*
> *(d) must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and*
> *(e) is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.*"

and section 39 (2) provided:

> "*Any person who applies for a reconnaissance permission, prospecting right or mining permit must submit an environmental*

[28] Such as section 5(4)(a),38 and 39, dealing with environmental management programmes and environmental management plans.
[29] As part of the general amendments

management plan as prescribed."

[45.] The repealed sections of the MPRDA affected by the legislative scheme to migrate and relocate the functional area of environmental impacts related to the authorised development of mineral resources from the MPRDA to NEMA would thus substantively have remained in force until at least 8 December 2014 when the special amendments to NEMA and the MPRDA came into effect.

[46.] Any regulatory gap would have been prevented by section 11 of the Interpretation Act[30], which provides: *'When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.'*

[47.] The MPRDA Amendment Act contemplated one transitional period whereupon completion of the migration and migration of the functional area of environmental impacts related to the authorised development of mineral resources from the MPRDA to NEMA, the Department of Mineral Resources would in substance retain its functions and jurisdiction over the two functional areas, but the empowering legislation would derive from two separate statutes.

[48.] The regulatory power to deal with the functional area of the granting of the authorisation to develop mineral resources through reconnaissance, prospecting and mining would be derived from the MPRDA, whilst its regulatory power to deal with the functional area of environmental impacts pertaining to the authorised development of mineral resources would be derived from NEMA.

[49.] The original section 13 of the NEMA Amendment Act however contemplated a second transitional period whereafter the Department of Mineral Resources would be deprived of the functions and jurisdiction over the functional area of environmental

[30] 33 of 1957

impacts relating to the authorised development of mineral resources, which functions were then to be transferred to the Department of Environmental Affairs.

[50.] This issue was resolved by the NEMA Amendment Act 25 of 2014 ('2014 NEMA Amendment Act'), which came into operation on 2 September 2014[31] which, inter alia, repealed section 13 of the NEMA Amendment Act[32]. This Act further repealed section 14(2) of the NEMA Amendment Act.[33] [34]

[51.] Section 163A was inserted in the National Water Act[35] by section 5 of the National Water Amendment Act,[36] also with effect from 2 September 2014. It is generally similar to section 50A of NEMA. Section 163A (2) of the National Water Act provides as follows:

> "Agreement for the purpose of subsection 1 means the Agreement reached between the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs titled *One Environmental System* for the country with respect to mining, which entails:
>
> (a) that all environment related aspects would be regulated through one environmental system which is the National Environmental Management Act, 107 of 1998 and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 28 of 2002;
>
> (b) that the Minister responsible for environmental affairs sets the regulatory framework and norms and standards, and that the Minister responsible for mineral resources will implement the provisions of the National Environmental Management Act, 107 of 1998 and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

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[31] Per GN 448 in Government Gazette No 37713 of 2 June 2014
[32] Section 32
[33] With effect from 1 September 2014. See sections 27 and 29
[34] The cross reference in section 94(2) of the MPRDA Amendment Act however remained
[35] No 36 of 1998
[36] No 27 of 2014

(c) that the Minister responsible for mineral resources will issue environmental authorisations in terms of the National Environmental Management Act, 107 of 1998 for prospecting, exploration, mining or operations, and that the Minister responsible for environmental affairs will be the appeal authority for these authorisations; and

(d) that the Minister, the Minister responsible for mineral resources and the Minster responsible for environmental affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and also agreed to align the time frames and processes."

[52.] Section 50A (2)(a) of NEMA refers to *"the principal Act"* whereas section 163A (2)(a) of the National Water Act identifies NEMA as the Act through which all environmental-related aspects would be regulated. In terms of those sections all environmental provisions would be repealed from the MPRDA.

[53.] Uncertainty arose about the exact date on which the special amendments to the MPRDA came into effect. As the regulations here in issue were published on 3 June 2015, it is not necessary to attempt to clarify this uncertainty.

[54.] At the time of publication of the regulations, the Department of Mineral Resources and its functionaries were empowered to deal with the functional area of environmental impacts relating to the authorised development of mineral resources in terms of NEMA and no longer in terms of the MPRDA.

