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

Case NO: 23619/2024

In the matter between:

AUKOTOWA FISHERIES PRIMARY CO-OPERATIVE LIMITED	First Applicant
THE GREEN CONNECTION NPC	Second Applicant
NATURAL JUSTICE	Third Applicant

and

DIRECTOR-GENERAL: DEPARTMENT OF MINERAL AND PETROLEUM RESOURCES	First Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
TOTAL ENERGIES EP SOUTH AFRICA S.A.S.	Third Respondent

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PREAMBLE

1. In the landmark Advisory Opinion of the International Court of Justice[1] ("the ICJ") delivered in July 2025, the Court held (among other things) that:

   1.1. there is an obligation of States under customary international law to prevent significant harm to the climate system, which is a vitally important part of the environment, and which must be protected for present and future generations;[2]

   1.2. States are obliged to put in place appropriate rules and measures, including regulatory mitigation measures, which are designed to achieve 'the deep, rapid and sustained reduction of GHG [greenhouse gas] emissions that are necessary to reduce the risk of significant harm to the environment';[3]

   1.3. the conduct of any organ of a State must be regarded as an act of that State;[4] and

   1.4. the failure of a State to take appropriate action to protect the climate system from GHG emissions – including through the granting of fossil fuel exploration licences – may constitute an internationally wrongful act attributable to the State. The wrongful act would consist of the breach of the conventional and customary obligations identified in the

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[1] *Obligations of States in respect of Climate Change* ICJ Advisory Opinion (23 July 2025).
[2] *Advisory Opinion*, para 273.
[3] *Advisory Opinion*, para 282.
[4] *Advisory Opinion*, para 427.

Advisory Opinion.[5]

2. In this case, the applicants seek to review decisions by the first respondent ("the DG") and the second respondent ("the Minister") to grant an environmental authorisation to the third respondent ("TEEPSA") authorising the drilling of up to 10 exploration wells in the Deep Water Orange Basin Block ("Block DWOB") in terms of the National Environmental Management Act, 107 of 1998 ("NEMA").

3. Block DWOB is located off the west coast of South Africa, roughly between Port Nolloth and Hondeklip Bay, stretching from about 188 to 340 km from the coast.

4. Port Nolloth is a small fishing village from which the majority of the first applicant's members conduct their small-scale fishing activities. Port Nolloth is characterised by high levels of poverty and fishing (including small-scale fishing) is a predominant commercial activity.[6] Small-scale fishers in Port Nolloth tend to be the second, third or even fourth generation to have lived off the sea. As set out in the founding affidavit, the members of the first applicant have observed their catches diminishing over the years.

5. The applicants allege that the decisions taken by the DG and the Minister have the potential to cause significant harm to the environment. The core of the case concerns the decision-makers' failure to take relevant considerations into account, particularly the effect of the decisions on climate change and the

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[5] *Advisory Opinion*, para 427.
[6] Founding affidavit, paras 5 – 12, pp. 7 – 9.

consequential impacts on vulnerable communities such as the fishers from Port Nolloth. This has resulted – so it is contended – in the decision-makers breaching their obligations to protect the environment for present and future generations.

OVERVIEW

6. The applicants allege that the decisions to grant the environmental authorisation fall foul of a foundational principle of NEMA, which is that the socio-economic and ecological costs of an environmentally harmful development must be weighed against its benefits before it is commences.

7. In Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others,[7] the Court stated:

> *"Construed in the light of section 24 of the Constitution, NEMA requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development…. "* [8]

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[7] 2007 (6) SA 4 (CC).
[8] Para 61.

8. As we explain below, TEEPSA has been permitted to embark upon the first phase of a long-term, capital-intensive project without any consideration being given to its impact on the South African Government's Low-Emission Development Strategy - an acknowledged policy priority and an essential measure for ensuring South Africa's compliance with its obligations under the Paris Agreement relating to GHG emissions.

9. Against this background, these submissions address the following four grounds of review:

    9.1. First, the assessment of "need and desirability" in terms of regulation 18 and appendix 3 of the Environmental Impact Assessment Regulations ("**the EIA Regulations"**). This is the inquiry at the heart of the environmental impact assessment process. It asks whether the harm that might be occasioned by a development proposal is justifiable in light of its purpose. The applicants contend that the evaluation of need and desirability was flawed and irrational because although the decisions were justified with reference to the benefit that will eventuate at the production phase, namely the development of "indigenous gas" for electricity generation, the scope of the assessment of the negative impacts of the project was expressly limited to its exploration phase. Due to this asymmetry, the assessment excluded a host of relevant considerations, including that any gas produced from Block DWOB would be surplus to requirements, could crowd out renewable energy technologies (undermining the Low Emissions Development Strategy) and would

contribute unnecessary GHG emissions to South Africa's inventory.

9.2. Second, the assessment of oil spill risk. The applicants allege that the decision-makers acted unreasonably in (a) concluding that two aggregated statistics were a sufficient basis for determining that a well blow-out and catastrophic oil spill was "highly unlikely" when the proposed exploration wells might plausibly be "ultra-deep" wells and there is a relationship between well-depth and oil spill risk; and (b) the key mitigation measures relied upon in connection with oil spill risk are contingency plans yet to be prepared.

9.3. Third, the potential socio-economic impact on small-scale fishers as a result of an oil spill. The applicants contend that the TEEPSA and the decision-makers did not assess the socio-economic impact on small-scale fishers and their communities.

9.4. Fourth, the decision-makers did not consider the factors enumerated in section 63 of the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (**"ICMA"**), which impose an additional layer of assessment in applications for environmental authorisation of *"coastal activities"* as defined in ICMA.

The structure of these submissions

10. In the remainder of these heads of argument:

10.1. We describe the background to (a) climate change and the legal and policy measures that have been adopted to address it, and (b) energy planning in South Africa, focusing on the role of gas.

10.2. We highlight relevant aspects of the EIA process and the decisions under review.

10.3. We set out statutory framework to the reviews, encompassing NEMA, ICMA and the Mineral and Petroleum Resource Development Act, 28 of 2002 ("MPRDA").

10.4. We address each ground of review in turn.

10.5. We deal with the question of an appropriate remedy.

10.6. Finally, we consider the issue of costs.

CLIMATE CHANGE

11. The phenomenon of "climate change" is explained in the National Climate Change Response White Paper, 2011 as follows:

> "… an ongoing trend of changes in the earth's general weather conditions as a result of an average rise in the temperature of the earth's surface often referred to as global warming. This rise in the average global temperature is due, primarily, to the increased concentration of gases known as greenhouse gases in the atmosphere that are emitted by human activities. These gases intensify a natural phenomenon called the "greenhouse effect" by forming an insulating layer in the atmosphere that reduces the amount of the sun's heat that radiates back into space and therefore has the effect of making the earth warmer… GHGs are emitted from, and are reabsorbed by, a variety of natural sources, but the rate at which human economies and societies are emitting these gases far exceeds the capacity of natural ecosystems to reabsorb them. Increased industrial activity since the mid-18th century has led to a rapid increase in the atmospheric concentration of GHGs such as carbon dioxide,

methane and nitrous oxide, in large part due to the burning of fossil fuels derived from oil, coal and natural gas."[9]

12. Authoritative statements on climate change as a scientific phenomenon are produced periodically by the Intergovernmental Panel on Climate Change ("IPCC").

13. The IPCC is a body established by the United Nations to (among other things) report on scientific knowledge regarding climate change. The work of the IPCC is performed by scientists nominated by 195 member states. It produces a comprehensive evaluation of developments in climate science every five to seven years in the form of assessment reports. It is currently in its seventh assessment report cycle (AR7), having produced a series of reports in 2021, 2022 and 2023.[10]

14. Based on the contents of the AR6 reports, it is possible to say that there is broad scientific consensus on the following:[11]

    14.1. The average global temperature of earth has already warmed by approximately 1.1°C above pre-industrial levels (the period before 1850) as a result of increased greenhouse gas emissions.

    14.2. At a point between 1.5°C and 2°C warming, there is a risk that rising temperatures will activate what are referred to as "tipping points". A tipping point is a critical threshold beyond which the climate system

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[9] Page 8.
[10] In its Advisory Opinion the ICJ relied extensively on the IPCC reports, referring to the evidence presented by it as *'the best available science'* (at para 137).
[11] Founding affidavit, pp. 24 to 25 (para 66).

will be irreversibly altered. The activation of multiple tipping points may lead to a feedback mechanism that sees global warming increase very rapidly. This is often referred to as “runaway climate change”.

14.3. The expected consequences of runaway climate change would include significant sea-level rise, widespread species extinction, severe disruptions to agriculture, and large-scale displacement of human populations.

14.4. If warming is to be kept below 1.5°C, global GHG emissions need to reach net zero by around 2050.

15. Formal efforts by the global community to address concerns related to climate change in international law date back to the adoption of the United Nations Framework Convention on Climate Change (“UNFCCC”) in 1992.[12]

16. The object of the UNFCCC was to "stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". All 197 member states of the UN are parties to the Convention, including South Africa.[13]

17. The UNFCCC requires that an annual “conference of the parties” is convened. The most significant instrument adopted under the UNFCCC was negotiated and drafted at the 21st conference of the parties – the “Paris Agreement”. It

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[12] The UNFCCC, and the measures taken pursuant to it, are described in the founding affidavit at pages 24 to 30 (paras 68 to 87).

[13] Although this statement was correct at the time that the founding affidavit was commissioned, it is no longer the case. On 7 January 2026 President Donald Trump issued a presidential memorandum withdrawing the United States from the UNFCCC, along with 65 other organisations, agencies and commissions.

has been ratified by 194 states, including South Africa.

18. The Paris Agreement records that the parties will endeavour to "hold the increase in the global average temperature to well below 2°C above pre-industrial levels" and "[pursue] efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[14] It binds the parties "to undertake and communicate ambitious efforts" in this regard.[15]

19. To this end, each of the parties is required (among other things) to communicate a "nationally determined contribution" ("NDC") on a five yearly basis, recording the reduction in GHG emissions that it intends to achieve.[16] Each successive NDC must be "a progression beyond" its predecessor and reflect that State's "highest possible ambition".[17] Each of the parties must strive to formulate and communicate long-term low GHG emission development strategies.[18]

20. It bears emphasising that the ICJ advisory opinion states in terms that States have an obligation under customary international law and treaty law to protect present and future generation from climate change harms caused by the burning of fossil fuels within and beyond their borders, and that countries must take measures to reduce GHG emissions and enforce these measures.

21. South Africa's domestic law and policy relating to climate change is directed toward ensuring that we make our fair contribution to the global effort to reduce

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[14] Article 2.
[15] Article 3.
[16] Article 4(2).
[17] Article 4(3).
[18] Article 4(19).

GHG emissions in terms of the Paris Agreement.

22. South Africa's most recent NDC was submitted to the UNFCCC in 2021 ("the NDC 2021'"). It undertakes that national emissions of carbon dioxide equivalent (CO2e) will peak between 2020 and 2025 in a range from 398 to 510 megatons (Mt) of CO2e and thereafter plateau and decline. (For clarity, it is noted that CO2e is a standard unit used to express the climate impact of a given greenhouse gas; this is necessary because some gases trap more heat in the atmosphere than others).

23. A strategy for achieving the targets recorded in the NDC 2021 has been laid out in South Africa's Low Emissions Development Strategy 2050 ("LEDS 2050").

24. The point of departure in LEDS 2050 is the following "vision statement":

> "South Africa follows a low-carbon growth trajectory while making a fair contribution to the global effort to limit the average temperature increase, while ensuring a just transition and building of the country's resilience to climate change."

25. The strategy focuses on four key sectors, namely, (a) energy; (b) industry; (c) agriculture forestry and land use, and (d) waste. The focus on the energy sector is explicable on the basis that it is the largest contributor to GHG emissions in South Africa. As is observed in LEDS 2050, South Africa is one of the top 20 global emitters and has a high dependence on fossil fuels.[19] The energy sector accounted for 79.5% of the total gross emissions for South Africa

[19] Page 1.

in 2015.[20]

26. Broadly stated, the LEDS 2050 lays down sector specific interventions as well as "cross-cutting measures to support low-carbon development". The specific interventions for the energy sector are addressed in section 4.1 of the policy. It is explained in the introduction to this section that:

> "Energy supply is the mandate of the Department of Mineral Resources and Energy. Decarbonisation of energy supply will largely be driven through the Integrated Energy Plan, the Integrated Resource Plan and the Industrial Biofuels Strategy, issued by the Department of Energy, the predecessor of this Department."

27. The thrust of the decarbonisation strategy is apparent from the following statements in LEDS 2050:

> "The IEP update with a clear trajectory for the energy sector is critical to guiding overall energy planning for the country, including in the context of this document to support a just transition away from fossil fuels towards a low carbon future."[21]
>
> "The Integrated Resource Plan (IRP) guides the evolution of the South African electricity supply sector, in that it identifies the preferred electricity generation technologies to be built to meet projected electricity demand. It thus provides a mechanism for Government to drive the diversification of the country's electricity generation mix and promote the use of renewable energy and other low-carbon technologies."[22]
>
> "The 2019 IRP is based on the current articulation of the [peak, plateau and decline] trajectory. Future updates to the IRP will need to take into

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[20] Page 12.
[21] Page 22.
[22] Page 23.

account any future modifications to the emissions trajectory. In this way electricity supply planning will be aligned with the country's increasing national ambition."[23]

28. The Integrated Energy Plan ("IEP") and the Integrated Resource Plan ("IRP") are energy planning tools provided for in the National Energy Act, 34 of 2008 ("NEA") and the Electricity Regulation Act, 4 of 2006 ("ERA"), respectively. The statutory and technical context to these plans is set out below.

ENERGY PLANNING; SOUTH AFRICA'S GAS NEEDS

29. As stated above, the principal instruments for energy planning in South Africa are the IEP and the IRP.

30. The NEA is the overarching legislation for energy governance in South Africa. Its objects, as articulated in the preamble, include "to ensure that diverse energy resources are available in sustainable quantities and at affordable prices, to the South African economy in support of economic growth".

31. Section 6 of the Act directs the Minister responsible for energy to develop review and publish an IEP on an annual basis. The function of the IEP is to "deal with issues relating to the supply, transformation, transport, storage of and demand for energy".[24] This encompasses electricity as well as all other forms of energy usage.

