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

CASE NO: **23619/24**

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

THIRD RESPONDENT'S HEADS OF ARGUMENT

CONTENTS

Abbreviation	Definition
Appeal Decision	Decision of the Minister of DFFE to dismiss the appeal by the first applicant and the joint appeal by the second and third applicants
Appeal Regulations, 2014	GNR.993 of 8 December 2014: National Appeal Regulations (Government Gazette No. 38303) (repealed by GNR.5985 published in Government Gazette 52269 of 13 March 2025).
ARR	Consolidated Appeal Response Report
BOCP	Blow-out Contingency Plan
DFFE	Department of Forestry, Fisheries and the Environment
DG	Director-General of what is now known as the Department of Mineral and Petroleum Resources (first respondent)
DG's Decision	Decision of the DG of the DMPR dated 23 October 2023 to grant an EA to TEEPSA to conduct exploration well drilling within the Deep Water Orange Basin
DMPR	Department of Mineral and Petroleum Resources
DWOB	Deep Western Orange Basin (the EA refers to the block as Deep Water Orange Basin)
EA	Environmental Authorisation granted in terms of the National Environmental Management Act, 1998
ER	Exploration right that was granted in 2019 under departmental reference 12/3/343 ER
EAP	Environmental Assessment Practitioner
EIA Regulations	Environmental Impact Assessment Regulations, 2014
ER343	Exploration Right held by the third respondent under department reference 12/3/343 ER
ESMP	Environmental and Social Management Programme
Final ESIA	The Final Environmental and Social Impact Assessment Report
FPR	Financial Provisioning Regulations, 2015
GHG	Greenhouse Gas
GWP	Global Warming Potential
ICMA	National Environmental Management: Integrated Coastal Management Act, 2008
IDA	Infrastructure Development Act, 2014
IEP	Integrated Energy Plan
IRP	Integrated Resource Plan

Abbreviation	Definition
Minister	Minister of Forestry, Fisheries and the Environment (second respondent)
MPRDA	Mineral and Petroleum Resources Development Act, 2002
NEA	National Energy Act, 2008
NEMA	National Environmental Management Act, 1998
NDP	National Development Plan 2030
OGNP	Oil & Gas National Programme
OSCP	Oil Spill Contingency Plan
PASA	Petroleum Agency of South Africa
Project	The exploratory drilling off the west coast of South Africa within the northern portion of offshore block DWOB
Record	Record in terms of Rule 53 of the Uniform Rules of Court
SIP	Strategic Integrated Project
SLR	SLR Consulting (South Africa) (Pty) Ltd
TEEPSA	TotalEnergies EP South Africa S.A.S. On 3 May 2022, Total E&P South Africa B.V. changed its name to TotalEnergies EP South Africa B.V.. On 10 July 2024, TotalEnergies EP South Africa B.V. changed its registered address from the Netherlands to France, which resulted in the change in legal designation from TotalEnergies EP South Africa B.V. to TotalEnergies EP South Africa S.A.S.

OVERVIEW

1. This review application concerns a challenge to the granting of an environmental authorisation (**EA**) in terms of the National Environmental Management Act, 1998 (**NEMA**) to the third respondent, TotalEnergies EP South Africa S.A.S., previously known as TotalEnergies EP South Africa B.V. (**TEEPSA**).

2. TEEPSA is the co-holder of an exploration right that was granted in 2019 in terms of section 80 of the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**), under departmental reference 12/3/343 ER (**the ER**), together with its joint venture partners.[1] The exploration right entitles the holders, subject to compliance with all other relevant laws, to conduct *exploration*[2] for *petroleum*[3] in the block known as the Deep Western Orange Basin (**DWOB**). At the same time, the MPRDA obliges the holders to continuously and actively conduct exploration operations (s 82(2)(b)).

3. DWOB is an offshore block, the eastern boundary of which is located far off the west coast of South Africa. The area of interest for exploration drilling is 9711.21 km^2 in extent, and is located offshore roughly between Port Nolloth and

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[1] TEEPSA Answering Affidavit (**TAA**) p 1641 par 8.

[2] In the MPRDA, exploration operation means '*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 a drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery*'.

[3] In the MPRDA, petroleum is defined as '*any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit*'.

Hondeklip Bay, approximately 188 km from the coast at its closest point and 340 km at its furthest, in water depths varying between 750 m and 3100 m. [4]

4. The purpose of the proposed exploration operations is to determine whether geological structures in this block contain oil or gas and, if so, the quantity of potentially extractable oil or gas. It essentially comprises two phases: pre-drilling surveys and site selection, followed by well drilling. TEEPSA proposes *inter alia* to drill one exploration well and, success dependent, up to nine additional wells within an area of interest within the block. The well drilling phase should only take 3 to 4 months in total, from start to finish. If a discovery is made and declared through the exploration process, the question of whether production will be commercially viable would only be determined after various further studies have been completed [5] In the event that it is determined that production would be commercially viable, then application would be made for a production right and an environmental authorisation for production operations.

5. The exploration that TEEPSA will engage in will have no material effect on climate change:

   5.1. The proposed exploration project itself will not result in the production of oil or gas, and will have no direct influence on South Africa's reliance

[4] TAA p 1642 par 10-11.
[5] TAA pp 1642-1643 par 11-13.

on fossil fuels, or on the GHG emissions that would arise from the consumption of fossil fuels.[6]

5.2. The maximum total CO_2-e emissions to be contributed by the exploration project, assuming 10 successful appraisals with tests, would represent a contribution of 0.14% to the National GHG Inventory total (of 2017) of 0.51 Gt. This is not challenged by the applicants.[7]

6. The proposed exploration operations include activities which are listed in Listing Notices 1 and 2 of the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations**), which necessitated an application for an EA in terms of NEMA. The process comprised a scoping phase and an impact assessment phase. It culminated in the submission on 7 July 2023 of the Final Environmental and Social Impact Assessment Report (**the final ESIA**)[8] by an independent environmental assessment practitioner (**EAP**), namely SLR Consulting South Africa (Pty) Ltd (**SLR**), to the Department of Mineral and Petroleum Resources (**DMPR**).

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[6] See the Climate Change & Air Emissions Impact Assessment carried out by Dr Lucian Burger and peer reviewed by Dr G. Petzer (appendix 16 of the final ESIA).
[7] TAA pp 1788-1789 par 330, 332.
[8] Rule 53 Record (**Record**) pp 1 to 656.

7. On 23 October 2023, the first respondent (**the DG**) granted an EA to TEEPSA for the exploration project, and approved TEEPSA's Environmental and Social Management Programme (**the DG's decision**).[9]

8. On 14 November 2023, the applicants appealed to the second respondent (**the Minister**) against the DG's decision.[10]

9. On 24 April 2024, the Minister dismissed the appeals listed in the appeal decision, including those of the applicants, and granted an amended environmental authorisation to TEEPSA (**the appeal decision**).[11]

10. In these proceedings, the applicants ask for the review and setting aside of the DG's decision and the appeal decision, and a substitution of these decisions with a decision refusing the environmental authorisation.

11. The applicants rely on four grounds of review to challenge the granting of the EA:

    11.1. **<u>The first review ground: need and desirability assessment flawed</u>**

    11.1.1. <u>First</u>, the applicants say that the decision makers' evaluation of need and desirability in terms of regulation 18 and

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[9] The decision is attached to the founding affidavit, as part of annexure JWS8 (pp 578-592). Specific conditions are imposed (JWS8 pp 590-591 par 5.5), and the reasons for the decision are given (JWS8 pp 593-597). Interested and affected parties were informed of the decision and the right of appeal on 25 October 2023 (JWS8 pp 575-576).

[10] JWS9 pp 598-601; JWS10 pp 602-665.

[11] JWS11 pp 666-949.

appendix 3 of the EIA Regulations was flawed and irrational, because the decisions were justified with reference to the benefit that will eventuate at the production phase, while the scope of the assessment of the negative impacts of the project was expressly limited to its exploration phase, thereby excluding relevant considerations pertaining to production.[12]

11.1.2. However, the reasons given for granting the EA in fact show that the need and desirability of the project is assessed with reference to the knowledge that would be gained through exploration. Furthermore, the assessment contended for by the applicants is at odds with the regulatory scheme which distinguishes between *exploration* and *production*. In compliance with the statutory framework, the scope of the assessment was correctly limited to the impact of the exploration wells that comprise TEEPSA's proposed exploration work programme. While climate change is a

[12] Applicants' Heads of Argument (**HOA**) par 9.1.

relevant consideration, the nature of the required assessment is phase-appropriate.[13]

11.2. **<u>The second review ground: oil spill risk assessment flawed</u>**

11.2.1. <u>Second</u>, the applicants say that the decision makers' assessment of the oil spill risk was flawed because: (a) the decision makers acted unreasonably in concluding that there was a sufficient basis for determining that a well blow-out and catastrophic oil spill was '*highly unlikely*' since 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 on in connection with oil spill risk are contingency plans that had yet to be prepared.[14]

11.2.2. These contentions do not give rise to a reviewable irregularity: (a) contested evidence is left to the evaluative judgment of the decision makers and is not reviewable, and in any event, the frequency evaluation is based on credible global datasets for exploration wells; and (b) the applicants

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[13] The applicants concede in their heads of argument that exploration 'will not always result in [production]' (citing *Green Connection*). This undermines their premise that production impacts are 'reasonably foreseeable future impacts' for purposes of Appendix 3. They are indeed not reasonably foreseeable when no discovery exists and no credible development concept has been tabled.

[14] Applicants' HOA par 9.2.

misconstrue the purpose of the contingency plans, and disregard the totality of mitigation measures that were taken into account by the decision makers, which include project-specific engineering design controls and barrier philosophies.

11.3. **Third review ground: failure to assess socio-economic impact**

11.3.1. Third, the applicants say that TEEPSA and the decision makers did not assess the socio-economic impact on small-scale fishers and their communities. [15]

11.3.2. This is not correct. The Oil Spill Drift Modelling Technical Report (**OSM report**), Fisheries Impact Assessment, and Socio-Economic Impact Assessment for Exploration Well Drilling Report (**SEI report**) informed the assessment of the socio-economic impacts on small-scale fishers in the final ESIA, and the final ESIA presented a full evaluation of the potential consequences in a range of scenarios, including the socio-economic impact of an oil spill on small-scale fishers.

[15] Applicants' HOA par 9.3.

11.3.3. Small-scale fisheries were identified as a receptor category with sensitivity and potential high consequence in a blowout scenario, and routes to impact (closure zones, tainting, reputational effects, market access) were assessed. At exploration stage, routine operations have negligible fishery disruption beyond short-lived safety zones.