Relevant provisions of the MPRDA

[55.] Section 107 does not expressly refer to petroleum. In terms of section 69 (2)(a) and (b)(i) of the MPRDA any reference in section 107[37] to minerals must be construed as a reference to petroleum.

[37] Which falls under chapter 7 of that Act.

[56.] The long title of the MPRDA provides: *'To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources and to provide for matters connected therewith'.*

[57.] This assists in illustrating the object or purpose of the said act.[38]

[58.] In section 1, the definitions of *'environment'* and '*environmental authorisation*' refer to the meanings ascribed thereto under NEMA.

[59.] The objects of the MPRDA are stated in section 2. The relevant subsections provide:

> *'2 The objects of this Act are to:*
> *(a) Recognise the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic;*
> *(b) Give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources;*
> *(c) ...*
> *(d) Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and participate in the mineral and petroleum industries and to benefit from the exploration of the nation's mineral and petroleum resources;*
> *(e) ...*
> *(f) ...'*
> *(g) Provide for security of tenure in respect of prospecting, exploration, mining and production operations;*
> *(h) Give effect to section 24 of the constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.'*

[38] South African Dental Association NPC v Minister of Health and Others [2015] 1 All SA 73 (SCA) para 52 and the cases cited in fn 16

[60.] Section 4(1) provides: *'When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any interpretation which is inconsistent with such objects'.*

[61.] Under section 37 of the MPRDA:

> *' (1) The environmental principles set out in section 2 of NEMA:*
> *(a) Apply to all prospecting and mining operations…and any matter or activity relating to such operation;*
> *(b) Serve as guidelines for the interpretation, administration and implementation of the requirements of this Act;*
> *(2) Any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.'*

[62.] Under section 80(1)(c) of the MPRDA, the Minister of Mineral Resources is responsible for the issuing of an environmental authorisation, which regulates the granting and duration of an exploration right.

[63.] The requirements for an application for an environmental authorisation is regulated by regulation 16 of the Environmental Impact Assessment Regulations[39] ('EIA regulations') under NEMA.

[64.] Prior to its deletion, section 107(1)(a) of the MPRDA provided as follows:

> *"(1)The Minister may, by notice in the Gazette, make regulations regarding*
>
> *(a) (i) the conservation of the environment at or in the vicinity of any mine or works;*
> *(ii) the management of the impact of any mining operations on the environment at or in the vicinity of any mine or works;*

[39] GN 982, published in Government Gazette no 38282 of 4 December 2014.

(iii) the rehabilitation of disturbances of the surface of land where such disturbances are connected to prospecting or mining operations;

(iv) the prevention, control and combating of pollution of the air, land, sea or other water, including ground water, where such pollution is connected to prospecting or mining operations;

(v) pecuniary provision by the holder of any right, permit or permission for the carrying out of an environmental management programme;

(vi) the establishment of accounts in connection with the carrying out of an environmental management programme and the control of such accounts by the Department;

(vii) the assumption by the State of responsibility or co-responsibility for obligations originating from regulations made under subparagraphs (i), (ii), (iii) and (iv) of this paragraph; and

(viii) the monitoring and auditing of environmental management programmes…".

[65.] The relevant portion of section 107[40] after the amendments provides as follows:

"(1) The Minister may, by notice in the Gazette, make regulations regarding…

(f) the form of any application which may or have to be done in terms of this Act and of any consent or document required to be submitted with such application, and the information or details which must accompany such application;

(g) the form, conditions, issuing, renewal, abandonment, suspension or cancellation of any environmental management programme, permit, licence, certificate, permission, receipt or other document which may or have to be issued, granted, approved, required or renewed in terms of this Act;

(h) the form of any register, record, notice, sketch plan or information which may or shall be kept, given, published or submitted in terms of or for the purposes of this Act;

(k) any matter which may or must be prescribed for in terms of this Act;

[40] Applicable at the time of publishing the regulations

(l) any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act;

(vi) the establishment of accounts in connection with the carrying out of an environmental management programme and the control of such accounts by the Department;

(vii) the assumption by the State of responsibility or co-responsibility for obligations originating from regulations made under subparagraphs (i), (ii), (iii) and (iv) of this paragraph; and

(viii) the monitoring and auditing of environmental management programmes...".

