



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 4 July 2019

STATUS Immediate

Minister of Mineral Resources v Stern & others (1369/2017) and Treasure the Karoo Action Group & another v Department of Mineral Resources & others (790/2018) [2019] ZASCA 99 (4 July 2019)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dealt with a consolidated matter in which it dismissed the appeal of the Minister of Mineral Resources from the Eastern Cape Division of the High Court, Grahamstown (Stern matter); and allowed an appeal by the Treasure the Karoo Action Group and Afriforum (TKAG matter) from the Gauteng Division of the High Court, Pretoria.

During November 2015, the applicants in the Stern matter sought an order reviewing and setting aside the Regulations for Petroleum Exploration and Production, 2015 (Petroleum regulations). The principal ground for review was that the Minister of Mineral Resources had no power to make the Petroleum regulations. During the same month, the applicants in the TKAG matter launched a similar application. In the Stern matter, Grahamstown High Court held that the Minister of Mineral Resources had no power to make the Petroleum regulations and reviewed and set them aside. In the TKAG matter, the Pretoria High Court came to the contrary conclusion and dismissed the application. Both courts granted leave to appeal to the SCA.

Between 2008 and 2010, three entities applied for rights to explore for shale gas in the Karoo through the use of hydraulic fracturing (fracking). The fracking process would likely have a

variety of adverse impacts on the environment, most notably, the emission of pollutants and the contamination of both surface water and groundwater.

The Minister of Mineral Resources established an interdepartmental task team to evaluate the potential environmental risks posed by fracking and the social impacts of shale gas exploration. The task team recommended that a monitoring committee be constituted to augment the regulatory framework on the exploration for and production of petroleum, including shale gas. It also recommended that, once these preceding actions have been completed, the fracking be authorised under strict supervision of the monitoring committee.

On 7 September 2012, Cabinet approved the recommendations of the task team. The envisaged monitoring committee was established and produced draft regulations that were published and then revised after the receipt of public comments. On 3 June 2015 the Minister of Mineral Resources promulgated the Petroleum regulations.

Subsequently, the Minister of Environmental Affairs, the Minister of Mineral Resources and the Minister responsible for Water Affairs entered into an agreement, entitled *One Environmental System*, making provision for the management of the environmental impacts of activities under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). It envisaged that all environmental aspects of exploration for and production of petroleum would be regulated through one environmental system under the National Environmental Management Act 107 of 1998 (NEMA). Accordingly, the Minister of Environmental Affairs would set the regulatory framework and norms and standards, which would be implemented by the Minister of Mineral Resources. The Minister of Mineral Resources would then issue the environmental authorisations, without which petroleum exploration or production may not commence, under NEMA.

The SCA held that the implementation of the *One Environmental System* agreement through, *inter alia* amendments to the MPRDA and NEMA, divested the Minister of Mineral Resources of the power to make regulations regarding environmental matters.

The SCA held that the greater part of the Petroleum regulations regulated environmental matters which only the Minister of Environmental Affairs, and not the Minister of Mineral Resources, had the power to regulate. This meant that the majority of the provisions of the Petroleum regulations were *ultra vires*.

The SCA held that it was not practical to separate the good from the bad and, accordingly, that the Petroleum regulations must be set aside in their entirety. It held that exploration for petroleum by fracking should not take place before such time that it is lawfully regulated.