11.3.4. Only the contingency of a (very low-likelihood) blowout produces the severe socio-economic case. For that contingency, the final ESIA and SEI report reasonably addressed: (i) potential scale and duration based on modelled shoreline contact probabilities; (ii) response strategies to minimise contact; and (iii) compensation pathways (insurer/SAMSA/DFFE). Village-level econometric loss curves and demographic replacement analyses for a contingency whose spatial/temporal footprint depends on still-unknown well location, season, currents, and oil properties would not be possible or reasonable.

11.3.5. The criteria in the EIA Regulations cannot be construed as requiring a level of certainty, prescription or exactness in cases where that is not possible or reasonable.

11.4. **<u>Fourth review ground: Failure to consider ICMA factors</u>**

11.4.1. <u>Fourth</u>, the applicants say that the decision makers did not consider the factors enumerated in section 63 of the National Environmental Management: Integrated Coastal Management Act, 2008 (**ICMA**).[16]

11.4.2. However, these factors were addressed in the final ESIA and were in substance considered by the decision makers, since the specific and general environmental statutes overlap substantially. At the least, these considerations were taken into account by the Minister, and any irregularity in the DG's decision in relation to ICMA has been overtaken by or cured in the appeal proceedings. It is immaterial that the sections are not mentioned by name by the decision makers.

12. Despite the wide-ranging nature and technical complexity of some of the issues raised, the core issue is whether the legislative framework requires an assessment of the nature and extent contended for by the applicants.

13. The applicants do not get out of the starting blocks. Most notably:

13.1. The applicants conflate the considerations that are only relevant to production operations with the considerations relevant to exploration

[16] Applicants' HOA par 9.4.

operations, under the guise of the need and desirability assessment. However, the project concerned is an exploration project, both legally and factually. It is not a production project, and it does not include a production phase. Nor is it certain that a production phase would ensue. It follows that the legally relevant assessment is confined to the impact of the proposed exploration activities, which are generally of a limited short-term nature. The distinction between exploration and production (as well as prospecting and mining) is a legislative choice in both the MPRDA and NEMA. Exploration and production operations have different purposes. The former is primarily driven by the pursuit of knowledge, which is not only in the interest of the holder of the right but also in the public interest.

13.2. The applicants seek to rely on expert evidence that is in large part speculative and/or of limited relevance. Relatedly, some of the facts upon which the applicants rely in support of their review grounds in the present application were not raised in the applicants' appeals and have no place in this review.

13.3. The information the applicants say should have been placed before the decision makers was either in fact placed before the decision makers and taken into account, or, on a proper scientific approach, is simply not capable of reliable ascertainment at the stage when authorisation is sought for exploration operations.

14. It is common cause that the applicants would prefer that no new oil and gas exploration be authorised.[17] In effect, they wish to ensure that the various stakeholders – including the public, the government and those whose skill lies in discovering new sources of energy – remain ignorant of whether South Africa is possessed of hitherto unknown sources of energy. That is the essence of their objective. But there is no warrant for this court to assist the applicants in achieving that objective, given its sterilising effect.[18] Ignorance about South Africa's energy options cannot be in the interests of the country or its people.

15. The remainder of these heads of argument addresses:

15.1. First, the applicants' failure to make out a case for review.

15.2. Second, the proper approach to the evidence in this matter.

15.3. Third, the legislative framework, in relevant part.

15.4. Fourth, the applicants' grounds of review, in turn.

15.5. Fifth, the substitution remedy sought.

THE APPLICANTS' FAILURE TO MAKE OUT A CASE FOR REVIEW

16. The founding premise of the applicants' argument in support of the first ground of review is the climate change crisis. However, the truisms about climate change

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[17] Applicants' HOA par 265.

[18] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) at para 26.

are of no assistance. This Court is not called upon to adjudicate on the threat posed by climate change or to consider the constitutional validity of the applicable legislation. It is the function of this Court to determine whether the granting of the EA was lawful, reasonable, and procedurally fair in terms of the existing, applicable legislation at the time the decisions were made.

The ICJ opinion

17. The applicants' reliance on the Advisory Opinion of the International Court of Justice (**ICJ**) is also misplaced in these proceedings.[19] As can be seen from the headings in part IV of the opinion, it concerns the **international law obligations** of **states** in respect of climate change. That is, the obligations of **states versus other states**. The ICJ discusses states' duties towards other states under various international law instruments, the climate change treaty framework, customary international law, environmental treaties, the law of the sea and international human rights law.

18. It is correct that conduct of any organ of a state is regarded as conduct of that state in international law. But that does not change the fact that international law is concerned with the duty of one state (inclusive of all organs of state through which it acts) towards other another state or states. It thus regulates the relationship state: state; not the relationship citizen: state. As a matter of law, it is accordingly not open to the applicants to rely on the South African state's

[19] Applicants' HOA par 1, 20 and 236

international law obligations (whatever they are, and for which no cognizable case is made out in the papers) in these proceedings, whether they are allegedly contained in treaty law[20] or form part of customary international law.[21]

19. It is explained thus by Harms ADP in *Van Zyl and others v Government of the RSA and others* 2008 (3) SA 294 (SCA) [[2008] 1 All SA 102 (SCA)] at para 60 et seq (footnotes omitted):

> *"[64] It is necessary to state a number of trite international law principles in order to understand the debate that follows:*
>
> - *The appellants are not subjects at international law and have, accordingly, no rights at international law. …*
> - *An international delict presupposes the existence of a right because without a right there cannot be a wrong. …*
>
> *[65] Before there can be an international wrong there must be an international right."*

20. In any event, the South African state has, through its legislative arm, complied with its international law obligations by putting in place 'appropriate rules and measures including regulatory mitigation measures' which are designed to arrest climate change in the form of section 24 of the Constitution and the relevant

[20] International obligations and agreements of the state are not even part of our municipal law, until and unless they have been incorporated into the municipal law by legislative enactment. See *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* 2021 (11) BCLR 1263 (CC) at paras 108-109, and 116-118. In this regard, Chapter 6 of NEMA makes specific provision for the procedure to incorporate international obligations and agreements.

[21] As stated by Harms ADP in the Van Zyl case *supra* at para 60 "[a]lthough customary international law is part of our law, it is conceptually difficult to understand how an international law rule dealing with one relationship (state:state) can be transformed into a local rule regulating another relationship (citizen:state)."

provisions of NEMA, the MPRDA and the regulations promulgated pursuant thereto. We further submit that the officials charged with the administration of these statutes are bound by these laws, as are its citizens, and cannot ignore the municipal law that governs EA applications. We submit that they have duly complied with their duties.

21. What we are concerned with in the present case, is an existing (unchallenged) statutory scheme in terms of which exploration and production are distinct activities and where, on the facts, it is common cause that the proposed exploration operation will not, in and of itself, have any discernible impact on climate change.

22. In terms of the existing legislation, as discussed below, the impacts of exploration need to be considered at exploration stage. The impacts of production will fall to be considered if and when application is made for environmental authorisation for production operations which may or may not happen in future.

23. The applicants argue that production impacts must be considered at exploration stage but this argument cannot succeed in terms of the existing wording of NEMA and its regulations and in the absence of a proper constitutional challenge of the current statutory scheme. Indeed, there is no allegation in the papers that any of the existing statutes or applicable regulations fall short of or offend the Constitution or international law norms that form part of South African law.

24. The applicant's reference in the heads of argument to the opinion expressed by the ICJ is thus misplaced and irrelevant. As in the *Van Zyl* case supra, *"[a] major*

problem with the appellants' case … is the way they seamlessly move between national and international law".

The legal principles that apply

25. Furthermore, this matter calls for deference because the subject-matter is largely technical and the decisions in issue are policy-laden.[22]

25.1. The decision makers had the benefit of three technical studies (drilling discharges modelling, oil spill modelling,[23] and underwater noise modelling), and five specialist studies (marine ecology impact assessment,[24] fisheries impact assessment,[25] socio-economic impact assessment,[26] cultural heritage impact assessment, and climate change and air emissions impact assessment[27]), commissioned during the impact assessment phase to assess the key potential impacts of the exploration operations and identify mitigation measures. In addition, an

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[22] See *International Trade Administration Alliance Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 48; and *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA) at para 53.

[23] The Oil Spill Drift Modelling Technical Report, dated 11 May 2023 and authored by Mr Benjamin Livas, is attached as annexure JWS5 to the founding affidavit at pp 247 to 378.

[24] The Marine Ecology Impact Assessment, dated June 2023 and authored by Dr Andrea Pulfrich, is in the Record at pp 2158 to 2487.

[25] The Fisheries Impact Assessment, dated April 2023 and authored by Ms Sarah Wilkinson, is in the Record at pp 2488 to 2691.

[26] The Socio-Economic Impact Assessment, dated April 2023 and authored by Mr Greg Huggins and Prof Anthony Leiman, is attached as annexure JWS6 to the founding affidavit at pp 379 to 497.

[27] The Climate Change and Air Emissions Impact Assessment, dated April 2023, authored by Dr Lucian Burger and reviewed by Ms Gillian Petzer, is attached as annexure JWS7 to the founding affidavit at pp 498 to 574.

independent peer review of the drilling discharges and oil spill modelling studies was also undertaken.[28]

25.2. The Minister has explained that the decision makers are best equipped to have made the decisions that are the subject of this review, given the variety of their departments' composition, experience, and access to relevant information and expertise.[29]

26. The following further principles are well-established and are dispositive of the grounds of review:

26.1. The applicants' challenge is based on a perception that the decision makers attached insufficient weight to a particular impact of the proposed project, namely climate change considerations. However, that does <u>not</u> found a reviewable irregularity:

'*The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (reasonably and rationally) a court of law cannot interfere*.'[30]

26.2. The regulatory scheme requires that climate change considerations be confined to the impacts of the <u>exploration</u> activities, and not in relation

[28] The Independent Peer Review of Drilling Discharges and Oil Spill Modelling dated 12 May 2023 and prepared by Mr Stephen Luger is at Record pp 2028-2046.
[29] Minister's Answering Affidavit (**MAA**) p 2030 par 2.6.
[30] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 22.

to production activities that may or may not eventuate and that would be subject to a separate impact assessment.

26.3. The applicants also contend that the decision makers acted unreasonably in accepting that an oil spill risk is highly unlikely. A review court may only interfere where a functionary exercises a competence to decide facts but fails to get the facts right in rendering a decision, where the facts (a) are material, (b) were established, and (c) meet a threshold of objective verifiability.[31] But the exercise of a judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.