[66.] The only prohibition on the regulatory powers of the Minister of Mineral Resources is contained in section 107(2) which pertains to state revenue or expenditure.

NEMA

[67.] The long title to NEMA states the objects of that act to be threefold and provides as follows:

> *'To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, instructions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith'.*

[68.] Competent authority in section 1 is defined as:

'in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity.'

[69.] Environmental authorisation is defined as:

'the authorisation by a competent authority, a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act[41] .

[70.] Section (2)(1) provides:

'(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-

(a) Shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

(b) Serve as the general framework within which environmental management and implementation plans must be formulated;

(c) Serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

[41] As defined, which definition does not refer to the MPRDA

(d) Serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and

(e) Guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment'.

[71.] Section 2 thus envisages that the principles set therein may impact upon decision making by other organs of state in terms of other legislation which impact on the environment.

[72.] Sections 23 and 23A set out the general principles of integrated environmental management and the mainstreaming of integrated environmental management.

[73.] Section 24 deals with environmental authorisations and under section 24(10)(a) enjoins the Minister of Environmental Affairs to develop or adopt norms or standards. Section 24(10)(b) provides that norms or standards must provide for rules, guidelines or characteristics which need to meet certain requirements.

[74.] Pursuant to and in accordance with OESA, section 50A was inserted in NEMA by section 17 of the 2014 NEMA Amendment Act with effect from 2 September 2014. It deals with future amendments in respect of environmental matters insofar as they relate to OESA.

[75.] Section 50A of NEMA provides as follows:

> *"Future amendments in respect of environmental matters in so far as it relates to the Agreement.*
>
> *(1)(a) Any proposed amendments to the provisions relating to prospecting, exploration, mining or production in this Act, the National Environmental management Amendment Act (Act no 62 of 2008), a specific environmental management Act or any other Act of Parliament that may have the effect of amending*

the provisions of the Agreement, must be subject to concurrence between the Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources.

(b) Any intervention contemplated in paragraph (a) that may lead to the amendment of the provisions of the Agreement must be tabled in Parliament prior to any steps being taken to effect those changes, and Parliament may express its view on the proposed amendment of the Agreement.

(2) Agreement for the purpose of subsection (1) means the Agreement reached between the Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources titled One Environmental System for the country with respect to mining, which entails—

(a) that all environment related aspects would be regulated through one environmental system which is the principal Act and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002;

(b) that the Minister sets the regulatory framework and norms and standards, and that the Minister responsible for Mineral Resources will implement the provisions of the principal Act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

(c) that the Minister responsible for Mineral Resources will issue environmental authorisations in terms of the principal Act for prospecting, exploration, mining or operations, and that the Minister will be the appeal authority for these authorisations; and

(d) that the Minister, the Minister responsible for Mineral Resources and the Minster responsible for Water Affairs agree on fixed time-frames for the consideration and issuing of the authorisations in their respective legislation and agree to synchronise the time frames.'

[76.] In order to interpret the regulations an integrated approach must be followed, taking onto consideration OESA, NEMA and the MPRDA.

[77.] From the sections referred to above, it is clear that NEMA is focussed on co-operative governance and recognises that certain matters which have an impact on the environment may be regulated by other legislation, falling under the ambit of power of other organs of state. It is not disputed on the papers that the Department and Minister of Environmental Affairs were involved in the making of the regulations.

[78.] Section 41 of the Constitution, dealing with the principles of co-operative government and inter-government relations, enjoins organs of state to, inter alia, to:

[78.1] 'Secure the well-being of the people of the Republic;
[78.2] Provide effective, transparent, accountable and coherent government for the Republic as a whole; and
[78.3] Cooperate with one another in mutual trust and good faith by inter alia coordinating their actions and legislation with one another'.[42]

[79.] Under section 50A of NEMA, the Minister of Environmental Affairs sets the regulatory framework and norms and standards, and the Minister of Mineral Resources will implement the provisions of the principal act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations.

