

South African court issues interdict against Shell concerning seismic survey

The High Court of the Eastern Cape in Makhanda (Grahamstown), South Africa, on 28 December 2021 issued an interim interdict to stop Shell from commencing seismic activity off the south-eastern coast of South Africa. The full judgment is available on [Saflii](#).

From a conflict-of-laws perspective, the interdict raises some points of interest.

First, it provides two examples of the application of non-State law. In considering whether Shell has adequately informed the local communities of its plans, the judge took into account not only the South African legislation, but also of the local communities' modes of communication and of seeking consensus. In this sense, even though Shell had published its intentions in newspapers, these have not reached the communities in which people were not necessarily able to read English and Afrikaans (the languages of the newspapers). The judge found that "the approach that was followed to consult was inconsistent with the communities' custom of seeking consensus." (para 25). The judgment implicitly recognise this custom as law. This approach is in line with the South African Constitution (sec. 211(3) states: *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*).

The next example of the application of non-State law is the Rio Declaration on Environment and Development (para 69 of the judgment) to find that where there are threats of serious or irreversible damage, the precautionary approach shall be taken, even in the absence of full scientific certainty (Principle 15 of the Declaration).

The second interesting point is that the judge allowed this civil action even though there was a public law remedy available to the applications, namely an application to the Minister to cancel or suspend the right to explore that was granted. The judge found that the time-consuming nature of that remedy and the unlikelihood of its success made it an unsatisfactory remedy (paras 74-77).