26.4. It follows that for the applicants to succeed in a review based on a mistake of fact, as they seek to do with the second review ground, they must demonstrate that the Minister disregarded uncontentious and objectively verifiable facts which were material, and which would have resulted in a different decision had they been taken into account. They have failed to do so.

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[31] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* 2020 (4) SA 453 (SCA) at para 23, with reference to *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12.

26.5. The applicants' overarching challenge is to the rationality of the decisions. But the threshold for a rationality review is high. In the matter of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*, the Constitutional Court explained the rationality test as follows:

> '*Before considering the factual basis for the applicant's contentions, it is necessary to sound a note of caution. Our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of administrative decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts. And this is particularly so for rationality review under PAJA. Hoexter notes that "[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection - not a perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision … substantively incorrect*.'"'.[32]

26.6. On the facts in evidence, the decisions to grant the EA were rationally connected to the information placed before the decision makers. NEMA does not require complete and absolute knowledge of all potential consequences of a project before environmental authorisation may be granted. Instead, section 24(4)(b)(iv) of NEMA[33] anticipates limitations and so requires '*reporting on gaps in knowledge, the adequacy of*

[32] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC) at para 78.
[33] Which provides for what procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must include, with respect to every application for an environmental authorisation and where applicable.

predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information'.

27. We accordingly submit that the applicants have failed to make out a case for review.

The *Green Connection* judgment

28. The applicants' reliance on the judgment in *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***) is misplaced. [34] As the applicants well know:

28.1. On 12 November 2025, Justice Mangcu-Lockwood granted leave to appeal to the Supreme Court of Appeal, in relation to two of the grounds of review being: (a) that the environmental impact assessment report failed to assess, and the state respondents failed properly to consider, the need and desirability of the proposed project because no consideration was given to the climate change impacts which will be caused by burning any gas discovered by the proposed project; and (b) that neither the environmental impact assessment report nor the environmental management programme report included the oil spill contingency plan or blow out contingency plan.

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[34] Applicants' HOA par 169-172.

28.2. In an application brought in terms of sections 16(1)(a)(i) and 17(2)(b) of the Superior Courts Act, 2013, Shell has applied for leave to appeal to the Supreme Court of Appeal in relation to the remaining review grounds that were upheld in *Green Connection*.

29. In order for a decision of a court of law to constitute a binding precedent to be followed by other courts, it must be enforceable. But because of the operation of section 18(1) of the Superior Courts Act, the execution and operation of the *Green Connection* decision is suspended. While this court is entitled to have regard to the reasoning adopted in *Green Connection*, that decision is not binding upon it. Were it otherwise, the anomalous position would arise that while the successful applicants in Green Connection cannot enforce the judgment, they may insist that another court in a different application give effect to the judgment.

30. We submit, with respect, that in any event the judgment in *Green Connection* is wrong, for the reasons traversed below.

31. At the level of legal principle, the Court interpreted NEMA as requiring:

31.1. First, the assessment of the climate change impacts which will be caused by (eventually) burning fossil fuels discovered through the proposed exploration activities.[35]

However, an exploration project, both legally and factually, does not include a production phase, nor is it certain that a production phase would ensue. It follows that the legally relevant assessment is in respect of the impact of the proposed exploration activities, which are generally of a limited short-term nature[36] and have no impact on climate change.

31.2. Second, the assessment of the environmental transboundary impacts that may be caused by a proposed project.[37]

However, (a) the reading in of international law obligations to this effect is precluded by the doctrine of separation of powers; (b) the legal instruments relied upon by the Court to require environmental impact assessments to assess transboundary impacts, are not part of municipal law and are therefore not enforceable at the instance of private individuals in South African courts; (c) there is no lacuna in NEMA and the EIA Regulations because Chapter 6 of NEMA makes

[35] *Green Connection* para 146-155.

[36] The *Green Connection* judgment refers to the mobilisation, operational, and demobilisation phases of the proposed 3 to 4-month drilling project at paragraph 96.

[37] *Green Connection* para 160, 186-189.

specific provision for the incorporation of international obligations and agreements; and (d) there is no obligation in municipal law which requires the subjects of the South African state to assess such impacts.

32. At the level of fact, the Court concluded that:

32.1. First, insofar as the environmental impact assessment report failed to quantify the economic impacts of an unplanned blow out and oil spill, it fell foul of the assessment requirements of NEMA and the EIA Regulations.[38]

However, NEMA does not require the impracticable. On the evidence before the Court, the quantification of the economic impact of unplanned events was limited by uncertainties in the information available at this stage, including the oil type (hydrocarbon profile); characteristics of the reservoir; type of well blow-out; well architecture; spill duration; seasonality; and the well location.[39] Where there are such limits, measures must be taken to safeguard against potential consequences.[40] The undisputed evidence is that the environmental impact assessment report selected the '*worst case scenario*' in respect of each factor for its modelling, and provided the mitigation measures

[38] *Green Connection* para 108.
[39] *Green Connection* para 89, 93 and 101.
[40] Section 2(4)(a)(vii) of NEMA.

in relation to each of those.[41] This is consistent with the cautious approach espoused in NEMA and the EIA Regulations.

32.2. Second, the DG and the Minister failed to consider ICMA factors, and the Minister failed to provide adequate reasons.[42]

However, the ICMA considerations were in substance considered in the Final EIR, and therefore by the DG, and also by the Minister, and it is immaterial that the sections are not mentioned by name by the decision makers. The is true for every piece of legislation that was considered by the DG and Minister and where specific sections were not explicitly referenced.

32.3. Third, the environmental impact assessment report and environmental management programme fell foul of NEMA and the EIA Regulations, for failing to include a description of the proposed impact management actions in the blow-out contingency plan and oil spill contingency plan.[43]

However, this conclusion is irreconcilable with the Court's findings that it is impossible to prepare the blow-out and oil spill contingency plans without the information which would only become available after

[41] *Green Connection* para 99.
[42] *Green Connection* para 123, 127 and 129.
[43] *Green Connection* para 203.

obtaining the environmental authorisation.[44] NEMA does not require the impracticable - it requires reasonable precautions.

32.4. Fourth, the failure to consider the climate change effects of production in the environmental impact assessment report vitiated the need and desirability assessment.[45]

Were it so that NEMA requires such an assessment, it would only be required to the extent possible. The Court's approach disregarded the evidence on the limitations associated with such an assessment, and why it is not reasonable to require an assessment of the environmental impacts of an as yet uncertain and undefined project.[46]

33. Finally, we submit that the findings in the judgment in *Green Connection* only bear on the first review ground. This Court must determine the remainder of the review grounds based on the specific facts and circumstances giving rise to the DG's decision and the appeal decision in the present matter.

34. This is because the findings of law in the *Green Connection* judgment are confined to two issues:

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[44] *Green Connection* para 195-198.

[45] *Green Connection* para 155-157.

[46] Furthermore, there is a confusion between production and post-production (down-stream) activities.

34.1. The assessment of the climate change impacts which will be caused by (eventually) burning fossil fuels discovered through the proposed exploration activities.[47]

34.2. The assessment of the environmental transboundary impacts that may be caused by a proposed project[48] (but this latter finding is not implicated by any of the review grounds raised in the applicants' affidavits in this matter).

35. Importantly, the Court in *Green Connection* granted leave to appeal in relation to these very findings of law, on the basis that there is reasonable prospect that an appeal court may disagree with the findings regarding the interrelatedness between exploration and production activities and what is required in an assessment at exploration stage, and because important questions of law relating to the applicability of international law instruments that are not expressly part of domestic law are at issue.

36. In the present matter, this Court's findings of fact in relation to the second to fourth review grounds are also critical to the question of a just equitable remedy. This is readily demonstrated with reference to the remedy crafted in *Green Connection*, where the Court remitted the decision on whether to grant TEEPSA an EA to the DG for reconsideration, which process must provide for the following:

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[47] *Green Connection* para 146-155.
[48] *Green Connection* para 160, 186-189.

36.1. TEEPSA must be afforded an opportunity to submit new or amended assessments, as the case may be, to cure the deficiencies identified in the first to fifth grounds of review of the Court's judgment; and

36.2. public participation must be conducted in regard to the new and/or amended assessments submitted by TEEPSA, before a decision is made by the DG.

37. We accordingly submit that in the present matter, this Court's determination of the merits of the review grounds is not fettered by the judgment in *Green Connection*.

THE PROPER APPROACH TO THE EVIDENCE

38. As to the proper approach to the evidence, it need hardly be stated that given that these are motion proceedings, where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicants' affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order. This is so, unless any of the respondent's versions consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.[49]

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[49] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at 634-635; see also *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 55-56; *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12; *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC) para 115.

39. It is of significance that the applicants do not dispute:

39.1. That, at the exploration stage, it would not be possible to evaluate the ecological impact of production to the level required by the EIA regulations.[50]

39.2. That the use of natural gas would have a considerable GHG emission advantage over coal when considering the future electricity demand.[51]

39.3. The credibility of the Lloyds registry data, nor that it was a suitable factor to consider in understanding the risk of a well blowout.[52]

39.4. The contents of the BOCP and OSCP, and that it is impossible to prepare these documents at this juncture.[53]

39.5. That the 20-day capping period relied upon in the OSM report was conservative and considered on a worst-case scenario.[54]

40. The applicants also state that they do not rely on the evidence of Prof Bracco and Dr Harris in relation to the issue of the oil spill risk, at issue in the second ground of review.[55]

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[50] Replying Affidavit (**RA**) p 2290 par 116-117.
[51] TAA p 1685 par 91.2, read with RA p 2286 par 98-99.
[52] RA p 2295 par 136.
[53] RA pp 2296-2297 par 145-146
[54] RA p 2298 par 151.
[55] RA p 2291 par 121-122. They state that such evidence goes to the magnitude of the potential ecological impact in the event of an oil spill.

41. Furthermore, the applicants accept that the exercise of estimating the base capital investment required to roll out the project, undertaken by Mr Trollip, is speculative.[56] The remainder of Mr Trollip's evidence is seriously and unambiguously disputed by both Mr Alleau, who is trained in *inter alia* liquified natural gas technical aspects, gas and power trading and marketing, oil and gas geology basics, upstream operations, finance for economists, and economic modelling, methods, and analysis, and Mr Human, an economist experienced in *inter alia* infrastructure developments in the gas energy, petrochemical, and mining sectors across international markets.