[80.] Under section 50A(2)(a) and (b) of NEMA the concept *'regulatory framework"* is not defined. The concept *'norms and standards'* is defined in broad terms[43] with reference to section 24(10), which provides in section 24(10)(b) that *'norms or standards must include for rules, guidelines or characteristics'.*

[81.] The regulatory framework and norms and standards are those pertaining to environmental management under NEMA and not those pertaining to developmental management under the MPRDA.[44]

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[42] Sections 41(1)(b),41(1)(c) and 41(1)(h)(iv)
[43] In the definitions in section 1
[44] The preamble to the 2014 NEMA Amendment Act seeks to empower the Minister of Environmental Affairs to take an 'environmental decision' insofar as it relates to exploration or production but is not an empowerment to take all decisions in relation thereto.

[82.] Section 50A(2)(b) does not prescribe the manner in which the Minister of Mineral Resources is to implement the provisions of NEMA and the subordinate legislation insofar as they relate to prospecting, exploitation, mining or operations, nor does it contain any prohibition, constraint or limitation on the Minister of Mineral Resources in relation to such implementation.

[83.] The concept of implementation in section 50A(2) is not restricted to issuing environmental authorisations, which is regulated separately under section 50A(3)[45]. The two subsections are not made subject to each other.

[84.] There is no prohibition on the Minister of Mineral Resources implementing by cross referencing to NEMA and the EIA regulations or repeating such provisions.

[85.] Section 107(1)(l) of the MPRDA empowers the Minister of Mineral Resources to make regulations regarding any matter the regulation of which may be necessary or expedient in order to achieve the objects of that Act. The legislature did not intend to remove this power as it was not included in the deletions in the MPRDA Amendment Act.

[86.] The Minister of Mineral Resources is thus empowered to make regulations which are necessary or expedient in order to achieve the objects of the MPRDA as reflected in section 2(h) being:

> *'to give effect to section 24 of the Constitution[46] by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development'.*

[45] As read with sections 24C(2A) and 24(1) of NEMA
[46] Which bestow on everyone the right to an environment which is not harmful and the right to have the environment protected and preserved for future generations.

[87.] The purpose of the regulations is consistent with achieving the aforesaid object of the MPRDA.

[88.] The purpose and substance of the regulations is thus primarily the regulation, control and administration of the manner in which hydraulic fracturing is to be conducted as one of the potentially available technical and engineering or industrial methods for the exploration or production of petroleum and deal with prescribed standards and practices that must ensure the safe exploration and production of petroleum[47].

[89.] The effect of the regulations is not in my view, as the applicants contend, the management of the environmental aspects relating to hydraulic fracturing, bearing in mind that the Minister of Mineral Resources is tasked with the implementation of the prescribed standards and norms set by NEMA as part of the legally required model of integrated environmental management set by OESA and the relevant legislation.

[90.] References to certain environmental aspects in the regulations as part of an overlap between technical decision making and environmental concerns is in the circumstances from a practical perspective inevitable. It does not alter the nature or dominant purpose of the regulations to environmental regulations.

The regulations

[91.] The regulations in their terms stated that the Minister of Mineral Resources made them under section 107 of the MPRDA as read with the provisions of section 14[48] of the Interpretation Act.[49]

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[47] As stated in regulation 85(1) of the regulations

[48] Section 14 provides: *'When a law repeals wholly or partially any former law and substitute provisions for the law so repealed, the repealed parts shall remain in force until the substituted provisions come into operation'*

[49] 33 of 1957

[92.] The regulations supplement the present MPRDA regulations and add chapters 6 to 10 thereto. Chapter 6 deals with general provisions, chapter 7 with environmental impact assessment, chapter 8 with well design and construction, chapter 9 with operations and management and chapter 10 with well suspension and decommissioning.

[93.] Regulation 85(1) of the regulations states expressly that the purpose thereof is to augment the MPRDA regulations:

> *'so as to prescribe standards and practices that must ensure the safe exploration and production of petroleum'.*

[94.] Various of the definitions in the regulations, such as *'competent authority'*, *'competent person'* and *'environmental authorisation'* ascribe the meanings of these concepts to the definitions in NEMA.