32. As things stand, the Government has not complied with section 6 of the NEA and the only step taken pursuant to this obligation has been the publication of

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[23] Page 26.
[24] Section 6(1) and 6(2).

a draft plan in November 2016.

33. The regulatory framework for electricity provision is established by the ERA.[25]

34. The IRP functions as a "roadmap" for electricity planning. It is developed in terms of regulation 4 of the Electricity Regulations on New Generating Capacity, [26] which contemplates the adoption of an "integrated resource plan" as the basis for determinations by the Minister of Electricity and Energy in terms of section 34 of the ERA. Although the regulations are silent on process and methodology, they clearly envisage a systematic process guided by relevant data:

> (1) The integrated resource plan shall- (a) be developed by the Minister after consultation with the Regulator; and (b) be published in the Government Gazette by the Minister.
>
> (2) The system operator, the NTC and the Regulator shall timeously provide such assistance as the Minister may require for purposes of developing and monitoring the implementation of an integrated resource plan.
>
> (3) The Regulator shall, after consultation with the Minister, the system operator and the NTC, make rules relating to the keeping of relevant information, the submission of such information and the rendering of

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[25] Certain key provisions of the Electricity Regulation Act were amended by the Electricity Regulation Amendment Act, 2024. These amendments took effect after the decisions were taken and need not be considered further for present purposes.
[26] GNR. 399 of 4 May 2011.

returns by licensees, as required in order to facilitate integrated resource planning.

35. In practice, the IRP is the product of a modelling exercise, the nature of which is explained in the expert affidavit of Mr. Hilton Trollip.[27]

36. A model is used to calculate the "least cost" mix of generation options to meet specified ranges of demand forecasts. This least cost plan is then adjusted to account for technical and policy considerations and "real world" conditions that cannot be easily or transparently incorporated into the model. The process is based on complex computer programs and statistics. The model prefers a given quantity of a particular technology based on a range of parameters, including the operational capabilities of the technology, costs, and a range of policy imperatives.

37. At the time of the decisions under review the relevant IRP was promulgated in 2019 ("the IRP 2019"). Mr. Trollip explains the contents and effect of the IRP 2019 in his affidavit.[28]

38. The IRP 2019 was structured to indicate the optimal combination of fuels/technologies to meet the forecast electricity demand for 2030. A specified number of megawatts, representing new generating capacity, is allocated across the different fuels and technologies (e.g. coal, nuclear, diesel, gas etc.), accounting for existing installed capacity.

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[27] Mr Trollip discusses the modelling exercise in his affidavits at pages 1544 to 1545 (paras 16 to 18) and 2341 to 2342 (paras 25 to 30) of the record.
[28] Affidavit of Hilton Trollip, paras 39 and 40, p. 1550 – 1551.

39. The IRP 2019 envisages the addition of a relatively significant amount of new generating capacity from gas and diesel (relative to historical usage) between now and 2030. It called for the addition of 1000 megawatts in 2024 and 2000 megawatts in 2027. Taken with existing installed capacity, the total installed capacity for gas and diesel in 2030, as envisaged by the IRP 2019, would then be 6380 megawatts.

40. This translates to 8.1% of the total system capacity. The actual energy contribution of gas and diesel to the system (i.e. the electricity produced annually) is lower, at 1.3%. The difference between the proportion of system capacity attributed to gas and diesel and its actual energy contribution is a function of the "average load factor". The average load factor refers to how frequently the system makes use of the capacity in question. An average load factor of 12% has been allocated to gas and diesel.

41. Mr. Trollip explains[29] that the gas needs reflected in the IRP 2019 could be met through gas imports and this is likely what was envisaged at the time it was promulgated (as no other source of gas could have been relied upon).

42. This accords with prudent energy planning:

    42.1. Gas may be the least cost option for the next five to ten years. But it is quite plausible that it can be replaced – as the least cost solution – with renewable energy plus battery storage plus hydrogen storage, at lower costs in about ten years.

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[29] Affidavit of Hilton Trollip, paras 45.1 to 45.5, p. 1553 to 1554.

42.2. It is undesirable to meet capacity requirements by means of inflexible commitments (such as a long-term gas purchase agreement with TEPSA or its successor) because gas-fired power may be overtaken by a better, lower cost technology. One of the foundational principles stated in the IRP is that "…long range commitments are to be avoided as much as possible, to eliminate the risk that they might prove costly and ill-advised" (at page 16). It is imperative that energy planning allows for flexibility, due to rapidly changing technological, economic and policy environments. These technologies are likely to provide cheaper options as carbon constraints increase.

43. In any event, Block DWOB (or any other offshore block) could not be the source of gas in the electricity system for a considerable period of time. According to TEEPSA, production would commence a minimum of 7 years after a discovery is made (Mr. Trollip puts this at 10 to 20 years).[30]

BACKGROUND TO THE DECISIONS

44. In or around November 2022, TEEPSA – through its appointed environmental assessment practitioner, SLR Consulting ("the EAP") – submitted an application for environmental authorisation to the erstwhile Department of Mineral Resources in terms of section 24 of NEMA. The first respondent ("the DG") was the competent authority to determine the application.

45. An environmental impact assessment process ("the EIA process") followed the submission of the application. The EIA process was conducted in terms of the

[30] Replying affidavit of Hilton Trollip, para 17, p. 2339.

EIA Regulations by the EAP.

46. The investigation was based on eight specialist studies/reports, namely, a drilling discharge modelling report, an oil spill modelling report ("the OSM Report"),[31] an underwater noise modelling report, a marine ecology impact assessment ("the MEA"), a fisheries impact assessment ("the FIA"), a socio-economic impact assessment ("the SEIA"),[32] a cultural heritage impact assessment and a climate change and air emissions impact assessment ("the CCA").[33]

47. The process culminated in the submission of the Final Environmental Impact Assessment Report ("FEIR") to the DG on 7 July 2023.

48. Chapters 5 and 10 of the FEIR are of most relevance to these proceedings.

49. Chapter 5 addresses the "need and desirability" of the proposed exploration activities. It is common cause that the need and desirability assessment framed the purpose of the proposed exploration activities as *"the generation of information on possible indigenous resources"* and did not extend to the production phase impacts.[34] As a result of this, no attempt was made to determine the volumes of oil or gas that would be produced, or the potential consequences of consuming this oil or gas.

50. Chapter 10 of the FEIR recorded the impacts of *"unplanned events"* including a well-blow out, leading to a major oil spill. In respect of all identified impacts,

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[31] "JWS5", p. 249.
[32] "JWS6", p. 379.
[33] "JWS7", p. 498.
[34] "JWS4", p. 191.

a rating of *"high"* or *"very high"* was given. Of particular concern in this application is the assessment of the impact on "near-shore coastal users" (which included small-scale fishers).

51. The conclusions presented in chapter 10 were informed by the OSM Report, the MEA, the FIA and the SEIA.

52. The OSM Report recorded the results of a modelling exercise undertaken to determine the reach and trajectory of a potential oil spill. The methodology entailed selecting two hypothetical release points and simulating the drift and properties of an oil slick emanating from these two points in four different seasons.

53. The author employed the "Oil Spill Contingency and Response" application ("OSCAR") to perform the simulation. OSCAR is a modelling tool used to simulate ocean dynamics (currents, temperature etc.) in order to predict how the independent particles making up an oil slick will interact with the environment.

54. The results indicated that the general drift direction of surface oil would be west- northwest and north-northwest in all seasons, from both release points. The maximum distance that surface oil would extend would be 1332 km from Release Point 1 and 1286 km from Release Point 2. Oil would reach the shore only in season 3.[35]

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[35] "JWS5", p. 249.

55. As appears from the papers filed of record, there is controversy regarding the robustness of the methodology employed by the authors of the OSM Report. Professor Annalisa Bracco, a Professor of Ocean and Climate at the Georgia Institute of Technology, has identified multiple flaws in the methodology, the cumulative effect of which is that the results are fundamentally unreliable and it is likely that the reach of an oil spill has been markedly underestimated.[36] Consequently, the conclusions drawn in the MEA and FIA regarding the duration and persistence of the impacts on fisheries are also unreliable.[37]

56. On 23 October 2023, the DG issued an environmental authorisation permitting TEEPSA to undertake the exploration activities ("the DG's decision").

57. On 14 November 2023, Aukotowa submitted an appeal against the decision to grant the environmental authorisation. Green Connection and Natural Justice submitted a joint appeal against the decision on the same day to the second respondent ("the Minister"). Various interested and affected parties also submitted appeals.

58. The Minister dismissed all the appeals on 6 May 2024 ("the appeal decision").[38]

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[36] Affidavit of Annalisa Bracco, p. 1510.
[37] See expert evidence of JM Harris, p. 2350.
[38] This decision was taken by Minister Creecy. However, her successor, Minister George, deposed to the answering affidavit in which he purported to explain and defend her decision. The applicants contend that no weight can be attached to Minister George's answering affidavit (for the reasons set out at paras 8 to 12 of their replying affidavit, pp. 2266 to 2267).

STATUTORY FRAMEWORK

The National Environmental Management Act

59. NEMA provides the framework for environmental management in South Africa. It is one of the laws enacted to give effect to section 24(b) of the Constitution, which provides that South Africans have the right to "reasonable legislative measures" that "prevent pollution and ecological degradation" and "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

60. In accordance with the power in section 24(2) of NEMA, in terms of which the Minister may identify activities that may not commence without environmental approval, the following activities relevant to this review application have been listed and published –

    60.1. Any activity including the operation of that activity which requires an exploration right in terms of section 79 of the MPRDA.

    60.2. Any activity including the operation of that activity which requires a production right in terms of section 83 of the MPRDA.

61. A listed activity may not be commenced unless environmental approval from the competent authority had been sought and obtained. In the case of mineral and petroleum activities, the competent authority is the Minister responsible for mineral resources. The procedure for applications for environmental authorisations is governed by the EIA Regulations.

62. An application for environmental authorisation is made to the competent authority as contemplated in chapter 5 of NEMA and chapter 4 of the EIA Regulations.

63. The substantive matters to be considered by the competent authority involve a careful exercise of discretion. NEMA and the EIA Regulations list multiple principles and factors which must be taken into account, including:

63.1. principles of environmental management in section 2 of NEMA;

63.2. general objectives of Integrated Environmental Management in section 23 of NEMA;

63.3. minimum requirements set out in section 24(4) of NEMA; and

63.4. the criteria in section 24O of NEMA and in regulation 18 of the EIA Regulations.

64. While section 2 of NEMA enumerates a number of principles of environmental management, a key principle is that environmental management is to *"place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interest equitably"* (section 2(2) of NEMA).

65. When development is pursued – which serves the needs of people – it must take place in a manner that is *"socially, environmentally and economically sustainable"* (section 2(3) of NEMA). In other words, it must be sustainable development.

66. Other relevant principles are that:

66.1. pollution and degradation of the environment are to be avoided, or, where they cannot be altogether avoided, are to be minimised and remedied (section 2(4)(a)(ii));

66.2. environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option;

66.3. environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons (section 2(4)(c));

66.4. the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment (section 2(4)(j));

66.5. the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage ((section 2(4)(o)).

67. Sustainable development entails development taking place within ecological limits which the environment is able to sustain, while serving the public interest in promoting justifiable social and economic development. This is the "triple

bottom line" where the three considerations of environment, social and economic considerations constitute sustainable development.[39]

68. It is in this context that regulation 18 of the EIA Regulations requires that the competent authority must have regard to the "need and desirability" of the activity, together with the considerations in sections 24O and 24(4) of NEMA when deciding upon an application for environmental approval.

69. Section 24O lays down the criteria to be taken into account by the competent authority when deciding upon an application for environmental authorisation. The decision must be taken on the basis of all *"all relevant factors"* including –

69.1. Any pollution, environmental impacts or environmental degradation likely to be caused if the EIA application is granted or refused;

69.2. Measures that may be taken to protect the environment from harm that may result from the activity;

69.3. The ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;

69.4. Where appropriate, any feasible and reasonable alternatives to the activity;

69.5. Any guidelines, departmental policies and environmental management instruments that have been adopted in the prescribed

[39] See Fuel Retailers, paras 44 to 81.

manner by the Minister or MEC;

69.6. Information contained in the application form, reports, comments, representations and other documents submitted in terms of NEMA to the MEC or Competent Authority in connection with the application for environmental approval.

70. The Department of Environmental Affairs (as it was known at the time) has published a Guideline on Need and Desirability Guideline ("the Guideline"). The contents of the Guideline are dealt with further below in connection with the first ground of review.

71. The EIA Regulations were made with the purpose to –

> "regulate the procedure and criteria as contemplated in Chapter 5 of [NEMA] relating to the preparation, evaluation, submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities, subjected to environmental impact assessment, in order to avoid or mitigate detrimental impacts on the environment, and to optimize environmental impacts, and for matters pertaining thereto." (Regulation 2)

72. An assessment of impacts is to be conducted to form part of the EIA application process. In the circumstances of TEEPSA's application for environmental authorisation of the exploration activities, the assessment was required to take the form of a "*scoping and environmental impact assessment"* as contemplated in part 3 of chapter 4 of the EIA Regulations.

73. In terms of regulation 23(1)(a) read with regulation 23(3), an environmental impact assessment report, inclusive of specialist reports, had to be submitted

to the Competent Authority and was required to contain the information set out in Appendix 3 to the EIA Regulations.

74. In terms of item 2 of appendix 3, the purpose of an environmental impact assessment is, among other things, to:

74.1. determine the policy and legislative context within which the activity is located and document how the proposed activity complies with and responds to the policy and legislative context;

74.2. describe the need and desirability of the proposed activity;

74.3. determine the nature, significance, consequence, extent, duration and probability of the impacts occurring to inform identified preferred alternatives; and the degree to which these impacts can be reversed, may cause irreplaceable loss of resources, and can be avoided managed or mitigated.

75. An environmental impact assessment report must accordingly contain (among other things):

75.1. A description of the policy and legislative context within which the development is located and an explanation of how the proposed development complies with and responds to the legislation and policy context (item 3(1)(e));

75.2. A full description of the process undertaken to identify, assess and rank the impacts the activity; (item 3(1)(i));

75.3. An assessment of each identified potentially significant impact and risk, including: the nature, significance and consequences; the extent and duration; the probability of it occurring; the degree to which it is reversible; the degree to which it may cause irreplaceable loss of resources; and the degree to which it can be mitigated. (item 3(1)(j)).