42. We accordingly submit that, to the extent that the Court may find that there are any material disputes of fact, the facts asserted by TEEPSA must be accepted as correct. This is so because: (a) the applicants seek final relief on motion; (b) TEEPSA has seriously and unambiguously engaged with the issues sought to be placed in dispute; and (c) the applicants have not applied for a referral of any disputes of fact to oral evidence.

43. In any event, the applicants did not submit the reports of Prof Bracco, Dr Harris and Mr Trollip to the decision makers, either as part of the ESIA process or the appeal process and accordingly cannot contend that their views fell to be considered. The applicants also did not submit the article of Dr New and Dr

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[56] RA p 2283 par 83.

Meckel to the decision makers and accordingly also cannot contend that their views fell to be considered.[57]

THE LEGISLATIVE FRAMEWORK

44. Before addressing the first of the review grounds, we deal with the necessary distinction between exploration and production activities, together with the purpose of exploration activities, as provided for in the overarching legislative framework.

Exploration and production are different activities for purposes of NEMA

45. As a point of departure, section 3(2)(a) of the MPRDA provides that the State, acting through the Minister, may '*grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right*'. The various permissions, rights and permits contemplated in the MPRDA have distinct purposes and requirements and confer distinct rights on holders.

46. The MPRDA, for example, distinguishes -

    46.1. between a prospecting right and a mining right (in the case of a 'mineral' as defined); and

[57] TAA p 1793 par 347; p 1794 par 352.

46.2. between an exploration right and production right (in the case of 'petroleum' as defined).

47. Prospecting is, by definition, aimed at searching for a mineral and is regulated by sections 16 to 20 of the MPRDA. Its aim is the acquisition of knowledge. Mining on the other hand is concerned with the extraction of a mineral and is regulated by sections 22 to 25 of the MPRDA.

48. Similarly, exploration operations are aimed at locating a discovery and are regulated by sections 79 to 82 of the MPRDA. That would comprise *inter alia* mapping the subsurface and trying to locate and determine the properties of a reservoir, if any. Production operations on the other hand are concerned with the '*exploration, appraisal, development and production of petroleum*' and are regulated by sections 83 to 87 of the MPRDA.

49. Exploration and production are therefore clearly distinct activities for purposes of the MPRDA. As stated, TEEPSA is a co-holder of an exploration right granted in terms of section 80 of the MPRDA to explore for petroleum in the DWOB block. It does not hold a production right nor is it entitled to conduct production operations. While exploration can be undertaken under a production right to gain more data, production cannot be undertaken under an exploration right.

50. The distinction between exploration and production also finds clear expression in NEMA. Section 24F of NEMA prohibits the commencement or continuation of '*<u>an activity</u> listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the*

case may be, has granted *<u>an environmental authorisation for the activity</u>*' (our emphasis).

51. In listing the activities which may be conducted pursuant to rights, permits or permissions granted under the MPRDA, the Minister for the Environment, acting under section 24(2)(a) of NEMA, maintained the definitions and distinctions of the MPRDA. In particular, Appendix 1 to Listing Notice 2 (GN R984) distinguishes between exploration and production activities and lists them as distinct activities as follows:

    51.1. '*[a]ny activity including the operation of that activity which requires an* *<u>exploration right</u>* *in terms of section 79 of the Mineral and Petroleum Resources Development Act* … '(LN2 item 18); and

    51.2. '*[a]ny activity including the operation of that activity which requires a* *<u>production right</u>* *in terms of section 83 of the Mineral and Petroleum Resources Development Act* …' (LN2 item 20).

52. The activity for which TEEPSA sought and obtained environmental authorisation under NEMA is <u>exploration</u>. That is the '*project*'. The intention is to locate a discovery i.e., to acquire data or knowledge. There is no 'project' here which includes 'a production phase' as the applicants would have it.[58]

53. The relevant statutory provisions and regulations mean, plainly, that the impacts of the <u>exploration operation</u> must be set out in the environmental and social

[58] FA p 12 par 26; RA p 2268 par 15.

impact assessment report (**ESIA report**), not the impacts of any potential future production operation. The latter is simply not the 'proposed activity'.

53.1. Item 1(2) of Appendix 3 to the EIA Regulations makes it clear that the environmental impacts, mitigation and closure outcomes as well as the residual risks of <u>the proposed activity</u> must be set out in the ESIA report.

53.2. Item 2(b) of Appendix 3 to the EIA Regulations clearly states that the objective of the environmental impact assessment process is to '*describe the need and desirability of <u>the proposed activity</u>…*'.

53.3. Regulation 18 of the EIA Regulations, which requires the competent authority to have regard to need and desirability, similarly refers to '*the need and desirability of the undertaking of <u>the proposed activity</u>*'.

54. Reference in these provisions to an *activity* is significant. The regulatory scheme is designed to provide for distinct assessments in order to respond to future uncertainties. Put simply, the future is uncertain and a production phase is by no means an inevitability (in public documents, exploration success rates have been described as below 15%).[59]

55. The statutory split between exploration and production is not a mere formality, it is legally meaningful. The MPRDA and NEMA (read with the Listing Notices) intentionally regulate exploration and production as separate listed activities, each requiring its own environmental authorisation with activity-appropriate

[59] Founding Affidavit (**FA**) p 37 par 121

information. The applicants accept that the statutory distinction exists but collapse it in substance by insisting that an exploration EA must evaluate production-stage climate and system-wide consequences. That approach contradicts the scheme of Chapter 6 of the MPRDA and Chapter 5 of NEMA.

56. The fact that a successful exploration operation may eventually lead to the production of oil or gas or that the purpose of exploration is to find commercially exploitable reserves of oil or gas cannot logically sustain an argument that the two activities, which the legislature has taken care to separate into distinct administrative processes, should not be collapsed into one. To do so would be to do violence to the language of the MPRDA and NEMA, and undermine the legislature's chosen framework.

Exploration is in the public interest

57. On a purposive approach, the distinction drawn in the legislative framework between the assessments required for exploration activities and for production activities is sound. This is because the considerations driving the need and desirability of exploration operations are different from those pertaining to a production operation. The broad purpose of exploration is the need to acquire and process data.

58. These observations assume greater force when one turns to the legislation governing the energy sector. The holder of an exploration right must submit the prescribed data, samples and reports relating to its exploration operations to the state which also becomes an owner thereof (excluding proprietary technology or information or data that is licenced or received under obligations of

confidentiality) and may freely dispose of such data.

59. In the case of petroleum resources, the MPRDA provides in s 88(1) that the holder of an exploration right must submit such information, data, reports and interpretations to the designated agency (PASA) as may be prescribed. Section 88(1A) provides that PASA must submit progress reports and the said data within 30 days from date of submission thereof to the Council for Geoscience. (See also section 21 read with section 69(2) of the MPRDA.)

60. Section 71 of the MPRDA provides that PASA must '*(e) receive, maintain, store, interpret, evaluate, add value to, disseminate or deal in all geological or geophysical information relating to petroleum submitted in terms of section 88*' and '*(f) bring to the notice of the Minister any information in relation to the exploration and production of petroleum which is likely to be of use or benefit to the state*'.

61. The need for knowledge or data is of fundamental importance in the context of the energy sector.

62. In fact, the Block DWOB exploration drilling project has been classified as a Strategic Integrated Project (**SIP**) in terms of the Oil & Gas National Programme (**OGNP**). The OGNP forms part of the Energy SIPs that were gazetted on 6 December 2022 (GG 437658) pursuant to the Infrastructure Development Act, 2014 (**IDA**). These projects are required to be expedited (s 17(2) of the IDA read

with Schedule 2).[60]

63. The applicants accept that the overarching legislation for energy governance in South Africa is the National Energy Act, 2008 (**NEA**).[61] The Integrated Energy Plan (**IEP**), which the Minister must develop in terms of section 6 of the NEA, guides determinations made by the Minister and directs how new generating capacity must be added to the electricity system.

64. The IEP must be based *inter alia* on the results of an energy analysis as envisaged in sections 3(4)(a) and 3(5) of this Act. Such an analysis cannot be conducted in the absence of relevant data and information – and this is expressly dealt with in the NEA:

    64.1. One of the main objects of the NEA is to ensure collection of data and information relating to energy supply, transportation and demand (section 2(f)).

    64.2. Section 3, under the heading '*Provision of data and access to date 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; …*'.

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[60] TAA p 1659 par 53.
[61] FA pp 21-2 par 55-61.

64.3. Section 3(4) further provides that '*the Minister must establish mechanisms to - (a) collect, collate and analyse energy data and information..*'.

64.4. 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*'.

65. It is thus clear that the collection of data and proper analysis thereof is fundamental to and informs the development and annual review of the IEP. It is not the other way around as the applicants would apparently have it.

66. The Integrated Resource Plan (**IRP**) is a national electricity sector planning document. The DMPR describes the IRP as a living plan that is continuously revised and updated as necessitated by changing circumstances. It has in fact been updated a number of times since its first publication in March 2011.

67. When considered against the legislative framework, the proposition that the state does not <u>need</u> to know whether there are commercially exploitable reserves of oil and gas in the DWOB and that it is not <u>desirable</u> that it acquires such knowledge simply has to be stated to be rejected. Ignorance is not a sensible or desirable condition. There can be no rational energy plan without appropriate knowledge. It follows that, provided that reasonable precautions are taken to avoid or minimise the adverse effects of exploration operations, exploration

would axiomatically be desirable.

68. The assessment of need and desirability can legitimately focus on: (a) whether acquiring subsurface information is in the public interest and aligned with policy frameworks; and (b) whether the inherent impacts of exploration impacts are acceptable with mitigation. Neither NEMA nor the EIA Regulations require a hypothetical production scenario EIA before there is a discovery, resource appraisal, a concept select, a development plan, or even a project definition capable of meaningful impact assessment. Requiring that would invert the EIA system and produce conjectural, low-utility assessments.

THE FIRST REVIEW GROUND: ASSESSMENT OF NEED AND DESIRABILITY

69. The applicants identify the following alleged shortcomings in the final ESIA as the first ground of review:

69.1. The decision makers assessed the desirability of the application by comparing '*the notional benefits of production with the calculated environmental risks and impacts of exploration*' which wholly subverted the purpose of regulation 18 of the EIA regulations and produced an irrational conclusion. [62]

69.2. Desirability was regarded in '*both the FEIR and the decisions, in particular the appeal decision*' to relate primarily to the prospect that gas will be found and produced, and so '*the environmental impact*

[62] FA pp 43-44 par 140-141

assessment should have been approached on the basis that the purpose of the exploration activities was production of gas'.[63]

69.3. In the context of applications for exploration activities, the EAP and decision maker must treat production as the ultimate purpose and consider whether the production of oil and gas is necessary and desirable.[64]

The applicants have not established a reviewable irregularity

70. This ground of review is premised on a central misconception:

70.1. First, as a matter of law, TEEPSA was not required to assess the climate change impacts of production in an application for an EA in respect of exploration operations. Section 24(1) of NEMA only requires applicants for an EA to identify and assess the impacts of the activity applied for. NEMA similarly only authorises the decision maker to consider considerations relevant to the activity applied for. It would be unlawful for the decision maker to take irrelevant considerations into account.