[95.] The regulations cover both technical aspects and certain environmental aspects. To the extent that they deal with environmental aspects, the regulations make cross references to NEMA and the EIA regulations, such as regulation 16 which deals with the general requirements for an application for environmental authorisation. References are further made to the standard requirements of the department responsible for water affairs, being the Department of Water and Sanitation as regulated by the National Water Act[50].

[96.] Examples of such regulations are regulations 86, 88, 94, 110 and 121 to 123. It is not necessary to deal with each of the regulations individually in light of the conclusions reached in this judgment.

[97.] The regulations further prescribe:

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[50] 36 of 1998

[97.1] The consent or document required to be submitted with an application in terms of the MPRDA, and the information and details which must accompany such application[51];

[97.2] The form, conditions, issuing, renewal, abandonment, suspension or cancellation of any environmental management programme, permit, license, certificate, permission receipt or other document which has to be issued, granted, approved, required or renewed[52] in terms of the MPRDA[53];

[97.3] The form of any register, record, notice, sketch plan or information which may or shall be kept, given, published or submitted in terms of or for purposes of the MPRDA or its subordinate legislation[54];

[97.4] Those matters which may or must be prescribed by regulation in terms of sections 79(1)(b), 80(5), 84(4) and 88(1) of the MPRDA.

[98.] The environmental aspects referred to in the regulations appear to have two purposes:

[98.1] to comply with the constitutionally mandated principle of cooperative governance; and

[98.2] in relation to environmental information or data, for informed decision making on matters pertaining to the safe exploration or production of petroleum.

[99.] The applicants have not in their papers made out any case that the Minister of Mineral Resources in fact made any new regulations pertaining to the environment.

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[51] E.g. regulations 86(3), 87(1) and (2), 88(2), 88(3), 89(1)-(3), 94(4)
[52] E.g. regulations 95(7), 98 (8)(b), 109(2) and 112(13).
[53] Or any subordinate legislation promulgated in terms thereof
[54] E.g. regulations 87(1), 88(2), 88(9)-(11), 96(6), 103(4), 112(3) and 113(9).

[100.] Similarly, no case is made out on the papers that the regulations are in breach of OESA or amend OESA. The founding papers are entirely silent on what the regulatory framework is under which section 50A(2) of NEMA must be considered and make no factual reference to what the norms or standards are or in what respect they have been breached or amended by the regulations.

[101.] The applicants simply dispute that the regulations are necessary or expedient as envisaged by section 107(1)(l) and on this basis contend that they are not authorised and that the objectives of section 2(h) of the MPRDA are to be achieved through NEMA.

[102.] The fact that certain of the regulations in certain respects refer to the environmental impacts of hydraulic fracturing does not support the applicants' contentions insofar as the regulations implement the regulatory framework and are consistent with OESA as set out in section 50A of NEMA.

[103.] The applicants do not in their founding papers attempt to identify the norms and standards which the regulations purport to set, nor do they illustrate that the regulations do not pertain to the implementation of norms and standards set under NEMA.

[104.] Section 50A(2)(b) of NEMA does not prescribe the manner in which the Minister of Mineral Resources is to implement the provisions of NEMA and the subordinate legislation insofar as they relate to prospecting exploration, mining or operations.

[105.] This provision does not state that the Minister of Mineral Resources cannot do so by making regulations that implement such provisions or subordinate legislation. The Minister may implement by cross referencing to NEMA and the EIA regulations and requiring compliance with their provisions.

[106.] For the reasons set out above I do not agree with the applicants' contention that the main purpose of the regulations is to regulate environmental aspects in conflict with NEMA.

Applicants' propositions

[107.] I now return to deal with the applicants' three propositions.

[108.] In my view the applicants' first proposition must fail. For the reasons already provided, section 107(1)(a) of the MPRDA is not the only provision empowering the Minister of Mineral Resources to make the regulations, nor is the inference justifiable that the legislature intended to remove any regulatory power from the Minister of Mineral Resources as regards the matters previously listed in subsection 107(1)(a).

[109.] The applicants' second proposition must also fail. The regulations in my view squarely fall within the ambit of section 107(1)(l) of the MPRDA upon a proper interpretation of its relevant provisions.

[110.] As already stated, the proposition that the substance of the regulations deals with the management of the environmental impacts of petroleum exploration and production lacks merit.