The Mineral and Petroleum Resources Development Act

76. Petroleum exploration and production is currently regulated by chapter 6 of the MPRDA. "Petroleum" is defined in section 1 as "*any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust*". As such, it includes both crude oil and gas.

77. A company that wants to undertake a petroleum development in South Africa must first apply for an exploration right to conduct the studies necessary to determine the extent and location of the petroleum deposits on the relevant area.

78. An "exploration operation" is defined in section 1 as "*the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery.*""

79. Exploration rights are granted in terms of section 80. The Minister of Mineral Resources and Energy (or the delegated authority) must grant an exploration right if the applicant satisfies the conditions set out in section 80(1), which relate in the main to the applicants financial and technical capacity to fulfil the

proposed exploration work programme.

80. An exploration right may be granted for a period of up to three years. The holder is entitled to renew the exploration right three times, for renewal periods of two years each. Accordingly, a company may hold an exploration right over a particular area for a total of nine years.

81. If at some stage an exploration right holder makes a discovery of oil or gas, it has the exclusive right to apply for and be granted a production right, provided that it satisfies the conditions set out in section 84(1) of the MPRDA. The condition stipulated in section 84(1)(c) is that "*the production will not result in unacceptable pollution, ecological degradation or damage to the environment".*

82. A production right may be granted for a period up to 30 years. The holder of a production right thereafter has the exclusive right to apply for and be granted successive renewals of the production right, which may be granted for 30 years at a time.

NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT ACT

83. ICMA is one of the *'specific environmental management Acts'* listed in NEMA. It applies to South Africa's coastal waters, which includes South Africa's territorial waters and exclusive economic zone.

84. The proposed project will take place in South Africa's exclusive economic zone. Therefore, it falls within the coastal zone and is a coastal activity regulated by ICMA.

85. The objects of ICMA are set out in section two of the Act. They are (among other things) to:

85.1. provide (within the framework of NEMA) for the co-ordinated and integrated management of South Africa's coastal zone;

85.2. preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations;

85.3. secure equitable access to the opportunities and benefits of coastal public property;

86. Give effect to South Africa's obligations in terms international law, regarding coastal management and the marine environment.[40]The following provisions of ICMA are of particular relevance:

86.1. Coastal public property is vested in the citizens of the Republic and is held in trust and managed on their behalf by the State (section 11);

86.2. The State is under a duty to ensure that coastal public property is managed, conserved and enhanced in "*the interests of the community as a whole*" (section 12: we shall elaborate on the requirements of this

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[40] Section two is to be read together with the Preamble to the Act, which states (among other things) that: (i) everyone has the constitutional right to have the environment, including the coastal environment, protected for the benefit of present and future generations; (ii) much of the rich natural heritage of our coastal zone is being squandered by overuse, degradation and inappropriate management, and the economic, social and environmental benefits of the coastal zone in the past have been distributed unfairly; and (iii) the conservation and sustainable use of the coastal zone requires the establishment of an innovative legal and institutional framework that clearly defines the status of coastal land and waters and the respective roles of the public, the State and other users of the coastal zone and that facilitates a new co-operative and participatory approach to managing the coast.

provision below).

86.3. An organ of state responsible for controlling or managing any activity in coastal waters, must do so (a) in the interests of 'the whole community'; and (b) in accordance with international law (section 21); and

86.4. ICMA is explicit in addressing how the public interest must be construed for purposes of the Act. The term "the interests of the community *as a whole"* is defined in section 1 to mean:

"[t]he collective interests of the community determined by –

(a) prioritising the collective interests in coastal public property of all persons living in the Republic over the interests of a particular group or sector of society;

(b) adopting a long-term perspective that takes into account the interests of future generations in inheriting coastal public property and a coastal environment characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable; and

(c) taking into account the interests of other living organisms that are dependent on the coastal environment".

87. In terms of section 7A, coastal public property is established, among other things, to:

87.1. protect sensitive coastal ecosystems;

87.2. secure the natural functioning of dynamic coastal processes;

87.3. protect people, property and economic activities from the risk arising from dynamic coastal processes include the risk of sea-level rise.

88. Section 12 – which we have referred to above – requires that in managing coastal public property (ownership of which vests in the citizens of the Republic but is held in trust by the State on their behalf) the State, in its capacity as the public trustee, must:

88.1. ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and

88.2. take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.

89. Section 63 of ICMA applies when an environmental authorisation in terms of Chapter 5 of the NEMA is required for coastal activities. The provision requires the competent authority to take into account all relevant factors, including the following:

89.1. :whether coastal public property will be affected by the activity and, if so, the extent to which the proposed activity is consistent with the purpose of establishing and protecting these areas (section 63(1)(c));

89.2. if the activity affects coastal public property, whether it is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations (section 63(1)(h)(i));

89.3. whether the activity would be contrary to "the interests of the whole community" (section 63(1)(h)(vii); and

89.4. the objects of ICMA (section 63(1)k).

90. By requiring that consideration be given to the *'interests of the whole community'* and conferring a special legal status on coastal public property (which affords these areas a particularly high level of protection), ICMA introduces concepts which are not present in NEMA or other environmental laws.[41]

91. We turn now to consider the applicants' grounds of review.

FIRST GROUND OF REVIEW: NEED AND DESIRABILITY

92. In considering the first ground of review, it is important to note that a decision to grant an authorisation under NEMA is not to be likened to an open-ended form of polycentric executive policy formation, because of the density of specification with which NEMA sets out how such an authorisation is to be given. It follows that the decisions of both the DG and the Minister may be reviewed on the basis of their conformity with NEMA.[42]

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[41] Sustaining the Wild Coast NPC v Minister of Mineral Resources 2022 (6) SA 589 (ECMk), at para. 130 ("*Sustaining the Wild Coast EC"*); *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* (5676/2024) [2025] ZAWCHC 349 (13 August 2025) ("*Green Connection*") at para 114.

[42] South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others, (479/2023) [2025] ZASCA 134 (17 September 2025) ("South Durban") at para 27.

93. The applicants contend that the evaluation of need and desirability on the part of both the EAP, the DG and the Minister failed to take into account relevant considerations and was irrational. The root of this irrationality, we submit, was the artificial narrowing of the scope of the evaluation to the exploration phase of the project.

94. The question of need and desirability must, of necessity, be addressed in light of the broader purpose of the development proposal. When exploration activities are divorced from their logical goal (i.e. production), they do not have any true function, and it is not possible to consider the degree to which they are necessary and desirable.[43]

95. This is borne out by the Minister's evaluation of need and desirability, which was wholly focused on the utility of domestically produced gas as a means of generating electricity (the DG's decision is silent as to his reasoning on need and desirability).

96. Thus, the evaluation suffered from a fundamentally flawed premise. The result was an asymmetric evaluation focused on the benefits that might be realised at the production phase of the project, while ignoring the costs and the negative environmental impacts, including both ecological impacts and increased GHG emissions.

97. The consequence of this was that a host of relevant factors were omitted from consideration and the conclusions drawn from this evaluation were

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[43] It follows that our discussion of this ground of review also encompasses the failure to assess the impact of production (which is referred to as a discrete review ground in the founding affidavit (from para 172 at p. 56).

fundamentally flawed.

What is the appropriate scope of the need and desirability inquiry?

98. As explained above, the notion of "need and desirability" derives from the concept of sustainable development, which is codified in the NEMA section 2 principles. This is elaborated in the Guideline:

> "The consideration of "need and desirability" in EIA decision-making therefore requires the consideration of the strategic context of the development proposal along with the broader societal needs and the public interest. The government decision-makers, together with the environmental assessment practitioners and planners, are therefore accountable to the public and must serve their social, economic and ecological needs equitably. Ultimately development must not exceed ecological limits in order to secure ecological integrity, while the proposed actions of individuals must be measured against the short-term and long-term public interest in order to promote justifiable social and economic development – i.e. ensuring the simultaneous achievement of the triple bottom-line." (Guideline, pg 10) [emphasis added]

99. An environmental impact assessment report must address the issue of need and desirability as prescribed by Appendix 3 to the EIA Regulations and in terms of regulation 18 the competent authority must consider the need and desirability of a development proposal when determining whether or not to grant an environmental authorisation.

100. The evaluation of need and desirability proceeds from an identification of *the purpose* of a given development proposal. This is explained in the Guideline as follows:

> "In order to properly interpret the EIA Regulations' requirement to consider "need and desirability", it is necessary to turn to the principles contained in NEMA, which serve as a guide for the interpretation, administration and implementation of NEMA and the EIA Regulations. With regard to the issue of "need", it is important to note that this "need" is not the same as the "general purpose and requirements" of the activity. While the "general purpose and requirements" of the activity might to some extent relate to the specific requirements, intentions and reasons that the applicant has for proposing the specific activity, the "need" relates to the interests and needs of the broader public." (Guideline, pg 10)

101. The assessment must be high-level, long-range and elevate substance over form. The Guideline states that:

> "What is needed and desired for a specific area should primarily be strategically and democratically determined beyond the spatial extent of individual EIAs…
>
> When formulating project proposals and when evaluating project specific applications, the strategic context of such applications and the broader societal needs and the public interest should be considered." [emphasis added] (Guideline, pg. 7)

102. Thus, the *purpose* of the exploration activities in the context of the need and desirability assessment must, we submit, be identified by reference to the actual purpose that they are ultimately intended to serve – i.e. the production of petroleum resources. This is because the risks and impacts that are occasioned by these activities must be considered in light of the ultimate benefit that will be delivered.

103. Characterising the purpose of the exploration activities as *"information gathering"* – as was done by the EAP and both decision-makers – resulted in

assessments which were divorced from the long-term public interest and the strategic context of the application (as required by the Guideline). This resulted in contrived assessments which precluded a rational consideration of whether a worthwhile public purpose was truly being served and, if so, whether the ecological cost was acceptable.

104. This is borne out by the manner in which need and desirability was addressed in the FEIR and evaluated by the Minister. While the scope of the need and desirability assessment was purportedly the exploration phase, and the *purpose* of the exploration activities (as the reference point for the assessment) was characterised as *"information gathering"*, the substance of chapter 5 of the FEIR (Need and Desirability) was wholly concerned with the benefits of *producing* oil and gas and it was these benefits on which the Minister relied in arriving at her conclusion that the exploration activities were necessary, desirable and should proceed.

105. it is simply not feasible to consider the need and desirability of *"exploration"* in isolation. If it is divorced from its ultimate goal (i.e. production), it is not a useful exercise.

What should be made of the distinction between exploration and production in the MPRDA and NEMA?

106. TEEPSA and the State respondents have consistently maintained that the assessment of the need and desirability of the exploration activities pursuant to NEMA (including the assessment of need and desirability) must exclude the production phase.

107. The basis for this contention is the fact that the MPRDA, NEMA and the listing notices published under NEMA all draw a distinction between exploration and production.

108. With respect, this argument is plainly wrong. We say so for the following reasons.

An expansive need and desirability assessment is consistent with the distinction between exploration and production

109. Firstly, the purposive need and desirability assessment outlined above does not breach the statutory distinction between exploration and production.

110. As we have explained, the need and desirability assessment necessarily projects forward in order to answer the main question with which it is concerned – i.e. are the risks and impacts which the competent authority is being asked to authorise justifiable in light of the broader purpose to which the activity is directed? Thus, in addressing the question whether *exploration* is necessary and desirable, one must acknowledge and consider that it is a preparatory step aimed at the *production* of petroleum resources. This is not the same thing as investigating the impacts of production.

111. TEEPSA has attempted in its answering affidavit to characterise exploration as a stand-alone activity by identifying its *"purpose"* as being information gathering for the purpose of energy planning in terms of sections 3 and 6 of the NEA.

112. It relies on the following provisions:

Section 3, under the heading ‘Provision of data and access to data sources’, provides that ‘the Minister must establish mechanisms to ensure (a) provision of any data and information reasonably required for the purposes of conducting analysis required for energy planning from any person and the time period for the provision of such data and information, where such data has not already been made available to any other public institution; ...’

Section 3(4) further states that ‘the Minister must establish mechanisms to – (a) collect, collate and analyse energy data and information...’

Section 3(5) provides that ‘the Minister must annually publish an analysis – (a) reviewing energy demand and supply for the previous year; (b) forecasting energy supply and demand for no less than 20 years; and (c) of plausible energy scenarios of how the future energy demand and supply landscape would look like under different demand and supply assumptions’.

Section 6(1) states that ‘the Minister must develop and, on an annual basis, review and publish the Integrated Energy Plan in the Gazette’.

Section 6(2)(b) provides that the IEP must inter alia deal with issues relating to the supply of energy in a way that accounts for ‘(b) economically available...’

Section 6(3) states (among other things) that the IEP must ‘(c) be based on results of the energy analysis envisaged in sections 3(4)(a) and 3(5)’.

Section 6(4)(b) also provides that the development of the IEP must take into account ‘(b) optimal use of indigenous and regional energy resources’.

Section 6(6) among other things states that the IEP must ‘(a) serve as a guide for energy infrastructure investments; (b) take into account all viable energy supply options; and (c) guide the selection of the appropriate technology to meet energy demand.’

113. The applicants do not dispute the proposition that information regarding South Africa's petroleum reserves may feature in the energy planning processes under the NEA. However, to characterise this as the core purpose of exploration is, we submit, far-fetched and ultimately unhelpful in construing the relationship between exploration and production in the context of the MPRDA and NEMA.

113.1. Firstly, if we are to take seriously the stance adopted by both TEEPSA and the State, any petroleum resources identified through exploration must be regarded as highly uncertain and of limited utility in energy planning processes.

113.2. Secondly, there is no indication (textual or otherwise) that the NEA envisaged that energy planning would depend on information gleaned through exploration operations.