70.2. Second, it is not disputed that TEEPSA evaluated the climate change impacts of exploration. The assessment contended for by the

[63] FA pp 52-53 par 164165.
[64] RA p 2272 par 36.

applicants[65] would not be meaningful given the range of variables and uncertainties that are associated with production activities that very possibly might never eventuate (including for instance, the type of hydrocarbons and the size of the discovery, the quality of the reservoirs if any, the spatial extension of the area to be developed and the way in which it could be developed to economically produce whatever hydrocarbon may be discovered in a success case).

70.3. Third, the need and desirability criterion in an exploration project is essentially the need for, and desirability of, knowledge gained through exploration. The desirability of knowledge is a policy issue, and the State has determined that petroleum resources must be explored.

The evaluation in the final ESIA

[65] Three 'scopes' are generally used for GHG emissions accounting and reporting to characterise direct and indirect emission sources:
• Scope 1: Direct GHG emissions: Occur from sources that are owned or controlled by the organisation. This includes for example, GHG emissions from the combustion of liquid fuels in drill unit, support vessels, and helicopters.
• Scope 2: Indirect GHG emissions from purchased energy: Occur from the generation of purchased electricity or steam that is brought onto the organisation's property.
• Scope 3: Other indirect GHG emissions: Occur from sources that are not owned or controlled by the organisation. This includes for example, purchased goods and services, upstream transportation and distribution, and the use of sold products (oil/gas etc).

The Climate Change Act was signed into law after the decision-makers made granted the EA. The draft regulations are in the process of being finalised. They reference only scope 1 (direct) emissions as being reportable by 'data providers'. What is being proposed by the applicants is a climate change impact assessment including assessment of production and/or combustion of the end product (either oil or gas) i.e., scope 2 and potentially scope 3 quantification which extends beyond what is envisaged in the regulations or required by South Africa's reporting obligations.

71. The final ESIA contains a broad and detailed discussion of need and desirability.

72. Chapter 5 of the final ESIA contains a detailed discussion of the 'need and desirability' of the proposed exploration project, spanning some 28 pages.[66] It considers the strategic context of the project proposal within broader societal needs and the public interest with reference to the following:

72.1. Background information on the use of hydrocarbons and the state of the petroleum industry in South Africa;

72.2. Consistency of an exploration project with nineteen local, national or international policies and plans;

72.3. Consistency with the NEMA principles;

72.4. Support for oil and gas in provincial and local policy and planning frameworks;

72.5. Securing ecological sustainable development and use of natural resources;

72.6. Promoting justifiable economic and social development;

72.7. Implications of the no-go alternative.

73. The emphasis in the whole of chapter 5 of the final ESIA is on the need for and desirability of exploring the country's natural gas and oil resources. For example,

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[66] JWS4 pp 166-193.

the following statements are made in chapter 5.2 of the final ESIA (considering need and desirability in the context of nineteen local, national or international policies and plans):

73.1. Para 5.2.1: '*Before the development of the country's oil and gas resources can take place, there is a need <u>to undertake exploration activities to determine their extent and the feasibility of utilizing these resources for production</u>*'.[67]

73.2. Para 5.2.3: '*the NDP indicates that "the country will explore the use of natural gas as a less carbon intensive transitional fuel" and that there [is] a requirement for "increasing exploration to find domestic gas feedstock to diversify the energy mix and reduce carbon emissions". Thus, the ongoing <u>exploration</u> of local natural gas reserves is a key action required to ensure that natural gas is a <u>viable</u> transitional fuel for use in the national electricity generation mix*'. [68]

73.3. Para 5.2.5 : '*Operation Phakisa aims to unlock the economic potential of South Africa's oceans. In this regard four priority sectors have been selected as new growth areas in the ocean economy, including: … (b) offshore oil and gas <u>exploration</u>*'.

…

[67] JWS4 p 174.
[68] JWS4 p 175.

In terms of offshore oil and gas exploration, the goal is to further enhance the enabling environment for exploration of oil and gas, resulting in an increased number of exploration wells drilled, while simultaneously maximizing the value captured for South Africa. In this regard, a key target identified by operation Phakisa is the drilling of 30 exploration wells in 10 years.

As the proposal by TEEPSA entails the drilling of up to 10 wells, it provides an opportunity to further establish the extent and economic viability of the indigenous gas reserves and or oil in the DWOB License Block and contribute to the above mentioned target of the drilling of exploration wells.'. [69]

73.4. Para 5.2.9: '*The IRP 2019 notes that "exploration to assess the magnitude of local recoverable shale and coastal gas are being pursued and must be accelerated" … In this regard, the proposed project could support this requirement through the ongoing exploration to determine the nature and extent of potentially viable offshore resources, which could include gas finds*'.[70]

73.5. Para 5.2.10: '*the proposed project could support meeting this priority intervention in energy security, through the ongoing exploration to*

[69] JWS4 p 176.
[70] JWS4 p 178.

determine the nature and extent of potentially viable offshore resources which could include gas finds'.[71]

74. This is also the case in chapter 5.3 of the final ESIA, where the consistency of the proposed project with the NEMA principles is considered:[72]

74.1. '*The proposed project aims to determine the extent and economic viability of the indigenous hydrocarbon reserves in the DWOB License Block. <u>Confirmation of the economic viability of such resources would enable the country to refine its short- to medium-term planning for the development of the petroleum sector within the country</u>. The sector is known to have economic benefits and environmental risks which need to be balanced….*'.

74.2. '*The South African government has indicated that there is a need for the country to reduce its reliance on coal-based electricity and is committed to a just transition to a net-zero and climate resilient society (as per SA-LEDS and draft NDC). Natural gas is included in the energy mix of the country to serve as a transition or bridge on the path to a carbon neutral goal (as per the Paris Agreement) and provide the flexibility required to complement renewable energy sources. <u>By determining the presence (and extent) of such resources, the</u>*

[71] JWS4 p 179.
[72] JWS4 pp186-189 table 5-2.

sustainability of developing the petroleum sector within the country can be better considered.'

75. In this regard, the relevant international reporting methodology for GHG emissions for South Africa does not extend to the reporting of Scope 3 emissions (value-chain emissions).[73]

76. Finally, in the need and desirability summary, it is acknowledged that '*the proposed exploration project itself, would not result in the production of oil and gas, but rather the generation of information on possible indigenous resources. Gaining a better understanding of the extent, nature and economic feasibility of extracting these potential resources, the viability of developing indigenous oil or gas resources would be better understood*.'[74]

The consideration of need and desirability by the decision makers

77. The DG accepted the motivation in the final ESIA as being in line with the requirements of the EIA Regulations and the Guideline on Need and Desirability.[75]

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[73] Nationally Determined Contributions (**NDCs**) are voluntary, high-level climate action plans under the Paris Agreement where countries commit to reducing GHG emissions. South Africa's NDCs are measured against the National GHG Emissions Inventory in terms of the UNFCCC Guidelines and the IPCC Code (Guidelines for National Greenhouse Gas Inventories 2006) and the GHG Protocol (2015) Corporate Accounting and Reporting Standard, pursuant to which only Scope 1 and Scope 2 emissions emitted in South Africa are included in an assessment of South Africa's compliance with its NDCs commitment.

[74] JWS4 p 190 ff para 5.7.

[75] JWS8 p 595 par 3.4.

78. The Minister too considered the Guideline on Need and Desirability. She also considered TEEPSA's comments on the appeal ground challenging the need and desirability assessment, including that:

78.1. The production, processing, transporting and use of oil/gas is not the subject of the proposed project, as it only seeks to investigate whether oil/gas reserves exist, whereupon it will be possible to determine whether production, processing, transporting and use of oil/gas is feasible and viable. Therefore, to understand whether future oil and gas development is in fact possible, exploration is needed to obtain information regarding the nature and extent of the of oil/gas reserves.

78.2. It is desirable to obtain this information because:

78.2.1. It deepens and expands the knowledge base of available resources in South Africa's Exclusive Economic Zone (EEZ). This knowledge would be useful for making strategic decisions regarding South Africa's future energy mix.

78.2.2. Knowledge of oil/gas resources is important to understand South Africa's reliance/ independence on trading parties for a non-coal-based energy resource.

78.2.3. If viable resources are identified, strategic decisions can be made around project development and associated economic development of these resources. All these options are contingent upon information and knowledge that can only be generated through exploration.

78.2.4. It can be obtained (as has been demonstrated in the ESIA Report) with low environmental impacts and low risk of harm.

78.3. Considering the above, the proposed project is needed and desirable to generate knowledge that is needed to make informed strategic decisions regarding where feasible and viable oil and gas in South Africa exists and to give effect to South Africa's key policy objectives. On this basis, it is considered that the proposed project is aligned with national policy objectives.

78.4. From a need and desirability perspective, the impacts of production '*in a general sense*' were considered in Chapter 5 of the final ESIA, and paragraphs 5.1 and 5.2 in particular, which describe the use of hydrocarbons and fossil fuels in South Africa, the South African Energy Sector and energy mix, and the government policies and laws governing the energy sector in South Africa. [76]

79. In her evaluation, the Minister pointed out that that South Africa's transition to a low-carbon, resilient economy and society is a multidimensional process that requires careful phasing of strategic planning.[77]

80. The Minister noted and was satisfied,

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[76] JWS11 pp 862-864 par 2.47.15-2.47.16, par 2.47.19.
[77] JWS11 p 875 par 2.51.