[111.] The narrow approach adopted by the applicants fails to recognise the necessary overlap and interaction between the MPRDA and NEMA and is based on an incorrect premise that all environmental issues can only be regulated by the Minister of Environmental Affairs, acting under NEMA.

[112.] In argument, the applicant relied heavily on the judgment of Bloem J in the Eastern Cape Division, Grahamstown in Stern NO and Others v Minister of Mineral

Resources[55] ('Stern'), in which the regulations here in issue were set aside on the basis that the Minister of Mineral Resources was not empowered to make the regulations.

[113.] The judgment in Stern must however be seen in the context of what issues arose in that matter and on what basis the application was argued. In Stern, the application was considered on the premise that the regulations are indeed environmental regulations and pertained to environmental matters[56]. It does not appear from the judgment that any consideration was given to the nature of the regulations. In the present matter, the issues are different and the matter was argued from a different perspective.

[114.] In my view Stern is distinguishable on this basis. If I am incorrect in distinguishing Stern on such basis, I am in disrespectful disagreement with the conclusion reached therein.

[115.] The applicants' third proposition must also fail. The applicants have made out no case that section 50A of NEMA positively constrains or limits the power of the Minister of Mineral Resources to make the regulations, absent any factual evidence that the regulations either constituted new matter pertaining to the environment, or was in breach of OESA or sought to amend it.

[116.] Section 44(1C) of NEMA provides as follows:

> *'Regulations made in terms of this Act or any other Act of Parliament that may have the effect ofamending the provisions of OESA referred to in section 50A must be made by the Minister of Environmental Affairs in concurrence with the Minister responsible for mineral resources and the Minister responsible for water affairs'.*

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[55] Eastern Cape Division Grahamstown case number 5762/2015 delivered on 17 October 2017
[56] Stern supra paras [26]-[29], [36], [38], [43] and [46]

[117.] Thus only the Minister of Environmental Affairs has authority to make any regulations that may have the effect of amending the agreement in section 50A of NEMA (in concurrence with the Ministers of Mineral Resources and the Minister of Water Affairs and Sanitation).

[118.] The applicants have not made any case in their founding papers that the regulations have the effect of amending OESA in section 50A of NEMA, which would trigger the exclusive powers of the Minister of Environmental Affairs[57] to make the regulations under section 44(1C) of NEMA.

[119.] Insofar as the applicants sought to contend in argument that the regulations are in breach of OESA, this contention was not canvassed in the founding papers and the respondents were not called upon to meet such a case in their answering papers.

[120.] On the papers, the Minister of Environmental Affairs has accepted[58] that there is no breach of the agreement in section 50A of NEMA in the making of the regulations.

[121.] There is no factual evidence presented on the papers that the regulations fail to implement the framework, norms and standards of the one environmental system.

[122.] The applicants sought the setting aside of the regulations in their totality on the basis that it is not possible to separate the good from the bad. However, even if the regulations fall to be set aside, this can only be done to the extent that they were not authorised, i.e. to the extent of the inconsistency. On the papers, the applicants have

[57] In concurrence with the Minister of Mineral Resources and the Minister of Water Affairs and Sanitation
[58] Electronic Media Network Ltd and Others v etv (Pty) Ltd and Others [2017] (9) BCLR 1108 (CC) par [41]

not illustrated that the regulations are inconsistent in their totality. The applicants' argument is flawed on this issue[59].

[123.] For the reasons stated, the applicants primary challenge must fail.

Further grounds of review

[124.] The remaining grounds of review can be shortly disposed of, mainly on the basis that they are squarely based on PAJA, reliance on which the applicants abandoned during argument.

[125.] The application papers make out no factual or legal basis for reviewing the regulations on the basis of the doctrine of legality and the issue of rationality is not adequately canvassed, if at all. A review on this basis must appear from the facts pleaded[60].