113.3. Thirdly, the current iteration of the Integrated Energy Plan (i.e. the document contemplated in section 6 of the NEA) is approximately 10 years old and is still in draft form. Moreover, the Government needed to be compelled by a Court to bring section 6 of the NEA into operation in proceedings brought by the second applicant. This provision was not in operation at the time the Minister took her decision.[44]

113.4. Finally, TEEPSA itself does not conceive of the exploration phase in this way. In its engagements with the South African Government, the oil industry has identified *"clarity and stability of terms that apply to the*

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[44] Case No. 320/2023 (High Court of South Africa, Western Cape Division, Cape Town.

lifetime of the project" as a necessary precondition for concerted oil exploration in South Africa.[45] This is reflected in public documentation emanating from the *"Operation Phakisa"* process conducted under the auspices of the Presidency. The reason given for this stance is that:

> *"Oil and gas exploration requires significant investments, particularly in South Africa's deep-water offshore environment where a single exploration well can cost over USD 150 mn. To achieve 30 exploration wells in the next 10 years, investments in the range of USD 3–5 bn are needed. Given that exploration success rates are below 15%, investors see these opportunities as risky."*[46]

The law recognises a link between exploration and production

114. Secondly, the law *does* recognise that exploration and production are connected processes.

115. In *Green Connection,* this Court held that:

> "[151] Whilst it is correct that the specific activity for which the EA in this case is granted is exploration and not production, and that the former process will not always result in the latter process, the two processes are intertwined. There would be no point in conducting an exploration activity unless an entity hoped to proceed to the next phase of production. And it is not speculation to conclude that by the time such an entity applies for authorization to conduct the next phase, it is armed with information that places it at an advantage to proceed to the next phase. This is the accumulative, phased process created by the legislation.

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[45] FA, para 122, p. 37. "JWS13" at p. 1118.
[46] FA para 121, p. 37; "JWS13" at p. 952.

[152] That this is so is confirmed by the definition of an "exploration operation" whose end-goal, according to the MPRDA, is to locate a discovery. It is defined as "the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery".

[153] Further confirmation of the interrelatedness of the two activities is found in the definition of a "production operation", which includes an exploration [operation]. It is defined as "any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum"". [emphasis added]

116. The Court found support for this principle in the judgment of the Supreme Court of Appeal in Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others.[47] In this case, the Court considered whether a party such as the respondent in that case was entitled to ventilate environmental objections before the grant of a mining license in terms of section 9 of the Minerals Act, 50 of 1991, or whether the appropriate juncture for a hearing was during the approval process in respect of the environmental management programme. The Court held that the respondent was entitled to a hearing before the grant of the mining license and in the course of its judgment reasoned that:

> *"The issue of a licence in terms of section 9 enables the holder to proceed with the preparation of an environmental management programme, which, if approved, will enable him to commence mining operations.*

[47] [1999] 2 All SA 381 (A).

Without the sec 9 licence he cannot seek such approval. The granting of the sec 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays " ... the necessary foundation for a possible decision ..." which may have grave results. In such a case the audi-rule applies to the consideration of the preliminary decision (see Van Wyk N O v Van der Merwe 1957 (1) SA 181 (A) at 188 B - 189 A.). In my view this is such a case."[48]

117. The above conclusion is reinforced by the definition of *'cumulative impact'* in the EIA Regulations as including the past, current and reasonably foreseeable future impacts of an activity. This requires a competent authority to consider how the environmental impacts of the listed activity under consideration, combined with the impacts of other similar activities, could become significant. There can be no doubt that production is a reasonably foreseeable consequence of exploration and it follows that the decision-makers failure to consider the impact of production amounted to reviewable irregularities.[49]

118. This reasoning applies with equal force to the scheme for the regulation of petroleum rights in terms of chapter 6 of the MPRDA. The grant of an exploration right sets in motion a change of events which *may well* lead to the grant of a production right.

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[48] At para 17.

[49] In *South Durban* (at paras 56 – 57) the SCA held that the failure of the decision-maker in that matter to consider the cumulative effect of the extraction and transportation of gas must lead to the review being upheld. The Court left open the question whether South African courts have jurisdiction over the assessment of the environmental impacts of GHG emissions associated with gas extraction and transportation outside of South African territory (at paras 58 – 59).

118.1. According to the preamble of the MPRDA, one of its objects is *"reaffirming the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations"*.

118.2. This is repeated in section 2(g), which provides that one of the objects of the MPRDA is "to provide for security of tenure in respect of prospecting, exploration and mining and production operations." The Director-General explains the rationale for this provision as follows:

> *"The reason for providing security of tenure for oil and gas right holders is founded in the fact that the early development phase requires substantial capital investment in exploration activity before any potential benefits from production can be realised. Therefore, to create an enabling regulatory environment, considering the nature and extent of the initial investment required during the exploration phase, sections 82(1)(a) and 2(g) of the MPRDA provide for security of tenure."*[50]

118.3. An exploration right holder's entitlement to produce any oil or gas resource that it discovers is guaranteed by section 82(1)(a), which provides, *"the holder of an exploration right has the exclusive right to apply for and be granted a production right in respect of the petroleum area in question."*

The evaluation of need and desirability by TEEPSA and the decision-makers

119. The scope and content of the need and desirability assessment is considered in chapter 5 of the FEIR.[51]

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[50] Director-General's Affidavit, para. 3.25, p. 2256.
[51] "JWS4"; p. 155 *ff*.

120. In the main, it summarised relevant policies, including energy-related policies, and provided a high-level analysis of the degree to which the proposed exploration activities were compatible with these policies. TEEPSA summarises chapter 5 of the FEIR in its answering affidavit.[52]

121. The Director-General did not record any evaluation of need and desirability in his decision. His decision is defective as a result of the failure to engage in this inquiry.

122. The material parts of the Minister's evaluation of need and desirability is set out at paragraphs 2.49 to 2.57 of the appeal decision. It reads:

> *"The central issue for determination under this ground of appeal relates to the need and desirability of the proposed project.*
>
> *Regarding the appellants' averments that South Africa is not currently meeting its international commitments on carbon emissions and that South Africa should therefore not permit any new fossil fuel projects; South Africa is committed to implement a Just Transition to net zero emissions by 2050. Moreover, South Africa's commitment to reduce its emissions is reflected in the NDP which records 2030 as the time that South Africa is working toward to reduce its dependency on carbon, natural resources and energy. However, South Africa's transition to a low-carbon, resilient economy and society is a multidimensional process that requires careful phasing of strategic planning. The appellant's take an oversimplistic approach to this issue.*
>
> *I have noted that Chapter 5 of the ESIA report discussed the needs and desirability of the project which covers the context of the oil and gas industry, applicable policies and planning frameworks (local, national, and international) and broad societal needs and public interest. I note too,*

[52] TEEPSA's answering affidavit, para 55, p. 1660.

that the project is in alignment with government policies and plans such as the IRP (2019) which recognises the need for South Africa to employ a diversified energy mix to meet the country's electricity requirements. I have furthermore considered the Guideline on Need and desirability as well as the No-Go alternative. I am therefore satisfied that the criteria for the need and desirability for the project has been demonstrated by the applicant, in particular that the project accords with legislative requirements and government policies and plans, including the IRP (2019), the NDP and the draft Marine Spatial Planning Sector Plans, which includes a Marine Offshore Oil and Gas Sector Plan (the Draft MS Plan). The IRP and IEP recognise natural gas as a required source to produce electricity and direct thermal energy. It acknowledges its role in contributing and maintaining base-load electricity and peak-load electricity and is also recognised as a way to transition South Africa towards a lower carbon economy providing the flexibility required to complement renewable energy sources and as a lower carbon option compared to coal.

…

Having regard to the fact that EA granted to the applicant is specifically only in respect of drilling exploratory wells in the area of interest, I am satisfied that the applicant was not required to consider alternatives regarding alternative energy sources or technologies. The applicant was also not required to consider relevant alternative energy generating options. Neither was the Competent Authority and nor am I in this appeal."

123. The following observations can be made about this passage:

123.1. The Minister pertinently declines to engage with questions arising from the incompatibility of the project with policy imperatives related to reducing GHG emissions.

123.2. The factors that the Minister regarded as decisive do not relate to information gathering, they concern the need for gas.

123.3. No reference is made to the purported *"information gathering"* function of the exploration activities.

The relevant factors omitted from the evaluation of need and desirability

124. The exclusion of the production phase impacts from the evaluation meant that highly material factors were left out of consideration. These relate both to negative aspects of production, and factors which go to the Minister's fundamental premise that gas produced from Block DWOB would be a sensible way of *"meeting the country's electricity requirements"*.

The fundamental premise

125. The Minister's conclusion that the project would be a desirable way of *"…meeting the country's electricity requirements"* was entirely theoretical and reached in the absence of any information about the volumes of gas that a commercially viable field on Block DWOB would yield.

126. If the EAP and the decision-makers had acknowledged that the production phase of the project was relevant to the need and desirability assessment and conducted a proper evaluation of need and desirability on this basis, it would have been necessary for them to engage with the specifics of a production scenario, and it would have been apparent that the quantities of gas involved would far exceed South Africa's electricity requirements as envisaged by the IRP 2019.

127. Mr. Hilton Trollip, an engineer and energy policy specialist, has calculated that for a field on Block DWOB to be commercially viable, it would need to produce at least 130 petajoules per annum, sustained over 20 years.[53] The annual gas utilisation reflected in the 2019 IRP, on the other hand, is approximately 19 petajoules per annum.[54]

128. Thus, the quantities of gas that would be produced on Block DWOB in the event of a commercially viable discovery are approximately 5 times the gas utilisation requirements of the IRP 2019.

129. Give the negative impacts of production outlined above, this mismatch between the volumes of gas that will be produced and what is actually required raises the question at the core the need and desirability assessment – does the development proposal meet a legitimate need and does it do so within the limits imposed by finite environmental resources?

130. TEEPSA has placed in dispute the calculations undertaken by Mr. Trollip for this analysis.

131. The calculation of gas utilisation in terms of the IRP 2019 is a relatively simple arithmetic exercise based on the generation capacity allocated to gas in the IRP 2019, and the load factor (i.e. the rate at which gas is utilised). [55]

132. The minimum commercially viable volume of gas for a production operation on Block DWOB was derived from a calculation of the capital costs of developing

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[53] Expert affidavit of Hilton Trollip, para 25, p. 1546.
[54] Expert affidavit of Hilton Trollip, para 41 p. 1551.
[55] Affidavit of Hilton Trollip, paras 39 – 42, p. 1550 – 1551.

a gas field on Block DWOB. Mr. Trollip explains the rationale for this methodology as follows:

> *"The capital costs of an oil or gas development increase as water depth increases, distance from the shore increases and ocean conditions become more severe.*
>
> *For a gas-field located 188km or more offshore and in water depths of more than 750m (as will be the case with Block DWOB), commercial viability will be determined predominantly by the capital costs of the development infrastructure (i.e. the offshore production facility platform, wells, subsea works etc, gas storage and transport facilities). The capital costs translate directly to the minimum volume of gas necessary to generate the revenue to pay for the investment.*
>
> *In conditions such as those of Block DWOB (deep water and far offshore) these capital costs will be so significant that substantial volumes of gas will need to be produced annually as a minimum criterion for commercial viability.*
>
> *Thus, a conservative estimate of minimum commercial production volumes can be obtained simply by reference to the capital costs. I say "conservative" because there are other variables that might add to the projected development costs and therefore increase the threshold (in terms of gas volumes) for commercial viability.*
>
> *Put simply, a large proven reserve and large annual production volumes will be a primary determinant of whether or not a project on Block DWOB proceeds.*
>
> *It would be time-consuming and costly to provide accurate minimum sizes for a gas field in Block DWOB to be economically viable. However estimated ranges that are meaningful for this analysis are possible."*

133. Mr. Trollip states "with certainty" that TEEPSA would have performed similar calculations (*'albeit with more accuracy and in more detail'*) to his because an exploration project is, from the outset, periodically assessed in terms of expected monetary value based on net present value.[56] He describes the nature of these assessments in his affidavit.[57] He is qualified to express this view by virtue of his experience having served on the board of PetroSA.[58]

134. The deponent to TEEPSA's answering affidavit, Mr. Florent Alleau, takes issue with the methodology employed in both calculations.[59]

135. He dismisses Mr. Trollip's calculation regarding the capital costs of a project on Block DWOB based on variables which he says were omitted from the calculation such as the volume and quality of the resource, taxes and customs duties, third party providers' costs,[60] but wholly fails to engage with the fundamental logic, which is in essence that a conservative calculation of base capital costs can and is executed regardless of these unknown variables, as Mr. Trollip confirms.[61]

136. As regards the gas utilisation calculation, Mr. Alleau states that the "the IRP does not specify load factors for gas plants, nor does it prescribe the operational role (baseload, mid-merit, or peaking) of gas assets".[62] However, this is beside the point. As Mr. Trollip explains, the modelling which produced

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[56] Affidavit of Hilton Trollip, paras 31 – 32, p. 1548.
[57] Affidavit of Hilton Trollip, para 34 to 36, p. 1549.
[58] This is reflected in Mr. Trollip's CV at p 1567.
[59] Answering affidavit, para 86, p. 1677ff.
[60] Answering affidavit, paras 86.1 to 86.13, p. 1677 – 1680.
[61] Replying affidavit of Hilton Trollip, paras 50 – 58, pp. 2346 – 2348.
[62] Answering affidavit, para 86.17, p. 1681.

the IRP2019 employed a 12% load factor, and this load fact was therefore inherent in the plan.[63]

137. We submit that Mr. Alleau's objections do not undermine Mr. Trollip's analysis in any meaningful way.

Negative impacts not considered

Incompatibility with policy

138. The proposal to embark upon long-term projects to develop offshore gas reserves for use in the electricity system would - given the abundance of gas that would be produced – inhibit the ability and flexibility to introduce renewable technologies into the system.

139. This is directly contrary to the interventions called for in LEDS 2050.[64]

Increased GHG emissions

140. A scenario in which South Africa purchases domestically produced gas from TEEPSA for use in the electricity system is calculated to increase South Africa's GHG emissions (and exacerbate climate change) for two reasons:

140.1. Given the quantities of gas that would be produced on Block DWOB, utilising this gas in the electricity system has the potential to crowd out renewable technologies. This would undermine the objectives set forth in South Africa's climate policies, principally LEDS 2050. Of

[63] Replying affidavit of Hilton Trollip, para 56, p.2347.
[64] This conclusion is reinforced by South Africa's obligations under customary international law, referred to above in our discussion of the 2025 ICJ Advisory Opinion.

course, it is possible that a majority of the gas may be exported, but this was not the scenario considered by the decision-makers in assessing need and desirability.