80.1. with the contents of chapter 5 of the ESIA report which covered the context of the oil and gas industry, applicable policies and planning frameworks (local, national and international) and broad societal needs and public interest;

80.2. that the project is in alignment with government policies and plans such as (i.e. not limited to) the IRP2019;

80.3. that the no-go alternative was assessed;

80.4. that TEEPSA had demonstrated the criteria for the need and desirability of the project and, in particular, that the project accords with legislative requirements and government policies and plans including (i.e. not limited to) IRP 2019, the NDP and the draft Marine Spatial Planning Sector Plans.[78]

81. The applicants mischaracterise the Minister's reasoning, reducing it to a '*fundamental premise that gas produced from Block DWOB would be a sensible way of "meeting the country's electricity requirements".*'[79]

82. The Minister in the final instance referred to the IRP and IEP, in particular, which recognise natural gas as a required source to produce electricity and direct thermal energy, and as a way to transition South Africa toward a lower carbon economy. But the fact that the Minister *inter alia* referred to this feature of the IRP

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[78] JWS11 pp 875-876 par 2.49-2.52.
[79] Applicants' HOA par 124-125.

and IEP does not in any way detract from the broad discussion in chapter 5 of the final ESIA which was accepted by the Minister.

83. We accordingly submit that the Minister complied with regulation 18 of the EIA regulations, and her determination of need and desirability calls for an appropriate level of deference.

No obligation to assess climate change impacts of production at exploration stage

84. TEEPSA's aim is to map the subsurface and try to locate and determine the properties of a reservoir, if any. The applicants do not contend that TEEPSA will be conducting production operations, and it is not in dispute that TEEPSA's proposed activities fall within the scope of an exploration operation as defined.

85. The applicants nevertheless contend that a lawful and rational evaluation of need and desirability would have considered the relative costs and benefits of the proposal across the lifetime of '*the project'* (which they define as comprising both exploration and production).[80]

86. The applicants' failure to distinguish between exploration and production activities leads to them further misconceiving the nature (and limitations) of an

[80] FA p 44 par 144, read with FA p 12 par 26.

impact assessment required for exploration operations (as opposed to production operations).

87. The Minister correctly observed that the stance that each phase of the process must be assessed at the outset irrespective of whether the exploration operation finds any oil and gas resources is based on the assumption that every exploration operation will yield positive results, and requires the competent authority to impose a burden on the applicant greater than that imposed by legislation. [81]

88. As the Minister pointed out in the Appeal Decision:

> 'a number of appellants conflate the scope of the EA granted to the applicant (which is for the drilling of exploration wells in the area of interest) with activities of extraction for purposes of production and consumption. I deem it necessary to point out that to undertake exploration, an applicant requires an exploration right under the MPRDA and an environmental authorisation (EA) in terms of listed activity 18 in Listing Notice 2. Production activities require a production right and an environmental authorisation under listed activity 20 in Listing Notice 2. Listing Notice 2 of the 2014 EIA regulations requires a separate authorisation for these two activities which are regarded as distinct from each other.' [82]

89. Consonant with s 24(1) of NEMA, the Minister determined that TEEPSA is only required to assess the potential impact and mitigation measures in respect of the activity for which it has sought an authorisation (i.e., exploration), and need not assess the potential impact and mitigation measures in respect of an activity for which it has not yet sought an authorisation (i.e., production), even though it might one day seek to do so. [83]

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[81] JWS11 p 699 par 2.6.
[82] JWS11 p 700 par 2.10.
[83] JWS11 p 701 par 2.11.

90. A growing body of case law in South Africa has engaged directly and explicitly with climate change issues. But these cases are not authority for the proposition that the climate change impacts of *production* activities must be taken into account in the need and desirability assessment of *exploration* activities for the following reasons:

90.1. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) (***Earthlife***)[84]

90.1.1. The court in *Earthlife* found that the assessment did not deal with <u>the project's</u> full life cycle climate impacts.

90.1.2. *Earthlife* thus clearly confines the assessment of the climate change impacts to the specific project – in that case, the environmental impacts of the decision to build a 1200MW coal-fired power station. In the present matter, the specific project is exploration drilling, not production or post-production combustion.

90.2. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) (***Wild Coast HC***):

90.2.1. *Wild Coast HC* relies on *Earthlife* which, as stated, is not authority for the proposition that climate change impacts of

[84] Para 148.

production and post-production combustion activities must be taken into account in the need and desirability assessment of exploration activities.

90.2.2. Furthermore, *Wild Coast HC* relies on *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) (***Save the Vaal***) for the statement that: '*exploration and production are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food*'.

90.2.3. However, the quoted passage does not appear anywhere in *Save the Vaal*, and *Wild Coast HC* incorrectly cited it.

90.3. *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) (***Wild Coast SCA***)

90.3.1. On appeal, the Supreme Court of Appeal (**SCA**) did not endorse the proposition that climate change impacts of production activities must be taken into account in the need and desirability assessment of exploration activities.

90.3.2. The findings of the SCA in relation to the defects in the process were confined to the inadequacy of the consultation process. The SCA in fact held that there was no warrant for the High Court's far-reaching finding that '*[a]uthorising new* *oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments'*, which finding has a sterilising effect.[85]

90.4. *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)[86] (***South Durban***)

90.4.1. *South Durban* is not authority for the proposition that climate change impacts of production and post-production combustion activities must be taken into account in the need and desirability assessment of exploration activities, for the reasons set out below.

90.4.2. The SCA made its findings in the context of production activities, as opposed to the ascertainment of whether resources exist to produce fuel to generate energy – the matter concerned an environmental authorisation for the construction of a mid-merit combined cycle gas power plant

[85] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) at para 26.

[86] After the filing of the notice of application for leave to appeal.

(CCGPP).

90.4.3. The SCA held that '*Under the EIA Regulations, 'cumulative impact' is defined as including the past, current, and reasonably foreseeable future impacts of an activity, considered together with the impacts of associated and similar activities. This means that, when assessing the impact of a listed activity, the competent authority must also consider how the environmental impacts of the listed activity under consideration, when combined with impacts of other similar activities, could become significant. That must be so, particularly where such other similar or associated activities relate to the same development. Appendix 3 to the EIA Regulations also requires an evaluation of how the impacts of a proposed project, when added to similar existing and foreseeable developments, can lead to significant environmental changes that would not be apparent from the consideration of the project in isolation.*'[87]

90.4.4. It follows from this finding that in the context of exploration activities, '*cumulative impact*' includes the past, current, and reasonably foreseeable future impacts of the exploration

[87] *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)[87] at par 56.

activity, together with the impacts of activities associated with and similar to the exploration activity. This does not include production because: (a) under the MPRDA, while exploration can be undertaken under a production right to gain more data, production cannot be undertaken under an exploration right; (b) production may not eventuate; and (c) production activities would require a new assessment and new environmental authorisation.

90.4.5. The SCA upheld the argument that the Minister had failed to consider the cumulative effect of the extraction and transportation of the gas, and found that it is not correct that the environmental impacts of the pipeline to the power plant only become relevant at a later stage.[88] This finding must follow from the certainty that gas will be delivered to the plant from a gas terminal at the Richards Bay Port via a gas pipeline which is yet to be built,[89] and so its impacts are '*reasonably foreseeable*'.

90.4.6. In the context of exploration operations, the climate change impacts of production and post-production combustion

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[88] *Ibid* par 57.
[89] *Ibid* par 2.

activities are severable from exploration.

91. The approach called for by the applicants in the context of offshore exploration—before any discovery, field appraisal, technology selection, routing, or market allocation—demands speculation that the EIA scheme is designed to avoid. The final FEIR did consider climate change and uncertainty at a screening/scoping level, appropriate to the phase, and imposed conditions to ensure future project-phase EAs (if any) address production-stage climate impacts with project-specific data. That is faithful to NEMA's progressive, risk-based assessment model.

<u>The assessment contended for by the applicants is misconceived</u>

92. As noted above, the applicants do not dispute that at exploration stage, it would <u>not</u> be possible to evaluate the ecological impact of production to the level required by the EIA regulations.[90]

93. In their affidavit, the applicants explain that they do not contend for '*the prediction and investigation of all production impacts, but rather an accounting for the fact of and general nature of these impacts, which at minimum would include increased GHG emissions and predictable impacts and risks such as minor spills [and] an ongoing risk of large oil spills over a lengthy period…*'.[91] Their case is that '*the general fact of an ecological impact associated with production activities…was a factor to be weighed in determining whether a petroleum project*

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[90] RA p 2290 par 116-117.
[91] RA pp 2289-2290 par 114.

on Block DWOB was a "desirable" means of addressing South Africa's gas needs'.'[92]

94. In their argument, the applicants point to considerations such as whether the quantities of gas involved in the event of production would exceed South Africa's electricity requirements as envisaged in the IRP 2019, the compatibility of potentially embarking on long-term production operations with policy, increased GHG emissions associated with potential production, the quantity of gas that would result from possibly simultaneous production operations, and the predictable ecological impacts of a possible production operation. [93]

95. These arguments fall away once it is accepted that upon a proper interpretation of the applicable legislation, potential impacts of production operations do not fall to be assessed as part of an application for an EA in respect of an exploration project. But in any event, the reasoning underpinning the argument is fallacious. It is that the Minister ought not to grant an exploration right because any commercially exploitable reserve of gas or oil discovered is likely to exceed South Africa's needs. The approach that South Africa should not establish the extent of its oil and gas reserves because any exploitable reserves discovered is likely to exceed its currently estimated requirements is not only illogical, it would constitute a wholly irresponsible government policy.

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[92] RA p 2290 par 117.
[93] Applicants' HOA par 126, 138, 140, 149-150, and 155.

96. Section 24(1) of NEMA only requires applicants for an EA to identify and assess the impacts of the activity for which they apply. NEMA similarly only authorises the decision maker to consider considerations relevant to the activity for which application is made. It would be unauthorised and unlawful for the decision maker to take irrelevant considerations into account. The impacts associated with production activities, whether general or specific, thus need not be assessed when the activity for which environmental authorisation is sought is exploration activities.

97. Furthermore, what the applicants contend for are irrational and irrelevant considerations, in light of the following:

97.1. As explained in the final ESIA, given the large uncertainties at the stage of exploration regarding the type of hydrocarbons, the size of the discovery, the quality of the reservoirs, the spatial extension of the area to be developed, the way to develop and economically produce the targeted discovery in a success case cannot be assessed in advance. The possible future production activities that may or may not arise vary hugely in scope, location, extent, and duration and cannot be reasonably defined until the proposed exploration project has been completed. It is not reasonable to undertake an assessment of the environmental impacts of an uncertain and undefined project.[94]

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[94] FA p 1711 par 127, with reference to paragraph 9.4.1 of the final ESIA (Record pp 483-484).

97.2. As explained in TEEPSA's answering affidavit, it would be largely speculative and thus of little assistance to attempt to assess the impacts of production prior to conducting exploration drilling due the many variables, assumptions and uncertainties that will be involved.[95] The outputs of an assessment are likely to be so broad as to be of little direct value in informing the impact assessment process or the development of mitigation measures and ultimate decision-making.