[126.] I am not satisfied that all the relevant facts have been canvassed on the papers regarding the rationality issue and that the respondents have not suffered any prejudice by the applicants attempting to merely argue the issue as a legal point.[61]

[127.] The appropriate test is rationality and differs from the principles applicable to a review under PAJA. Reasonableness and the rationality concept are conceptually distinct. [62]

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[59] Pharmaceutical Manufacturers Association of South Africa and Another: In re: the Ex parte application of the President of the Republic of South Africa and Others [2000] JOL 6158 (CC)
[60] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) par [27]
[61] Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) 23B-D
[62] Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) paras [26]- [37, [39]]

[128.] The present enquiry is thus not concerned with the motivation for the decision, but with the relationship between the decision and the objective sought to be achieved, entailing an evaluation of the relationship between the means employed to achieve a particular purpose on the one hand and the purpose itself.

[129.] Stated differently, it is an evaluation of the relationship between means and ends. What must be considered is whether the decision of the Minister of Mineral Resources to make the regulations is rationally connected to the purpose for which the power to do so was conferred[63].

[130.] It was not disputed that the Executive is constrained by the principle that it may exercise no power and perform no function beyond that conferred by law. It was also accepted that a decision must be rationally related to the purpose for which the power was conferred, failing which the exercise of the power would be arbitrary and at odds with the Constitution.

[131.] Various of the applicants' contentions in its papers are not relevant to the present enquiry. More importantly, the applicants failed to put up primary factual evidence to support a review based on the doctrine of legality in relation to the grounds raised. It was not disputed in argument, nor could it be, that various issues of relevance were not directly addressed in the applicants' papers in the context of rationality.

[132.] The applicants contended that relevant considerations were not taken into account and irrelevant considerations were taken into account. On the papers, reliance was squarely based on the provisions of sections 6(2)(e)(iii) and (vi), 6(2)(f)(ii) and 6(2)(i) of PAJA and the concept of rationality was not dealt with on any factual basis.

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[63] Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) par [90]; Affordable Medicines Trust v Minister of Health of Republic of South Africa 2006 (3) SA 247 (CC) paras [49], [75] and [77]; Masetlha v President of the Republic of South Africa 2008 (1) BCLR 1 (CC) par [80]; Minister of Defence and Military Veterans v Motau 2014 (8) BCLR 930 (CC) par [69]

[133.] The applicants asserted that the regulations are not based on relevant material concerning South African conditions and that conditions in foreign countries were taken into account. The excluded material included a report commissioned from the Academy of Science of South Africa by the Department of Science and Technology in October 2014 to establish the technical readiness of South Africa to support the shale gas industry and the strategic assessment commissioned from the Council for Scientific Research by the Minister of Environmental Affairs in May 2015.

[134.] As neither report is complete, the applicants contended that until these reports are finalised, it is impossible to determine the appropriate regulatory framework to ensure the safe exploration and production of shale gas in South Africa, which the regulations purport to do. Their objection was based on the failure to consider the peculiarly South African conditions that may impact on fracturing which the reports would deal with.

[135.] The applicants did not however in their papers identify the material upon which the regulations were actually based, nor was it illustrated that or how they do not deal with local conditions.

[136.] The respondents disputed on a factual basis that the regulations did not take account of the unique South African attributes and conditions. They further pointed out that any lack of consideration of two non-existent reports does not meet the rationality test applicable to a legality review.

[137.] It was further contended by the applicants that the extensive reliance on American standards, which are both contextually foreign and lenient in favour of hydraulic fracturing, was inappropriate. It was alleged that the lack of sound South African based scientific research informing the regulations infringes the right in section 24 of the Constitution to have the environment protected through reasonable legislative and other measures and the precautionary principle in section 2 of NEMA.

[138.] These contentions were however not supported by any factual evidence. The applicants further presented no factual evidence illustrating the infringement of section 24 of the Constitution or a flaunting of the precautionary principle which could underpin a legality review on this basis.

[139.] The next ground of attack was that the 2015 regulations were drafted without reference to scientific learning. The applicants questioned the extent to which certain reports of the Council of Canadian Academies and the supplemental environmental impact statement of the New York Department of Environmental Conservation were taken into account in the drafting of the regulations. In their papers, the applicants again placed reliance on the provisions of sections 6(2)(e)(iii) and (vi), 6(2)(f)(ii) and 6(2)(i) of PAJA.