140.2. Methane escapes in the process of producing gas. This released gas is referred to as "fugitive emissions".[65] It is uncontroversial that methane has a very significant warming effect.[66] It is common cause that fugitive emissions associated with *production* are an order of magnitude larger than those associated with electricity generation – equating to up to 1% of the total gas produced.[67] Thus, if South Africa *produces* gas for use in its electricity system, the net effect on GHG emissions will be substantial and significantly more than would have been the case if we made use of imported gas. Thus, if South Africa *produces* gas for use in its electricity system, the net effect on GHG emissions in South Africa will be substantial and significantly more than would have been the case if we made use of imported gas.

141. That these considerations were relevant is beyond dispute.

142. Firstly, the project's potential to increase GHG emissions implicated a range of policy objectives, as well as South Africa's ability to meet its obligations in terms of the NDC.

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[65] Founding affidavit, paras 168.1 and 168.2, p. 54.
[66] Methane has a global warming potential over a 20-year time horizon that is 84 times greater than that of carbon dioxide, and over a 100-year time horizon its GWP is 28 to 34 time greater according to the Fifth Assessment Report of the International Panel on Climate Change. Expert affidavit of Professor Mark New, para 4, p. 2356.
[67] TEEPSA's answering affidavit, para 91.4.1, p. 1686; para 91.12.1, p. 1690.

143. As set out above, this is the primary focus of the need and desirability assessment in so far as the question of "desirability" is concerned – i.e. the compatibility of the proposed activity with "the strategic context" as defined by policy.

144. Secondly, it is clear that climate impacts are a relevant consideration in applications for environmental authorisation of projects such as this.

145. In Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others[68] the Court (per Murphy J) held that the impact of a development proposal on the climate was a relevant consideration in an environmental impact assessment process under NEMA and remarked that:

> *"The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences."*[69]

146. In *Green Connection*,[70] this Court held that:

> *"… it is incongruous to rely on the long-term benefits of generating electricity and gas, which is a result of production, whilst not considering the climate change effects of production. Climate change is relevant to both exploration and production activities. It makes no sense to rely on the positive consequences of production stage for purposes of*

[68] 2017 (5) SA 227 (GP).
[69] At para 82.
[70] At para 154.

considering an application at exploration stage, only to resist considering the negative consequences of the production stage when it comes to consideration of climate change."

147. In South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others,[71] the Supreme Court of Appeal was seized with an application to review an environmental authorisation issued for a "gas-to-power plant". The Court rejected arguments to the effect that gas-generated electricity served as "a transitional fuel" (from coal) and was indicated in policy instruments such as the IRP. This did not remove the obligation on the decision-makers to consider alternative sources of electricity that would generate fewer GHG emissions.[72]

Other similar projects

148. The majority of South Africa's exclusive economic zone is subject to an exploration right.[73] If all (or even some) of these exploration projects were successful and led to gas production, the resulting gas would almost certainly exceed domestic demand.

149. Because TEEPSA and the decision-makers did not regard the production phase as having any relevance to the process, no consideration was given to the consequences of both these projects or the quantity of gas that would result from simultaneous production operations.

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[71] (479/2023) [2025] ZASCA 134 (17 September 2025)
[72] Para 9; para 43 to 54.
[73] "JWS12", p. 950.

150. Proceeding from the Minister's conclusion that the exploration activities were necessary and desirable because South Africa needs gas to generate electricity, the possibility that multiple gas-generating projects might be underway in the intermediate term was a relevant consideration.

151. In Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others,[74] the Constitutional Court held that:

> *"First, NEMA requires all developments to be socially, economically and environmentally sustainable. Unsustainable developments are in themselves detrimental to the environment. This is particularly true of developments contemplated in section 21 of ECA, that is, developments that may have substantial detrimental impact on the environment, such as a filling station. The proliferation of filling stations poses a potential threat to the environment. This threat arises from the limited end-use of filling stations upon their closure. The proliferation of filling stations may ultimately lead to the closure of one or some of the existing filling stations. The filling station infrastructure that lies in the ground may have an adverse impact on the environment. As observed by the Supreme Court of Appeal, "[t]he environment may well be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict…" The inherent danger in the proliferation of filling stations has led some governments to impose restrictions not only on where filling stations may be constructed, but also on the distance between filling stations."*

[74] 2007 (6) SA 4 (CC) at para 74.

152. While the Court in *Fuel Retailers* was concerned with the prospect of a proliferation filling stations that were surplus to requirements, the principle applies equally (and more compellingly) to a proliferation of petroleum development projects.

Predictable ecological impacts

153. There are predictable, long-term ecological impacts that go along with petroleum projects.

154. This fact is acknowledged by the Minister in the appeal decision at paragraph 2.70, where she states with reference to ecological impact:

> "I have only considered the impact of exploration which are far less significant and far less invasive than they will be if extraction and production takes place."[75]

155. We do not contend that the prediction and investigation of all production impacts should have been carried out, but the Minister should have taken into account that a more invasive impact over an extended period (up to 30 years in terms of section 84 of the MPRDA) would be an inevitable consequence of production. These impacts are general in nature and entirely predictable (as was noted by the Minister in her appeal decision).[76]

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[75] "JWS11", p. 997.

[76] See paragraph 2.70 of the appeal decision, where the Minister states *"I have only considered the impact of exploration which are far less significant and far less invasive than they will be if extraction and production takes place."*

Evidence regarding industrial gas demand

156. An incidental debate regarding the utility of gas in the South African economy crystalized in the answering and replying papers, as emerges from the expert affidavit of Mr. Jacob Human[77] and the response by Mr. Hilton Trollip.[78] Mr. Human's affidavit was filed together with TEEPSA's answering papers, while Mr. Trollip's affidavit was filed by the applicants with their replying papers.

157. Mr. Human is an economist and the Chief Executive Officer of the Industrial Gas User's Association of South Africa ("IGUASA"). His evidence is directed at demonstrating that South Africa has a pressing need for gas produced offshore South Africa if the gas requirements of the industrial users that he represents are taken into account. He says that the applicants have ignored this factor.

158. Mr. Human's evidence is not technically relevant in this review because the Minister decided that the exploration activities were necessary and desirable on the basis that South Africa needs gas to *generate electricity* (there is a sound technical basis for the distinction which will shortly become apparent). The Minister is bound by the reasons given in her appeal decision;[79] these cannot now be fortified with *ex post facto* reasons – particularly not when they are supplied by the party that stands to benefit most from her decision.

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[77] p.1960.
[78] p. 2334
[79] Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C) at para 11; National Lotteries Board and others v South African Education and Environment Project 2012 (4) SA 504 (SCA); National Energy Regulator and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC) at para 39.

159. In any event, Mr. Human's statements are untenable when considered in light of all the facts, which we set out below.

160. Mr. Human's arguments (which are made at a general level) can essentially be summarised as follows*: "domestic gas"* is the cheapest source of gas available to South African industrial users; gas supply is severely constrained in South Africa; gas is indispensable to achieving energy security while reducing emissions; South Africa requires many sources of gas *"to secure energy sovereignty"*; therefore, producing gas on Block DWOB is necessary.

161. Mr. Human also refers to an updated version of the IRP2019 – the draft IRP 2024 – which envisages a significant increase in electricity by means of gas-fired technologies.[80]

162. According to Mr. Trollip, Mr. Human is correct that if one were to expand the scope of the analysis to include industrial usage, the volumes of gas that would likely be produced from Block DWOB would (from a purely arithmetic perspective) match the current gas needs of the South African economy.

163. However, the proposal that these gas requirements should be met with gas produced from Block DWOB (or any other offshore production operation in South Africa) is in his assessment *"nonsensical"*. This is because:[81]

163.1. Industrial users of gas in South Africa are in urgent need of a new gas supply due to a sudden and unexpected announcement that their

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[80] The 2024 draft IRP is, in any event, not relevant – as the DG stated (and Minister Creecy noted in her decision) – the IRP 2019 is in place and is applicable until such time as it is amended (answering affidavit, p. 2107, para 27.11.3).

[81] This is a summary of the analysis provided in Mr. Trollip's affidavit, paras 15 - 24, p. 2338 – 2341.

present source (i.e. gas piped to South Africa from the Pande-Temane gas field in Mozambique) will be terminated in 2028. The sequence of events leading to this situation are explained in Mr. Trollip's affidavit.[82] This is now referred to as "the gas cliff".

163.2. The gas cliff poses a significant challenge for key industrial sectors relying on gas and methane rich gas, including steel, glass, ceramics, automotive, food, beverage, pulp and paper, among others. If the gas cliff materializes, the socio-economic impact will be significant, with many job losses.

163.3. According to Mr. Trollip (who for a time served on the board of the Petroleum Oil and Gas Corporation of South Africa), an offshore gas development on Block DWOB would only come online 10 to 20 years following a discovery. TEEPSA disputes this timeframe and avers that 6 or 7 years is a more reasonable timeframe.[83] Even if the shorter timeframe is adopted, there is an absence of suitable capacity or infrastructure in the region. For example, the project would require a minimum of 188 kilometres of pipeline to shore or offshore liquid natural gas ("LNG") processing and export capacity. Regardless, it is clear that that the date would be well after 2028.[84]

163.4. All major industry players have agreed that LNG import terminals are the solution to this immediate crisis. This consensus represents the

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[82] Affidavit of Hilton Trollip, paras 16.1 to 16.6, p. 2338 – 2339.
[83] TEEPSA's answering affidavit, para 86.14, p. 1681.
[84] Affidavit of Hilton Trollip, para 46.1, p. 1553.

unified position of gas users, suppliers, and government regulators and the only viable solution given the 2–3-year timeline.

163.5. The most promising source of gas to replace Pande-Temane is the gas that will in due course be produced from the Rovuma Basin in Mozambique. This gas field could supply South Africa for the next 500 years at current demand. TotalEnergies has already invested 20 billion US dollars in developing the discovery. Activity on the field is currently frozen due to security concerns but must at some stage resume.

163.6. Whatever source of gas is put in place to address the position of the industrial gas users in the next three years will be well-established as a permanent solution by the time any gas is being produced on Block DWOB (if indeed this ever occurs). A market could not exist for both Block DWOB gas and whatever solution is found.

164. Regarding Mr. Human's assertion that *"domestic gas"* is the cheapest source of gas available in South Africa, the current price of *"domestic gas"* is entirely contingent on the current status *quo* – i.e. the import of gas by Sasol *via* pipeline from the Pande-Temane field. It is extremely unlikely that gas could be supplied from Block DWOB at a cheaper rate.[85]

165. In light of this, we submit that Mr. Human's evidence is of little assistance to this Court.

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[85] Affidavit of Hilton Trollip, paras 31 – 40, p. 2343 – 2344.

166. A further reason why little weight should be attached to the evidence of Mr. Human is that he does not meet the standard of an expert witness because he is not independent. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.[86]

167. IGUASA – of which Mr. Human is CEO - is for all intents and purposes a lobby group. Its objectives are described on its website and include acting as *"a collective voice for industry"* and *"protecting and promoting the long-term availability of secure, sustainable and competitively priced gas"*.[87] Thus, its interests lie with ensuring an abundance of cheap gas as far into the future as possible.

The precedent established in Green Connection

168. In *Green Connection*, this Court considered a virtually identical question to that which arises in this case – namely whether the environmental authorisation granted to TEEPSA in respect of proposed exploration operations on offshore Block 5/6/7 was defective because the need and desirability assessment failed to account for the climate impacts of the production phase. In her judgment, Mangcu-Lockwood J accepted that an environmental impact assessment for exploration activities must include a need and desirability assessment which considers the broad consequences of production.[88] She upheld the challenge

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[86] PricewaterhouseCoopers Inc and Another v National Potato Co-operative Ltd (451/12) [2015] ZASCA 2 (4 March 2015) at para 98.
[87] Replying affidavit, paras 25 – 26, p. 2270.
[88] Paragraphs 146 to 150.

to the decisions under review and made the following findings:

> *"…it is incongruous to rely on the long-term benefits of generating electricity and gas – which is a result of production, whilst not considering the climate change effects of production. Climate change is relevant to both exploration and production activities. It makes no sense to rely on the positive consequences of production stage for purposes of considering an application at exploration stage, only to resist considering the negative consequences of the production stage when it comes to consideration of climate change.*
>
> *The approach of the decision-makers itself indicates the intertwined nature of the two processes. It proceeded from the assumption that any gas discovered will, in due course, be combusted to produce energy. This indicates the sense in which it is facile to distinguish the two processes when climate change impact assessment is considered.*
>
> *The asymmetric assessment of need and desirability is accordingly established by the applicants."*[89] [emphasis added]

169. Given that the issues concerning the scope of the need and desirability assessment in *Green Connection* and in this case cannot be distinguished in any material respect, this Court is required by the *stare decisis* principle (the doctrine of precedent) to follow *Green Connection*, unless it is persuaded that the decision was clearly wrong.

170. As the Constitutional Court has noted, the doctrine of precedent is a core component of the rule of law, without which litigation would be directionless, hazardous and chaotic. It serves the purpose of the maintaining legal certainty and equality before the law, as well as the satisfaction of legitimate

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[89] Paragraphs 154 to 156.

expectations. It entails a general duty on the part of judges to follow the legal rules in previous judicial decisions. An individual litigant would feel unjustly treated if a past ruling applicable to his/her case were not followed where the material facts were the same. The doctrine of precedent advances certainty, predictability, reliability, equality, uniformity and convenience.[90]

171. The doctrine of precedent also entails that a court stands by its previous decisions, unless the earlier decision is held to be clearly wrong. A decision will only be held to be clearly wrong where it has been arrived at on the basis of: (i) a fundamental departure from principle; or (ii) a manifest oversight or misunderstanding. That is, where there has been something in the nature of *'a palpable mistake'*. In short, a court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. Mere disagreement with the earlier decision, or a differing view of the law, is not a ground for overruling it.[91]

172. Given that the findings on the scope of the need and desirability inquiry in *Green Connection* were clearly, comprehensively and persuasively motivated, it would be untenable to suggest that the decision was based on a palpable mistake. We accordingly submit that this Court is required by the doctrine of precedent to follow *Green Connection*.

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[90] Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC) at para 54.
[91] Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others 2018 (4) SA 107 (SCA) at para 3.