98. In any event, TEEPSA has shown that:[96]

98.1. Mr Trollip's analysis omits a critical contextual point: the IRP is not a comprehensive national energy planning tool. Rather, it is a subcomponent of the IEP, which is South Africa's principal policy framework for guiding the long-term development of the entire energy sector.

98.2. Mr Trollip's analysis of gas demand also ignores the National Development Plan 2030 (**NDP**) which addresses the issue of natural gas, particularly offshore and West Coast gas resources, in the national energy mix.

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[95] See the analysis set out at FA pp 1699-1704 par 106-112, which demonstrates that that given the information available to TEEPSA at the stage the ESIA is compiled for exploration operations, it is not possible to predict the '*general ecological impact associated with production activities*' in any meaningful way.

[96] TAA pp 1667-1691 par 68-91; p 1733 par 168 and 170; p 1737 par 182.

98.3. It is incorrect to assume that the use of gas displaces renewable energy sources, as if the two are in direct competition for fixed resources or outcomes. In reality, they may be complementary, additive, or independent.

98.4. Case studies confirm that successful hydrocarbon development can simultaneously support domestic energy needs and global export revenue generation – and broad-based economic growth.

98.5. Mr Trollip's suggestion that South Africa should avoid reliance on domestic gas from Block DWOB based on development timelines, infrastructure costs and comparative LNG pricing, is speculative, economically narrow, and overlooks the broader role of domestic gas in supporting South Africa's energy transition and industrial development.

98.6. Mr Trollip fails to substantiate his calculations. As noted above, the applicants accept that the exercise of estimating the base capital investment required to roll out the project, undertaken by Mr Trollip, is speculative.[97]

98.7. The proposed exploration project as contemplated (i.e., not including possible production) has no direct influence on South Africa's reliance on fossil fuels and whether consumers use more or less oil or gas, nor on which types of fossil fuels contribute to the country's energy mix.

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[97] RA p 2283 par 83.

98.8. The maximum total CO_2-e emissions to be contributed by the exploration project, assuming 10 successful appraisals with tests, would thus be approximately 0.17% of the ‘energy’ sector total of 0.41 Gt. It represented a contribution of 0.14% to the National GHG Inventory total (of 2017) of 0.51 Gt.

98.9. Although the aim may be to replace the coal-fired power generators by renewable energy sources, the amount of reliable baseload required to sustain the national electricity demand make natural gas an attractive option; at least as a bridging technology, allowing the development of technologies at the scale required for sustained renewable energy conversion and storage capacity.

98.10. With reference to the Meckel and New methodology, whilst the concept of the proposed system is not invalid, the use of the current emission factors in the methodology is problematic because the fugitive emission fractions for methane are unrealistically high as shown. Furthermore, the methodology requires statistical <u>percentiles</u> of YTF amounts, which are not readily available. This uncertainty compounds the uncertainty in estimating GHG emissions. So, whilst the referenced statistical methodologies may be mathematically sound, the current information base to drive these models carry substantial uncertainty in estimating upper and lower limits of commercially viable oil and gas resources.

98.11. When compared to coal, which is the dominant fuel in South Africa’s power and industrial energy mix, natural gas reduces lifecycle emissions by approximately 40%–60%, even when accounting for moderate methane leakage rates.

98.12. Relative to coal, natural gas is associated with relatively low CO_2-eq emissions, even including the entire value chain and fugitive emissions of methane.

98.13. The number of wells drilled offshore South Africa without incident, some of which were drilled in difficult weather conditions, demonstrates the existence of a mature industry knowledgeable of this environment.

98.14. Since 2010, both the technology and mitigation measures have significantly improved to prevent blowouts and minimise their impacts. With the post-2010 technologies and approaches available, no surface blowouts leading to significant surface spills from a marine oil rig, whether engaged in production or in exploration, has been recorded since 2011, despite the large numbers of offshore rigs in operation around the world.

99. We submit that the climate change aspects of the proposed exploration project were sufficiently addressed in the CCIA and final ESIA, as found by the Minister:

'2.8 I have perused the ESIA report and note that section 3.2 of the Climate Change and Air Emissions Impact Assessment Report (CCIA) indicates that the climate change impact for the project was assessed. The CCIA, on page 62, concludes as follows:

"Thus, with the implementation of the mitigation measures, the intensity and magnitude of the GHG impact reduces to low, with the residual impact reducing to low significance.

The impact of climate change over the lifetime of the Project taking the *robustness of the Project into account is not expected to have a significant impact on the Project. Furthermore, since the Project is of a temporary nature and expected to be completed in the near future, changes in meteorological parameters are not expected to have a significant impact on the Project.*

An annual Carbon Tax environmental levy will be required in July of each year after operations commence."

2.9. I find that the CCIA falls within the scope of the proposed project. In this regard, I also find that there is no legal requirement to conduct a full life cycle impact assessment for GHG beyond the exploration activities, nor to assess the impacts associated with production activities.'[98]

100. It is respectfully submitted that the Minister's approach to climate change considerations is lawful, rational and reasonable.

101. For all these reasons, we submit that this review ground must fail.

THE SECOND REVIEW GROUND: ASSESSMENT OF THE OIL SPILL RISK

102. In challenging the assessment of the oil spill risk, the applicants' argument is to the effect that:

102.1. the decision makers' acceptance of the correctness and validity of the assessment of oil spill risk in the final ESIA was unreasonable; and

102.2. material reliance should not have been placed on the contents of the Oil Spill Contingency Plan (**OSCP**) and the Blow-out Contingency Plan (**BOCP**).[99]

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[98] JWS11 p 700 par 2.8-2.9.
[99] Applicants' HOA par 175-203.

The applicants have not established a reviewable irregularity

103. The second ground of review is unsustainable both as a matter of law and on the facts:

103.1. The decision makers' assessment of contested evidence on the oil spill risk and their weighing of evidence is not reviewable, even if this Court would have reached a different view on these matters were it vested with original competence to find the facts. This Court may only interfere where the decision-makers exercised a competence to decide facts but failed to get the facts right in rendering their decisions, where the facts (a) are material, (b) were established, and (c) meet a threshold of objective verifiability. [100]

103.2. The applicants do not dispute the credibility of the Lloyds registry data, nor that it was a suitable factor to consider in understanding the risk of a well blowout. They say that the point of challenge is the degree to which the decision-makers relied on this data, and the failure to consider that increased risk attaches to 'ultra deep wells'.[101]

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[100] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* 2020 (4) SA 453 (SCA) at para 23, with reference to *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12.

[101] RA p 2295 par 136.

103.3. However, the weight attached to Lloyds registry data is not reviewable, and the alleged increased risk in the case of ultra deep wells was far from an objectively verifiable, established fact.

103.4. The applicants also focus on the OSCP and BOCP to the exclusion of the range of mitigation measures that were taken into account by the decision makers.

104. We deal below with the facts relevant to this ground of review.

<u>The data</u> [102]

105. TEEPSA has explained that the global data maintained by Lloyds Register indicates that frequency of a blowout from normal exploration wells is in the order of 1.43×10^{-4} per well drilled. This equates to a 1 in 7000 chance.

106. In the Consolidated Appeal Response Report (**ARR**) TEEPSA stated that:

'*The probability of a well Blowout occurring is considered to be extremely low. Offshore South Africa, 358 wells have been drilled to date (based on shapefile data provided by PASA in 2021) and no well blowouts have been recorded to date. Worldwide offshore well blowout database from 1980 until 2019 maintained by Lloyds Register (and IOGP Blowout frequencies Sept 2019) indicates that the*

[102] The details of what was placed before the decision-makers is set out at TAA pp 1730-1733 par 158-165.

frequency of a blowout for exploration wells is in the order of 1.43 x 10^{-4} *(0.000143)*[38] *per well drilled'*.[103]

107. In the ARR, TEEPSA further explained that:

'*<u>The reference to 358 wells being drilled without a blowout is to merely put regional drilling activity into context based on local experience from the industry</u>. The International Association of Oil & Gas Producers (IOGP) released a report in September 2019 titled "Risk Assessment Data Directory - Blowout Frequencies" (Report 434-02). This report presents frequencies of blowouts and well control incidents and is intended to be applied to well operations worldwide, both offshore and onshore. The report considers worldwide offshore well blowout database from 1980 until 2019 maintained by Lloyds Register (and IOGP Blowout frequencies Sept 2019) and indicates that the frequency of a blowout for exploration wells is in the order of 1.43 x 10-4 (0.000143) per well drilled.*

The fact that 358 wells have been drilled in the region and none of these have resulted in a well blow outs demonstrates that (i) the technical and operational measures currently employed as best practice are effective in preventing well blow outs; and (ii) the likelihood of well blow out occurring is extremely unlikely…'[104]

108. As to the integrity and reliability of the worldwide offshore well blowout database maintained by Lloyds Register and the 'IOGP Blowout frequencies Sept 2019':

108.1. Lloyd's Register is a global professional services company specialising in engineering and technology for the maritime, oil and gas, and energy sectors.

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[103] Record p 4950. 1. The footnote numbered 38 includes a link: https://www.iogp.org/bookstore/product/risk-assessment-data-directory-blowout-frequencies/. The document referred to is report 403-02 of the International Association of Oil & Gas Producers (IOGP) of September 2019.
[104] Record 5062.

108.2. The data from Lloyds Register refers specifically to deep offshore wells and is supported by industry standards and documentation from the Foundation for Scientific and Industrial Research (SINTEF).

108.3. This data is also used by regulators such as the Bureau of Safety and Environmental Enforcement in the USA.

109. Considering a frequency in the order of less than 1.5×10^{-4} per well drilled, the occurrence is correctly termed ‘highly unlikely’.

Ultra deep wells

110. The applicants state that they do not rely on the Prof Bracco and Dr Harris in relation to the issue of the oil spill risk. They point only to the two papers referred to in their appeal submission, which they say established a strong *prima facie* indication of elevated risk of blowout in the case of the proposed exploration wells.[105]

111. The validity and appropriateness of the extracts from these papers were disputed by TEEPSA in the ARR.[106]

112. Furthermore, in these proceedings the evidence of Mr Affes, whose knowledge and experience are not disputed,[107] is that:

[105] Supplementary Founding Affidavit (**SFA**) p 1245 par 21, read with RA p 2292 par 124.2.
[106] The extracts from the ARR are reproduced at SFA pp 1245-1246 par 22.
[107] RA pp 2294 par 133.