[140.] The papers however lacked any proper factual basis for the allegations. Absent a proper factual basis that the process adopted by the Minister of Mineral Resources was irrational, these additional grounds raised by the applicants cannot properly be tested on the basis of rationality and must fail.

[141.] For these reasons, the above stated grounds of attack must fail.

[142.] The last ground of attack was that inadequate public participation was allowed before the 2015 regulations were finally published and that the 30 day period afforded was insufficient to meet the participatory democracy standards enshrined in the Constitution, given the highly specialised and technical nature of hydraulic fracturing. The applicants placed reliance on sections 3(2)(ii), 4(1), 5, 6(2)(c), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(ii), and 6(2)(i) of PAJA.

[143.] The applicants have not put up any factual basis on which it can be concluded that the process adopted was irrational[64]. A process was implemented in terms of which interested parties were afforded an opportunity of 30 days to be heard.

[144.] The Constitutional Court[65] has emphasised that, whilst it is necessary that citizens must be provided with a meaningful opportunity to make representations prior to the making of laws that would govern them, Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligations to facilitate public involvement, provided they acted reasonably.

[145.] In my view it cannot be said that the process which was adopted was irrational. The enquiry is not whether there are other means which could have been used, but whether the means selected are rationally connected to the objective sought to be achieved. Objectively speaking, it cannot in my view be said that they fall short of the standard demanded by the constitution.[66]

[146.] For the reasons stated, this ground of attack must also fail.

[147.] In the circumstances, the application must fail on its merits.

Non-joinder

[148.] In their answering papers and in argument, the respondents raised the non-joinder of certain parties which they contended have a direct and substantial interest in the application, including the Department of Water and Sanitation and its Minister, the

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[64] Minister of Home Affairs and Others v Scalabrini Centre, cape Town and Others [2013] 4 All SA 571 (SCA), paras [67]-[68]

[65] In Poverty Alleviation Network v President of the Republic of South Africa 2010 (6) BCLR 520 (CC). See Doctors for Life International v Speaker of the National Assembly 2006 (12) BCLR 1399 (CC) par [122]

[66] Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC) paras [12] and [36]

Petroleum Agency of South Africa and each person who has made an exploration application that is being considered pursuant to the regulations.

[149.] In light of the conclusion which I have reached regarding the merits of the application, it is not necessary to make a formal finding on the issue of non-joinder as it would be of academic interest only.

Costs

[150.] I turn to the question of costs. The applicants placed reliance on the general rule enunciated in Affordable Medicines[67] and Biowatch[68] and contended that even if they were unsuccessful in the application, they should not be mulcted in costs.

[151.] Considering all the relevant factors and despite the change in stance adopted by the Applicants in relation to the basis of the application, it cannot be said that the present proceedings were frivolous or vexations or do not relate to matters of constitutional import. I have also taken into consideration that section 32(2) of NEMA provides certain protection to parties such as the applicants in certain circumstances.

[152.] It would in my view be a judicial exercise of the discretion afforded to the court in relation to costs, not to grant an adverse costs order against the applicants.

[153.] I make the following order:

[153.1] The application is dismissed.

[153.2] The parties are directed to pay their own costs.

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[67] Affordable Medicines Trust v Minister of Health and Others 2006 (3) SA 247 (CC) para [139]
[68] Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) paras [20]-[25]

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT
PRETORIA

APPEARANCES

DATE OF HEARING	:	20 and 21 February 2018
DATE OF JUDGMENT	:	16 May 2018
APPLICANTS' COUNSEL	:	Adv P Lazarus SC Adv A Pantazis
INSTRUCTED BY:		Hurter Spies Incorporated (012 941 9239/664 0708) Ref: T P Kruger/W1104
FIRST TO THIRD RESPONDENT'S COUNSEL	:	Adv HN Maenetje SC Adv N Mavungua
INSTRUCTED BY:		State Attorney (Mr M.O. Letsoko) (012 309 1649/086 644 5436) Ref: 8620/2015/Z14/PM
FOURTH RESPONDENT'S COUNSEL	:	Adv MM Oosthuizen SC Adv F Patel
INSTRUCTED BY:		State Attorney (012 309 1672) Ref: C Brandt/LK/CG0506