Conclusion and grounds of review

173. As we have shown, the premise of the need and desirability assessment was fundamentally flawed with the consequence that the decision-makers failed to consider a range of relevant considerations and arrived at a fundamentally unsound conclusion.

174. In the premises, we submit that the decisions fall to be set aside on the following bases:

174.1. they were not rationally connected to the purpose of the empowering provision in that the irrational assessment of need and desirability precluded a proper evaluation in terms of section 24O whether the exploration activities were the best practicable environmental option; and

174.2. they did not take account of relevant considerations;

174.3. They accordingly fall to be reviewed in terms of section 6(2)(e)(iii) and 62(f)(ii)(bb) of PAJA.

SECOND GROUND OF REVIEW: OIL SPILL RISK

175. Applicants' grounds of review under this head relate to:

175.1. the reasonableness of the decision-makers' acceptance of the statement in the FEIR that an oil spill is "highly unlikely"; and

175.2. the reliance on an oil spill contingency plan (**"OSCP**") and blow out contingency plan (**"BOCP**") as mitigation measures, notwithstanding

that these plans do not presently exist.

176. We deal with each in turn.

Oil spill "highly unlikely"

177. It is common cause that a major oil spill resulting from a "well blow-out" is the most significant risk arising from the exploration activities, and that this occurrence could correctly be described as "catastrophic".

178. Because the consequence of an oil spill would be the effective destruction of the marine environment for a sustained period, this risk has a bearing on multiple aspects of the impact assessment. The impact on marine ecology, commercial and small-scale fisheries, coastal and near-shore users and intangible heritage was in every case estimated as *"high"* or *"very high"*.

179. The FEIR characterized this risk as *"highly unlikely"*.[92] The factual foundation for this conclusion is that:

> *"In a South African context, 358 wells have been drilled in the offshore environment to date and no well blowouts have been recorded. Global data maintained by Lloyds Register indicates that frequency of a blowout from normal exploration wells is in the order of 1.43 x 10-4 per well drilled."* [93]

180. Both the Director-General[94] and the Minister[95] proceeded on the basis of these statements, acknowledging that the consequences of a blow-out would be

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[92] "JWS4", p. 144.
[93] "JWS4", p. 137.
[94] "JWS8", p. 594.
[95] "JWS11", paras 2.33 to 2.36

serious but nonetheless they accepted – based on the EAP's assessment – that the risk was "very unlikely" to materialise.

181. The flaw in this approach is that TEEPSA is proposing to drill what are referred to as "ultra-deep"[96] wells and there is a documented relationship between depth and oil spill risk (although it is acknowledged that the nature of the relationship is not fully understood).

182. Professor Annalisa Bracco, a Professor of Ocean and Climate and the Associate Chair for Research of the Ocean Science and Engineering Graduate Program at the Georgia Institute of Technology, states the following in this regard:

> *"Studies have shown that every 30 metres of depth added to a drilling operation increases the probability of a "company reported incident" (including a blowout) by 8.5%. This conclusion was based on an empirical analysis of company reported incidents of oil and gas production platforms in the Gulf of Mexico between 1996 and 2010."*[97]

183. While the reason for this correlation is uncertain, its existence is clear.

184. If it is accepted that the depth of a well increases the risk of an oil spill, it follows that the aggregated assessment of risk provided by the Lloyds Register was insufficient. Similarly, the figure of 358 offshore wells drilled without incident in South Africa's exclusive economic zone is uninformative as regards depth

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[96] The classification "ultra-deep" refers to wells in excess of 1500m. The deepest points on Block DWOB are 3100m.

[97] The particular study cited by Professor Bracco is a paper authored by Muehlenbachs, Cohen and Gerarden and titled "*The impact of water depth on safety and environmental performance in offshore oil and gas production".* It is referenced in the Minister's appeal decision, "JWS11", para 2.18.10.1.1, p. 720.

risk – and it is also a relatively small sample if one considers the magnitude of the event in issue. The assessment of risk in the FEIR was accordingly unsound.

185. The appeal submitted to the Minister by the Green Connection ("GC") and Natural Justice ("NJ") made this point and substantiated it by reference to credible information addressing depth risk. In particular:

185.1. The paper, authored by Muehlenbachs, Cohen and Gerarden, referred to in Professor Bracco's affidavit.

185.2. A paper entitled *Scenarios and Responses to Future Deep Oil Spills: Fighting the Next War* authored by recognised experts in the field in 2020 stated that *"the use of novel drilling and production technologies, in largely unexplored frontier regions, and with significant unknown unknowns regarding oil and gas behaviour at extreme pressures and temperatures, contributes to the increase risks of ultra-deep-water development …"*[98].

185.3. A 2020 publication of the US National Oceanic and Atmospheric Administration entitled *Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico* cautioned that *"[a]s drilling occurs at deeper depths, there can be an increased risk of loss of well control …. Pressures and temperatures in deeper waters provide extreme conditions where equipment, including safety-critical systems, could be more likely to fail and … are more difficult to reach*

[98] Natural Justice's appeal, "JWS10", para 17, p. 606.

> *quickly. Capping deepwater wells is not a regularly occurring activity, so lack of experience also plays into the risk. Vessels are having to travel much farther to get out to those deeper sites, which could increase spill response times or have fewer available response vessels."*[99]

186. In its responding statement, TEEPSA disputed the correctness of this material based on its own analysis and assertions regarding the measures that it will implement to manage the risk.[100]

187. Presented with these submissions, the Minister considered that *"there [was] not enough to persuade [her] …. to refuse the applicant an EA"*.[101] In other words, she took as her point of departure that TEEPSA had been validly granted an environmental authorisation and considered whether the material raised by NJ in relation to depth risk was sufficiently persuasive to justify removing it.

188. The relevant passage of the appeal decision is instructive as to her approach and is worth repeating in full:

> *"A wealth of information has been placed before me by the various parties. Some of it is technical. I have reviewed the literature furnished to me. Whilst I accept that my decision in this appeal requires that an equilibrium be struck between a range of competing interests and considerations, I am satisfied that, after careful consideration, there is not enough in the appeal to persuade me to refuse the applicant an EA on*

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[99] Natural Justice's appeal, "JWS10", para 18, p. 606 – 607.
[100] The relevant passages are set out in the supplementary founding affidavit, paras 22.1 – 22.2, p. 1246.
[101] "JWS11", para 2.32 – 2.36, p. 820 – 821.

the grounds raised by the appellants under this head. The appellants' concerns are adequately dealt with and accommodated. In light of the above, I find that this ground of appeal has no merit and is accordingly dismissed."

189. Judged by the standard of the precautionary principle – which dictates how the environmental authorities should proceed when faced with scientific uncertainty - the Minister's decision falls far short of what was required of her.

190. In *Fuel Retailers*, the Constitutional Court, in examining the duties imposed on environmental authorities, emphasised that the approach adopted in our legislation is one of risk-aversion and caution, which entails *'taking into account the limitation on present knowledge about the consequences of an environmental decision'*.[102] The Court held that the precautionary principle *'is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed [activity]'*.[103]

191. The content of the principle has been canvassed in numerous decisions since,[104] and its import is clear. The principle applies if two conditions are met – (a) the proposed activity poses a threat of serious or irreversible environmental damage; and (b) there is uncertainty as to the magnitude of the impact or the degree of the threat. If both of these conditions are satisfied, the principle is activated and there is a 'shifting of an evidentiary burden of showing

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[102] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC) (Fuel Retailers) at para 81.

[103] At para 98.

[104] See, for example, African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others 2025 (2) SA 31 (SCA); Endangered Wildlife Trust and Another v Director-General (Acting) Department of Water and Sanitation and Another 2025 (3) SA 151 (SCA).

that this threat does not, in fact, exist or is negligible'.[105]

192. Thus, the minimum required of the Minister in the circumstances was to take meaningful steps to determine whether legitimate scientific uncertainty existed on the question of depth risk. If legitimate uncertainty was established (we submit it clearly was) she would have been bound to reject the assessment presented in the FEIR, given that it was not established that the risk did not exist or was negligible.

193. What the Minister actually did was the opposite of what was required of her: she cast the onus upon the appellants to persuade her that the question of depth risk had a bearing on the overall risk of an oil spill and then decided solely on the basis of her own *"review of the literature"* (read in light of TEEPSA's rebuttals) that they had failed to do so. It is clear that she did not appreciate that the inquiry was to be guided by the precautionary principle because she understood the object to be *"[striking] an equilibrium between a range of competing interests and considerations"*.

194. TEEPSA contends that this is a mischaracterisation of the Minister's reasoning process because she "had the benefit of the robust analyses in the appeals and reports placed before her" and her appeal decision contains a statement to the effect that she had "thoroughly considered the extensive submissions made".[106]

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[105] WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others 2019 (2) SA 403 (WCC) at para 104. See also the Guideline, p 13.
[106] Answering affidavit, paras 228 – 229 p. 1759.

195. If this was the standard by which a decision-maker could justify a departure from the precautionary principle, it would be rendered completely ineffective. The Minister did not have sufficient expertise to resolve this scientific dispute one way or the other and the *"robust analyses"* that served as the counterweight to the material in GC and NJ's appeal was nothing more than TEEPSA's input.[107]

196. The only material in Minister George's affidavit which goes to elucidate the Minister's reasoning in this regard are the *ad seriatim* responses to the applicants' supplementary affidavit, in which he enters into his own technical critique of the materials included in GC and NJ's appeal.[108] As we have pointed out above, Minister George's hearsay evidence is irrelevant and, in any event, it is not clear on what basis he purports to claim expertise in the field or how his observations featured in Minister Creecy's reasoning.

197. In the premises, we submit that both decisions (and in particular the Minister's) were manifestly unreasonable in their evaluation of oil spill risk, were based on errors of law and took into account irrelevant considerations.

Speculative mitigation measures

198. The OSCP and BOCP are yet to be formulated.109 Their respective functions are described in the FEIR.

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[107] The independent review of the OSMR undertaken by Stephen Luger referred to in this connection at paragraph 228 of TEEPSA's answering affidavit (p. 1759) relates to the likely impact of an oil spill, not risk.

[108] Minister's AA, paras 31.15 to 31.23, pp. 2200 – 2201.

[109] Founding affidavit, para 61, p 66.

199. BOCP:

199.1. The BOCP *"focuses on well control operations and will set out the detailed response plan and intervention strategy to be implemented in the event of a blowout. It ensures response times are minimised and that the most efficient and effective contingency measures are implemented."*[110]

200. OSCP:

200.1. The OSCP *"provides for a comprehensive response to all oil and chemical pollution emergencies in the marine environment regardless of how costs might be attributed or ultimately recovered. In updating the OSCP for each well, TEEPSA will review the capacity of local resources and, where necessary, it will be adjusted/made specific to local context and any shortcomings in local resources will be addressed where required."* A generic structure of the contents of the OSCP is provided.[111]

201. These plans factored heavily in the ultimate assessment of oil spill risk by the EAP and the decision-makers.

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[110] This passage appears in section 11.3.73 of the FEIR. This section was erroneously omitted from annexure "JWS4", but a copy will be made available to the Court.

[111] This passage appears in section 11.3.74 of the FEIR. This section was erroneously omitted from annexure "JWS4", but a copy will be made available to the Court.

201.1. They are the principal *"mitigation measures"* identified in the FEIR in connection with the impacts of a well blow-out.[112]

201.2. They are singled-out and relied upon by the Director-General as the factor which makes the "high" and "very high" impact of a well blow-out tolerable (aside from the fact that it is "very unlikely").[113]

201.3. The Minister expressly identified the OSCP and BOCP as material mitigation measures in her evaluation of the grounds of appeal relating to oil spills.[114]

202. The theoretical contents and implementation of a future OSCP and BOCP (which were taken for granted) materially impacted the evaluation of oil spill risk. For example, these documents have a bearing on, the mode and feasibility of applying dispersants to the ocean surface, which would dictate whether oil reaches the shoreline.[115]

203. The applicants do not dispute that there may be real obstacles to compiling an OSCP and BOCP before specific well locations have been identified, as TEEPSA avers. However, we contend that in these circumstances, material reliance should not have been placed upon the contents of these plans – which had not been formulated – and the risk should have been assessed accordingly.

204. If a circumstance is to be regarded as "mitigating" an impact, the manner and

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[112] "JWS4", p. 137 – 138.
[113] "JWS8", p. 594.
[114] "JWS11", para 2.33, p. 821.
[115] See TEEPSA's answering affidavit, para 194.1, p. 1741; 196.5, pp. 1741 – 1472.

degree to which it does, must be known at the time of evaluation. If it is not known, the decision-maker cannot arrive at a reasoned evaluation of the impact as a basis for deciding whether or not it is acceptable.

205. In Noordhoek Environmental Action Group v City of Cape Town and Others[116] a similar question of principle arose in the context of an environmental authorisation granted for a road along a route that would intersect the foraging grounds and breeding ponds of a population of Western Leopard Toads, an endangered species of special concern.

206. The City of Cape Town (the holder of the environmental authorisation) proposed to mitigate the impact of the road on the toads by constructing the road with toad underpasses and various other special features. The environmental authorisation was granted subject to a condition that an anuran (i.e. toad) specialist be appointed to monitor the effectiveness of the mitigation measures.

207. The applicants argued *inter alia* that the decision to grant an environmental authorisation was irrational because it depended upon a mitigation which was untested and untried.[117] Although the Court rejected this argument, its reasoning is instructive. Among the reasons given for the finding was that "*the [Western Leopard Toad]-related impacts were not at any stage assessed as a fatal flaw (even prior to mitigation). In these circumstances, it is not irrational to develop the most appropriate mitigation when a detailed design of*

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[116] Noordhoek Environmental Action Group v City of Cape Town and Others (4819/21) [2024] ZAWCHC 105 (23 April 2024).
[117] At paragraph 52.

the road is undertaken…".

208. The situation here is the opposite: an oil spill is acknowledged to be a "catastrophic" risk associated with the exploration activities and the BOCP and OSCP were cited as key factors rendering it acceptable, in circumstances where they had yet to be formulated.

209. In *Green Connection* the Court held, in identical circumstances, that the speculative reliance on an OSCP and BOP amounted to non-compliance with the EIA Regulations, in particular the requirement to prepare an environmental management programme describing the measures to manage impacts.[118]

Conclusion

210. Inasmuch as the Minister failed to adopt the risk averse and cautious approach prescribed by section 2(2A)(a) of NEMA and purported to resolve the scientific uncertainty regarding depth risk herself, we submit that she failed to comply with a mandatory and material procedure prescribed by an empowering provision and acted unreasonably. Her decision accordingly falls to be reviewed and set aside in terms of sections 6(2)(b) and 6(2)(h) of PAJA.

211. Given that both decision-makers relied upon the envisaged OSCP and BOCP as mitigation measures materially diminishing the impacts associated with an oil spill, we submit that their decisions failed to take into account relevant considerations, were unreasonable and were not rationally connected to the purpose of the empowering provision. Their decisions accordingly fall to be

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[118] At paragraph 199.

reviewed and set aside in terms of sections 6(2)(e)(iii), 6(2)(f)(ii) and 6(2)(h) of PAJA.

THIRD GROUND OF REVIEW: ASSESSMENT OF SOCIO-ECONOMIC IMPACT ON SMALL-SCALE FISHERS

212. Item 3(3)(j) of Appendix 3 to the EIA Regulations provides that an environmental impact assessment report must contain:

> *"an assessment of each identified potentially significant impact and risk, including- (i) cumulative impacts; (ii) the nature, significance and consequences of the impact and risk; (iii) the extent and duration of the impact and risk; (iv) the probability of the impact and risk occurring; (v) the degree to which the impact and risk can be reversed; (vi) the degree to which the impact and risk may cause irreplaceable loss of resources; and (vii) the degree to which the impact and risk can be mitigated."*

213. The assessment of impacts contemplated in this provision is recorded in chapters 9 and 10 of the FEIR. Chapter 10 deals with impacts associated with "unplanned events". Section 10.4.3 of chapter 10 deals with the impact of a well blow-out.

214. The only part of this section in which the socio-economic impact on small-scale fishers is addressed is section 10.4.3.3 titled "impact on coastal and nearshore users".[119]

215. The high-water mark of the assessment is "*… a reduction in income and livelihoods impacts of those dependent on small-scale fishers*". In all other respects, their position is conflated with that of other "coastal and nearshore

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[119] "JWS4", p. 237.

users" such as tourism establishments.

216. We submit that this assessment falls far short of what is required by item 3(3)(j) of appendix 3. Indeed, on every dimension of assessment mentioned in item 3(3)(j) aside from "consequence", section 10.4.3.3 is uninformative.

217. The decision-makers would not be able to discern the significance, duration, reversibility or potential for mitigation of the socio-economic impact on small-scale fishers and their communities.

218. The reason for this is that neither the FEIR nor the SEIA provide or consider the relevant context. Neither of these reports reflect that:

218.1. Port Nolloth is a small village marked by poverty, where fishing is a predominant economic activity.

218.2. There would be a dearth of alternative employment opportunities available for small-scale fishers whose fishing operations were abruptly halted due to an oil spill.

218.3. These effects would place a further strain on the economic base of the Port Nolloth community and would likely have a distinct and pronounced impact on the social fabric of the village.

218.4. The primary mitigation measure put forward in respect of this impact - compensation to small-scale fishers through TEEPSA's insurer,[120] in accordance with a process administered by the Department of

[120] "JWS4", p. 239.

Forestry, Fisheries and Environment and the South African Maritime Safety Authority[121] – would be of limited efficacy in mitigating these acute effects, given the period of time that it would take for this process to run its course.[122]

219. TEEPSA has assembled miscellaneous extracts from the SEIA and the FIA to demonstrate that it *did* assess the potential socio-economic impact on small-scale fishers.[123] A perusal of these passages reveals that they are all generalised in nature and directed at providing explanatory context – they do not add any information that would elucidate the criteria listed in item 3(3)(j).

220. TEEPSA does not dispute that the socio-economic impact on small-scale fishers was a distinct impact warranting assessment in terms of item 3(3)(j). The only question appears to be whether this was adequately done. We submit that it clearly was not.

Conclusion

221. We submit that the decisions fall to be set aside on the following bases:

221.1. they did not comply with a material procedure in that the FEIR did not assess the impact of the exploration activities on small-scale fishers as required by item 3(3)(j) of the EIA Regulations; and

221.2. they did not take account of relevant considerations.

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[121] TEEPSA's AA, para 259, pp. 1771 - 1772.
[122] Founding affidavit, paras 219 – 228, pp 69 – 71.
[123] TEEPSA AA, paras 251 – 253, p. 1766 – 1770.

222. They accordingly fall to be reviewed in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(bb) of PAJA.

FOURTH GROUND OF REVIEW: ICMA

223. The objects of ICMA, the special legal status – and high level of protection – conferred on coastal public property and the requirement that consideration be given to the *'interests of the whole community'* (a concept unique to ICMA) have been described above in setting out the statutory framework to this application. This provides the context against which this Court must determine whether the DG and the Minister have complied with ICMA.

224. In the founding affidavit, Mr Steenkamp set out the applicants' case in relation to the fourth review ground[124] – the failure to take into consideration and apply the requirements of ICMA –as follows:[125]

224.1. the competent authority would, at a minimum, have had to consider whether the proposed project:

224.1.1. would affect coastal public property;

224.1.2. is consistent with the objective of conserving, protecting and enhancing coastal public property for the benefit of current and future generations;

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[124] This overlaps with the review based on the failure to consider the interests of future generations (supplementary founding affidavit, paras 30 – 34, pp 1248 – 1249), which will be considered in this section, in discussing the ICMA review grounds.

[125] Founding affidavit, paras 244 – 245, pp 75 – 76.

224.1.3. is likely to cause irreversible or long-lasting adverse effects to the coastal environment that cannot be satisfactorily mitigated;

224.1.4. would substantially prejudice any costal management objective;

224.1.5. is socially and economically justifiable and ecologically sustainable and consistent with the interests of future generations in inheriting coastal public property and a coastal environment characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable;

224.1.6. is in the interests of other living organisms that are dependent on the coastal environment;

224.2. he also had to consider whether granting an environmental authorisation for the project is consistent with the duties of the decision-maker to conserve and protect coastal public property for the benefit of present and future generations and to ensure that it is used, managed, protected, conserved and enhanced in the interests of the whole community; and

224.3. neither the DG nor the Minister made any attempt to comply with the above requirements.

225. Mr Steenkamp stated that the DG failed to consider ICMA and section 63 of that Act, pointing out that the reasons given for his decision:

225.1. give no consideration to ICMA or section 63 of that Act and failed even to mention ICMA (while specifically identifying other statutory considerations); and

225.2. failed to consider or even mention the following considerations: coastal public property; the objective of conserving and enhancing the coastal public property for the benefit of current and future generations; coastal management objectives; and the interests of the whole community.[126]

226. The short-comings in the DG's decision were not cured by the Minister on appeal. Although the failure to consider ICMA was raised in the applicants' appeals, these were dismissed by the Minister without addressing any of the issues raised in relation to ICMA. All the Minister did was summarise the submissions made without drawing any conclusions of her own.[127]

227. The decision-makers were required to consider the ICMA factors, weigh them together with all other relevant considerations and then come to reasoned conclusions with regard to the requirements of the Act. This was not done.

227.1. Firstly, it is the case of all respondents that the omitted factors were *implicitly* addressed by the decision-makers because they considered the FEIR, which included a table setting out the EAP's comments on

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[126] Founding affidavit, paras 246 – 249, pp 76 – 77.

[127] Founding affidavit, paras 250 – 251, pp 77 – 78. The Minister summarised the ICMA appeal grounds (paras 2.64.7 – 2.64.9, pp 887 – 888), set out TEEPSA's response in relation to ICMA (paras 2.65.17 – 2.65.19, pp 898 – 899) and the *'competent authority's response'* (para 266, p 910), but she did not consider ICMA in evaluating the relevant grounds of appeal (paras 267 – 273, pp 911 – 913).

each of the factors, and other matters which *"bear on section 63"*.[128] For the reasons canvassed above, this is not sufficient.

227.2. Secondly, Minister George explained the approach adopted by the Minister as being one entailing a trade off in favour of *"sustainable development"* in which the *"interests of the whole community"* extend *inter alia* to *"mining companies, oil and gas companies … electricity generators… manufacturers and users of oil and gas products"*.[129] This is contrary to the clear terms of the definition of "*the interests of the whole community"* in ICMA, which states that the collective interests of all persons living in South Africa are to be prioritised.

228. The applicants' contentions are fortified by the principle of subsidiarity. As stated by Cameron J in *My Vote Counts*,[130] subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and requires that a higher norm should be invoked only where the more concrete norm, or detailed principle or remedy, does not avail. The principle of subsidiarity is derived from Roman Catholic canon law, where it entails that human affairs are best handled at the lowest possible level of management. In the context of the Bill of Rights, subsidiarity requires that where the Constitution contains both a specific right, like the right of access to housing, and a more general

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[128] TEEPSA's AA, para 266, p. 1774 (the ICMA considerations were in substance considered in the final ESIA, and therefore by the DG and the Minister: *'[i]t is immaterial that the sections were not mentioned by name'*); para 270 - 272, pp. 1774 - 1775; para 274, p. 1775; paras 276 – 279, p. 1776; Minister's AA, para 31.73 – 31.76, p. 2237

[129] Minister's AA, para 31.65, p. 2235.

[130] My Vote Counts NPC v Speaker of the National Assembly and others 2015 (12) BCLR 1407 (CC) at paras 46 – 49 (although Cameron J wrote on behalf of a minority of the Court, the majority did not disagree with his analysis of the principle of subsidiarity, but only with his application of the principle).

right, like the right to human dignity, a litigant must first invoke the specific right.

229. As we have noted above, ICMA is one of the *'specific environmental management Acts'* listed in NEMA. It is a more concrete or specific law than NEMA. In terms of the principle of subsidiarity, it takes precedence over the more general environmental principles articulated in NEMA. In failing to consider and apply ICMA, the DG and the Minister committed fundamental irregularities.

Future generations

230. The obligation in section 63(1)(h)(i) of ICMA,[131] reinforces the objects of NEMA identified in its preamble[132] and the guiding principle in section 2(4)(o) of NEMA, (the environment is held in public trust for the people and must be protected as the people's common heritage). This guiding principle reflects a broader duty to ensure that the environment is protected for the benefit of present and future generations through reasonable legislative measures that prevent pollution and ecological degradation, as guaranteed by section 24(b) of the Constitution.[133]

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[131] Which obliges the competent authority, before granting an environmental authorisation, to consider whether the activity is situated within coastal public property and is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations.

[132] The Preamble states that:

"sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations;

everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures …" [emphasis added]

[133] Supplementary founding affidavit, paras 30 to 35, pp. 1248 to 1249.

231. The facts and circumstances canvassed above in connection with the first ground of review (flawed need and desirability assessment) and the third ground of review (oil spill risk), demonstrate that no consideration was given to the long-term implications of an oil spill or of disregarding South Africa's climate change policy while pursuing the development of offshore oil and gas.

232. TEEPSA denies that the consequences of an oil spill could persist for a sufficiently long period of time to implicate the interests of "future generations".[134] However, in doing so they rely on evidence of Professor Anthony Leiman, an economist who does not appear to have any expertise that would qualify him as an expert on the question. Dr Jean Harris has deposed to an affidavit affirming that:

> "For some species and habitats, impacts may persist for decades, affecting multiple generations. Oil residues and resultant altered ecosystems have been documented to persist for at least 15 years, and other published studies showing multi-decadal disruptions with recovery still not achieved after more than 30 years after the oil spill." [135]

233. We submit that, in the circumstances, Dr Harris' evidence should be dispositive of the matter.

234. In African Climate Alliance v Minister of Mineral Resources and Energy, the Court accepted the principle that a decision by the State to *"procure 1500 megawatts of new coal-fired power stations"* would impact on the rights of children (as the category of person with the greatest stake in the

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[134] TEEPSA's answering affidavit, paras 302.1 - 302.5, pp. 1781 - 1782; affidavit of Anthony Leiman, paras 7.1 - 7.5, pp. 1982 – 1983.
[135] Affidavit of Dr Jean Harris, para 13, p.2354.

future) by reason of the resulting long-term pollution.[136]

235. In Fuel Retailers in a context identical to this application (i.e. the review of an environmental authorisation), the Constitutional Court said the following:

> *"The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out."*

236. This same approach is reflected in the recent ICJ Advisory Opinion, where the Court held:

> *"Due regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law."*[137]

The *Green Connection* precedent

237. The position adopted by the decision-makers is uncannily similar to the circumstances considered by this Court in *Green Connection*. Mangcu-

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[136] African Climate Alliance and Others v Minister of Mineral Resources and Energy and Others (56907/2021) [2024] ZAGPPHC 1271 (4 December 2024) at paras 1 and 28.
[137] At paragraph 157.

Lockwood J in her judgment[138] in that matter set out how:

237.1. the DG's decision, while it listed the information considered, made no specific mention of ICMA;

237.2. Total tabulated a list of references to the Final EIR which it argued amounted to a consideration of the ICMA factors, though under a different rubric, but it did not deny that no reference was specifically made to ICMA or its provisions;

237.3. Total went no higher than to assume that the DG *"would have"* considered ICMA factors, because they were contained in the Final EIR;

237.4. None of the documents cross-referenced by Total made any attempt to explain findings or indeed assessments relating to whether: (i) coastal public property would be affected by the project; (ii) the project was inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations; or (iii) the project would be contrary to the interests of the whole community;

237.5. The Minister responded to the appeal grounds relating to ICMA as follows:

"Having considered the grounds of appeal and the responses thereto, I determine that the grant of the EA read together with the general and specific conditions and the identification of the potential impacts and

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[138] *Green Connection*, at paras 117 – 124.

mitigation measure of the project, the authorisation was rational and reasonable and that the provisions of the ICMA and section 63 were considered. In any event, I have considered in the appeal and I am of the view that the authorisation is rational and reasonable."

238. Mangcu-Lockwood J stated that:

238.1. she was unable to conclude that the DG considered ICMA factors, as to make the finding that they had been considered incidentally, there would have to be some reasoning which relates to ICMA factors and she found none;[139]

238.2. the Minister's decision was woefully deficient: (i) as it did not identify any portions of the DG's decision which considered the ICMA factors (because he did not consider these factors at all); and (ii) although the Minister purported to consider the ICMA factors, she failed to set out any findings in respect of them;[140] and

238.3. the Minister's decision was also unsatisfactory in that it did not go beyond setting out mere conclusions, and failed to specify what exactly was taken into account in relation to the requirements of ICMA. Her decision accordingly did not provide adequate reasons and had to be set aside for this reason as well.[141]

239. This Court's findings in *Green Connection* are fortified by the judgments in the *Sustaining the Wild Coast* matter.

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[139] *Green Connection*, at para 121.
[140] *Green Connection*, at para 125.
[141] *Green Connection*, at para 125.

240. In Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others,[142] the full bench of the Eastern Cape High Court found that: (i) sections 12 and 21 of ICMA meant that the area to which the exploration right applied enjoyed a special legal status that afforded the environment within the area a particularly high level of protection; and (ii) this necessitated that decisions affecting the area had to be taken in a manner which complied with the requirements of ICMA. One of the objectives of ICMA is to introduce an integrated approach to management, but the decision-maker did the opposite and dealt with the application as an energy sector-specific issue. Given that the Minister was duty bound to take into account the considerations referred to in ICMA, but did not do so, this rendered the decision reviewable.

241. On appeal to the SCA, Ponnan JA (writing for a unanimous Court) endorsed the High Court's finding in relation to the failure to take into account the specific measures for the protection of the coastal zone required by ICMA.[143]

242. Applying the principles established in *Green Connection* and the *Sustaining the Wild Coast* cases, leads one to the following conclusions:

242.1. proper consideration of the factors referred to in section 63(1)(c) and section 63(1)(h)(i) of ICMA would have required the competent authority to arrive at a considered conclusion on whether the impacts and risks of the exploration activities (most notably the possibility of a

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[142] 2022 (6) SA 589 (ECMk) at paras 128 to 132.
[143] Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC 2024 (5) SA 38 (SCA), at para 25.

catastrophic oil spill) are consistent with the purpose of protecting coastal public property.

242.2. This, in turn, would have called for consideration of:

242.2.1. section 7A, which defines the purpose of coastal public property as being “(a) To improve public access to the seashore; to protect sensitive coastal ecosystems; to secure the natural functioning of dynamic coastal processes; to protect people, property and economic activities from risks arising from dynamic coastal processes, including the risk of sea-level rise; or to facilitate the achievement of any of the objects of this Act”;

242.2.2. section 3(a), which requires the State, through its functionaries and institutions, to act as the trustee of the coastal zone pursuant to fulfilling the rights in section 24 of the Constitution;

242.2.3. section 12, which obliges the State, in its capacity as the public trustee, to: (a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and (b) take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.

243. In addition, proper consideration of the factor in section 63 of ICMA would have required the decision-makers to pertinently apply their minds and come to reasoned conclusions as to whether:

243.1. the *"interests of the whole community"* are served by the exploration activities, in accordance with the definition of this term in ICMA;

243.2. the project satisfied the objective of conserving and enhancing coastal public property for the benefit of current and future generations; and

243.3. the further considerations set out in paragraphs 244 to 245 of the applicants founding affidavit (long-lasting adverse effect on the coastal environment; prejudice to any coastal management objective; socially and economically justifiable; and, in the interests of other living organisms).[144]

244. It follows that the decision-makers could not have discharged the obligations imposed on them by ICMA simply by taking cognisance of the contents of the FEIR. What was required of them was a reasoned evaluation within the framework of principles and objectives established by ICMA. They failed to comply with these requirements:

244.1. Firstly, it is the case of all the respondents that the ICMA requirements were *implicitly* addressed by the decision-makers because they considered the FEIR, which included a table setting out the EAP's comments on each of the factors, and other matters which "bear on

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[144] Founding affidavit, paras 244 – 245, pp 75 – 76.

section 63".[145] For the reasons canvassed above, this is not sufficient.

244.2. Secondly, Minister George has purported to explain the approach adopted by the Minister as being one entailing a trade off in favour of *"sustainable development"* in which the *"interests of the whole community"* extend *inter alia* to *"mining companies, oil and gas companies, electricity generators… manufacturers and users of oil and gas products"*.[146] This is contrary to the clear terms of the definition of the term in ICMA, which requires that the collective interests of all persons living in South Africa be prioritised.

245. This Court is bound by the SCA's findings on ICMA in *Sustaining the Wild Coast* and is required to follow this Court's decision in *Green Connection* (concerning the application of ICMA), unless it is persuaded that the decision is clearly wrong.

246. It is not necessary for us to repeat what has been stated above concerning the doctrine of precedent being a core component of the rule of law and its importance in advancing legal certainty.

247. While only the core reasoning (*ratio decidendi*) of a judgment – and not *obiter dicta* – have binding effect, the fact that a higher court decides more than one issue in arriving at its decision does not mean that the reasoning leading to any one of these decisions is *obiter*, leaving lower courts free to choose whichever reasoning they prefer to follow. Unwarranted evasion of a binding

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[145] TEEPSA's AA, para 266, p. 1774; para 270 - 272, pp. 1774 - 1775; para 274, p. 1775; paras 276 – 279, p. 1776; Minister's AA, para 31.73 – 31.76, p. 2237

[146] Minister's AA, para 31.65, 2235.

decision undermines the doctrine of precedent and could eventually lead to the breakdown of the rule of law.[147] It follows that this Court is bound by the SCA's findings in relation to ICMA in *Sustaining the Wild Coast*.[148]

248. In any event, the facts relating to the consideration of ICMA by the decision-makers in this matter are in all material respects indistinguishable from *Green Connection*. Given the persuasive nature of the reasoning in *Green Connection* – which is reinforced by the binding principles set out by the SCA in *Sustaining the Wild Coast* – there is no realistic prospect of the respondents being able to meet the high threshold of demonstrating that this Court's finding in *Green Connection* is clearly wrong.

249. For the reasons set out above, we submit that there was a failure to comply with section 63 of IMCA and as a consequence, the decisions:

249.1. did not comply with a mandatory and material procedure prescribed by NEMA and the EIA Regulations;

249.2. were materially influenced by an error of law;

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[147] Camps Bay Ratepayers and Residents Association and Another v Harrison and Another 2011 (4) SA 42 (CC) at para 30. The Constitutional Court stated that if judges believe that there are good reasons why a decision that is binding on them should be changed, the proper course of action for them is to formulate those reasons and urge the higher court to effect the change.

[148] Even if the respondents were to suggest that the SCA's findings on ICMA were *obiter* – which we submit is not the case – the Constitutional Court has stated (in Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC) para 56) that the fact that *obiter dicta* are not binding does not mean that courts can free themselves from what they consider to be unwelcome authority by artificially characterising binding findings as *obiter*. Only that which is truly *obiter* need not be followed. But, even *obiter dicta* may be of potent persuasive force and be departed from only after due and careful consideration.

249.3. were taken because irrelevant considerations were taken into account and relevant considerations were not considered;

249.4. were not rationally connected to the information before the decision makers; and

249.5. were grossly unreasonable.

250. Therefore, the decisions stand to be set aside in terms of sections 6(2)(b), 6(2)(d), 6(2)(e)(iii), 6(2)(f)(cc) and 6(2)(h) of PAJA.

251. In addition, the decisions:

251.1. do not set out any findings or process of reasoning in relation to any of the factors required to be considered by section 63 of ICMA; and

251.2. do not set out any findings or process of reasoning in relation to a determination that the granting of the environmental authorisation for the project was warranted in the light of considerations prescribed by section 63 of the ICMA.

252. Therefore, the decisions do not contain adequate reasons for any findings in relation to section 63 of the ICMA and (in terms of section 5(3) of PAJA) they are presumed to have been taken without good reason. and, as such, stand to be set aside in terms of sections 6(2)(e)(iv) and 6(2)(f)(ii)(aa) to (cc) of PAJA.

253. We turn now to consider the question of the appropriate remedy.[149]

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[149] In the applicants' supplementary founding affidavit (at paras 6 to 13, pp. 1242 to 1243) they set out

REMEDY

254. The applicants seek an order substituting the decisions of the DG and the Minister with an order refusing the environmental authorisation.[150]

255. TEEPSA contends that such order would not be competent because the jurisdictional conditions for such an order have not been met, namely the existence of *"exceptional circumstances"*.[151]

256. We submit that an order of substitution is the only order that could give effect to a decision in favour of the applicants. We say so because:

256.1. A finding that the EAP adopted an inappropriate frame of analysis in limiting the evaluation of need and desirability to the exploration phase would necessarily entail a finding that the process should have evaluated the impact of a production phase on *inter alia* South Africa's climate change policy and commitments.

256.2. Correcting the error would – of necessity - require an environmental impact assessment process in which relevant information is provided regarding the production phase. This information would include the

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a further ground of review, based on the Minister's treatment of the responding statement submitted by the Petroleum Agency of South Africa **(PASA)** in the appeal process as recording the views and the stance of the competent authority – i.e. the DG. The same point was raised by the applicants in *Green Connection* and rejected by the Court (at paras 204 – 216). The applicants accept that this Court is required to follow the decision on this point in *Green Connection* as it not *'clearly wrong'*, but they do not abandon the review ground and reserve the right to rely on it, should this application serve before another court on appeal.

[150] Founding affidavit, paras 258 to 259, p. 79.

[151] Section 8(1)(c)(2)(aa) of PAJA provides that "The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders …setting aside the administrative action and…in exceptional cases substituting or varying the administrative action or correcting a defect resulting from the administrative action.

volumes of gas that would be produced in a production scenario, the existence of multiple other similar projects across South Africa's exclusive economic zone, the implications of utilising any petroleum resources produced on Block DWOB for South Africa's low emissions development strategy, and the greenhouse gas emissions that would result from producing the oil or gas on Block DWOB.

256.3. The appropriate scope of this evaluation would need to be determined through the preparation and submission of a scoping report, which would need to be subject to public participation.[152] Consequently, the environmental impact assessment must commence afresh, and an appropriate order must reflect this reality.

257. The circumstances outlined above constitute *"exceptional circumstances"* for purposes of section 8(1)(c)(2)(aa).

258. In Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another[153] the Constitutional Court considered section 8(1)(c)(2)(aa) and held that it would be competent for a court to make a substitution order in terms of this provision where two conditions are met. Firstly, that the Court is in as good a position as the relevant functionary to make the decision. Secondly, the outcome is a foregone conclusion.

259. If the Court upholds the first ground of review, both of these conditions would be met. Neither the DG nor the Minister could decide to grant the authorisation

[152] EIA Regulations, regulation 21.
[153] 2015 (5) SA 245 (CC).

on the basis of an FEIR that is found to have proceeded from an irrational premise. The court is in as good a position to decide this as the DG and the Minister and the determination is a foregone conclusion (assuming a lawful process). The same considerations apply to the further grounds of review.[154]

260. In the circumstances, we submit that a substitution order is competent and for the same reasons is just and equitable and appropriate.

CONCLUSION

261. The applicants seek an order granting them the costs of two counsel (on scale C).

262. In the event that the applicants are unsuccessful, we contend that the Court should exercise a discretion in terms of section 32(2) of NEMA and direct that the parties bear their own costs. Section 32(2) provides:

> *"A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the*

[154] The application of the proper test in relation to the precautionary principle would lead to the rejection of TEEPSA's application (second ground of review); there is insufficient information in the FEIR or the SEIA to allow for a proper assessment of the impact on small-scale fishers in Port Nolloth (third ground of review); and the final ESIA does not coherently address the requirements of ICMA, leaving the decision-makers unable to evaluate the relevant considerations (fourth ground of review).

environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

263. We submit that this application falls squarely within what is contemplated in section 32(2) and this would be an appropriate case to engage it.

264. If, in these circumstances, the Court decides not to engage rule 32(2) and to make a costs order in respect of TEEPSA, we submit that there is no factor which would justify a departure from the Biowatch principle, and it would accordingly be appropriate to order that the State parties bear their own costs.

265. The second and third applicants have a principled objection to oil exploration in South Africa (as pointed out by TEEPSA).[155] It does not follow that these proceedings should be regarded as an abuse (as TEEPSA contends). It is apparent from this Court's judgment in *Green Connection* that the review grounds relied upon by the applicants – which share many of the same features as the review grounds which were upheld in *Green Connection* – are well-founded.

266. The draft order sought by the applicants is annexed to their Practice Note.

Peter Hathorn SC

Jane Blomkamp

Applicants' counsel
16 January 2026

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[155] TEEPSA's AA, para 393 to 395, pp. 1801 - 1802

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

Case NO: 23619/2024

In the matter between:

AUKOTOWA FISHERIES PRIMARY CO-OPERATIVE LIMITED	First Applicant
THE GREEN CONNECTION NPC	Second Applicant
NATURAL JUSTICE	Third Applicant
and	
DIRECTOR-GENERAL: DEPARTMENT OF MINERAL AND PETROLEUM RESOURCES	First Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
TOTAL ENERGIES EP SOUTH AFRICA S.A.S.	Third Respondent

LIST OF AUTHORITIES

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1. Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC)

2. Sustaining the Wild Coast NPC v Minister of Mineral Resources 2022 (6) SA 589 (ECMk)

3. Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others (5676/2024) [2025] ZAWCHC 349 (13 August 2025)

4. Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others [1999] 2 All SA 381 (A)

5. Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others 2017 (5) SA 227 (GP)

6. South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others (479/2023) [2025] ZASCA 134 (17 September 2025)

7. Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C)

8. National Lotteries Board and others v South African Education and Environment Project 2012 (4) SA 504 (SCA)

9. National Energy Regulator and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC)

10. Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC)

11. Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others 2018 (4) SA 107 (SCA)

12. African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others 2025 (2) SA 31 (SCA)

13. Endangered Wildlife Trust and Another v Director-General (Acting) Department of Water and Sanitation and Another 2025 (3) SA 151 (SCA).

14. WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others

2019 (2) SA 403 (WCC)

15. Noordhoek Environmental Action Group v City of Cape Town and Others (4819/21) [2024] ZAWCHC 105 (23 April 2024)

16. African Climate Alliance v Minister of Mineral Resources and Energy (56907/2021) [2024] ZAGPPHC 1271 (4 December 2024)

17. Camps Bay Ratepayers and Residents Association and Another v Harrison and Another 2011 (4) SA 42 (CC)

18. Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245 (CC)

19. Obligations of States in respect of Climate Change ICJ Advisory Opinion (23 July 2025)