112.1. Ultra-deep wells present more challenges due to the complex processes and equipment that must be utilised to reach such depths. However, the risk of a blowout cannot be determined or correlated directly to elements such as geology, sea conditions or terminal well depth. Blowout occurs due to the combined failure of different barriers. An exploration well drilled in formation where no reservoir is present (zones capable of flowing) can hardly lead to a blowout. This is even more relevant in an exploration setting, as the probability of finding a reservoir is usually in the range of 1 in 10.

112.2. There is also no correlation between water depth and blowout frequency. Increased water depth accounts for longer and more complex operations. Sea and weather conditions come into play in the same way. However, all drill units are designed to operate within acceptable sea state and metocean conditions, beyond which drilling operations must be halted and the rig secured. This is a standard practice across the oil and gas industry.

112.3. With the post-2010 technologies and approaches available, no surface blowouts leading to significant surface spills from a marine oil rig, whether engaged in production or in exploration, has been recorded since 2011, despite the large numbers of offshore rigs in operation around the world.[108]

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[108] TAA pp 1736-1737 par 179-182.

113. Indeed, of the 23 Namibian wells drilled from 2021 to 2025 (listed below), 20 wells were drilled in ultra-deep water conditions (1500m or more) without incident by different operators and most of these were drilled just north of block DWOB.[109]

114. In the circumstances, the applicants have failed to show that the decision makers' acceptance of the correctness and validity of the assessment of the oil spill risk as 'highly unlikely' was unreasonable.

<u>No onus</u>

115. Relatedly, the applicants assert that the Minister adopted the stance that the second and third applicants effectively bore an onus to persuade her that the DG's decision regarding oil spill risk was wrong, contrary to what is required of the Minister under NEMA. [110]

116. However, the applicants mischaracterise the Minister's approach to this ground of appeal:

    116.1. The Minister did not impose any onus on the first and second applicants.

    116.2. The full text of the Minister's reasoning shows that she fairly considered all the information placed before her, in reaching her decision. By way of example, the Minister states that:

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[109] TAA pp 1734-1735 par 173.
[110] SFA p 1247 par 26.

'2.21 I have thoroughly considered the extensive submissions made by the appellants regarding the applicant's alleged failure to assess and consider the risks associated with the proposed project on Marine Ecology and Avifauna, the impacts in relation to noise and in relation to oil spill, well integrity, well abandonment and water quality. I have also thoroughly considered the applicants and CA's responses and comments to these submissions.

…

2.34 It is my considered view, after reviewing the literature made available to me in the appeal, that the potential impacts on the receiving environment and on marine and coastal receptors have been identified, considered and addressed….'.[111]

117. The Minister's approach is also not inconsistent with the precautionary principle because the data relied on concerned risk, not impact. In any event, the data was objectively verifiable, whereas the extracts from the papers relied on by the applicant contained vague and speculative statements insufficient to give rise to the scientific uncertainty contended for.

<u>The mitigation measures</u>

118. The applicants do not dispute the contents of the BOCP and OSCP, and that it is impossible to prepare these documents at this juncture.[112] That is why a framework TEEPSA OSCP was provided in the final ESIA. [113]

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[111] JWS11 p 817 par 2.21 pp 820-822 par 2.32-2.36.
[112] RA pp 2296-2297 par 145-146
[113] TAA p 1746 par 200 ; Record, from p 560.

119. The facts regarding the nature and purpose of an OSCP and BOCP are as follows, in relevant part:

119.1. BOCPs and OSCPs are internal operating documents that set out the way TEEPSA prepares for and responds to an oil pollution incident and is specific for each project. They are operational plans that TEEPSA follow to respond to incidents.[114]

119.2. The EA includes conditions requiring (a) the submission of the BOCP and OSCP within 60 days prior to the commencement of the proposed drilling operations (5.5.2); and (b) an enhanced OSCP if operations are planned to cover the Austral winter (5.5.4).[115]

119.3. TEEPSA is required to ensure that all the required measures are in place to deal with a blow-out event, including the preparation and implementation of project- and well-specific OSCP and BOCP, that they align with the South African National Oil Spill Contingency Plan (**NOSCP**) and that they are <u>approved</u> by SAMSA, and submitted to PASA and the DFFE (final ESIA, Record p 626). [116]

120. It follows that the BOCP and OSCP do not assess the impacts of spills, nor are they mitigation measures to prevent an oil pollution incident. They are operational tools and recovery plans setting out how the operator would respond to an oil

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[114] TAA p 1739 par 189.
[115] TAA p 1740 par 192.
[116] TAA p 1745 par 198.

pollution incident i.e., how it would implement the impact management actions in a specific project in specific circumstances.

121. The impact of an oil pollution incident is assessed in the final ESIA, as are the mitigation measures that the operator will implement to prevent an oil pollution incident and, in the unlikely event that it should occur, to minimise the impact thereof. In the ARR TEEPSA further explained that it adopts a '*multi-barrier approach*'. The first step is avoidance or prevention. If that fails, mitigation measures are implemented, including the following:

121.1. If a kick is detected, the well will be closed to control the source of the flow, thus reducing the probability of a blow-out. A heavier fluid is introduced to raise the hydrostatic pressure and achieve a balance. The fluid or gas that infiltrated the wellbore would slowly be evacuated in a controlled and safe manner.

121.2. If well control cannot be achieved by increasing the mud weight, the Blowout Preventer (**BOP**) stack will be used to control the pressure through mechanical devices designed to rapidly seal the well (or 'shut in') in an emergency. The BOP consists of the following minimum configuration: 2 annular preventers; capability to safely disconnect with Lower Marine Riser Package; blind shear rams and casing shear rams (capable to shear pipes in well in order to shut well in) and 3 pipe rams to seal around drill pipes. [117]

122. The applicants argue that material reliance should not have been placed upon the contents of the OSCP and BOCP, and that '*both decision-makers relied upon the envisaged OSCP and BOCP as mitigation measures materially diminishing the impacts associated with an oil spill*'.[118] This is not accurate.

123. By way of example, the Minister in fact states the following:

> '*I take note that a 'multi-barrier'' approach will be implemented to minimise the risk of oil spills. In addition, various mitigation measures for unplanned events, such as blow-outs are described in the ESIA report. <u>The mitigation measures include, among other, blowout and oil spill contingency plans, an emergency response plan, a shipboard oil pollution emergency plan, the availability of capping stacks. All of these will be implemented if there is a spill or blow-out</u>. I am satisfied that these contingent plans, properly implemented, will prevent or reduce the impacts of an oil spill or blow-out on the receiving environment. I am also satisfied, after careful consideration, that the recommended mitigation measures satisfy the requirements of the precautionary approach*.'[119] (our emphasis)

124. We therefore submit that the second review ground is without merit.

[117] Record from p 5357.
[118] Applicants' HOA par 203 and 211.
[119] JWS11 p 821 par 2.33.

THE THIRD REVIEW GROUND: ASSESSMENT OF SOCIO-ECONOMIC IMPACTS ON SSF

125. The third review ground is a challenge to the assessment of the socio-economic impacts on small-scale fishers in the final ESIA.

126. The applicants allege non-compliance with 'item 3(3)(j)' of Appendix 3 to the EIA Regulations (presumably the applicants intend referencing item 3(1)(j)). Specifically, they say that '*the EAP should have investigated and reported on the <u>significance</u> and <u>consequences</u> of the loss of livelihood for small-scale fishers such as the members of Aukotowa*'.

127. In advancing this review ground, the applicants disregard the evidence, and the limitations attendant upon such an assessment.

The applicants have not established a reviewable irregularity

128. It is important to note at the outset that impact assessment typically relates to the determination of consequences of predictable impacts from proposed project activities. An oil spill is a risk (or unplanned event), rather than an anticipated project impact which is more typically assessed in ESIA.

129. Three studies informed the assessment of the socio-economic impacts in the final ESIA, namely the OSM report, the Fisheries Impact Assessment, and the SEI report. As demonstrated in TEEPSA's answering affidavit, these reports did in fact assess the socio-economic impacts of an oil spill on fisheries and communities, noted the uncertainties involved, and modelled the impacts based on a worst-case scenario.

130. The final ESIA addressed both the significance and the consequences of the socio-economic impacts on SSF, with reference to:

130.1. The fishing activities of small-scale fishers.[120]

130.2. The effect of an oil spill on such activities. [121]

131. As noted above, small-scale fisheries were identified as a receptor category with sensitivity and potential high consequence in a blowout scenario, and routes to impact (closure zones, tainting, reputational effects, market access) were assessed. At exploration stage, routine operations have negligible fishery disruption beyond short-lived safety zones; only the contingency of a (very low-likelihood) blowout produces the severe socio-economic case. For that contingency, the final ESIA and the SEI report reasonably addressed: (i) potential scale and duration based on modelled shoreline contact probabilities; (ii) response strategies to minimise contact; and (iii) compensation pathways (insurer/SAMSA/DFFE). Village-level econometric loss curves and demographic replacement analyses for a contingency whose spatial/temporal footprint depends on still-unknown well location, season, currents, and oil properties would not be possible or reasonable.

132. While it is correct that the EIA regulations require that the nature, significance, consequences, extent, and duration of the identified potentially significant impact

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[120] TAA pp 1760-1762 par 235-237.
[121] TAA pp 1762-1772 par 238-259.

be assessed, the criteria in the EIA Regulations cannot be construed as requiring a level of certainty, prescription or exactness in cases where that is not possible or reasonable.

133. Prof Leiman, one of the socio-economic specialists who originally compiled the SEI report for final ESIA, has explained that in the event of an oil spill, the time for ecosystems to fully recover would depend on the timing, extent and duration of the spill, the mitigation methods adopted and the use or avoidance of toxic dispersants. The intensity of socio-economic impacts would also depend on the presence or absence of compensation (a key measure in mitigation of oil spill impacts). [122]

134. Mr Arnott of SLR has also explained the challenges in quantifying the risk of a well-blowout as follows:

134.1. An oil spill is a risk (or unplanned event), rather than an anticipated project impact which is more typically assessed in ESIA.

134.2. The key challenges associated with the assessment of potential impacts from an oil spill relate to the fact that such spills are not a normal part of project operations. The <u>exact</u> timing and nature of a spill – in the highly unlikely event that it occurs – cannot be reasonably anticipated, modelled and assessed. This is the case for any project risk (or unplanned event), such as a dam break or explosion risks. As such, <u>a</u>

[122] TAA p 1770 par 254.

reasonable 'worst-case' scenario is typically modelled and assessed, with an inference that actual impacts, should the risk event take place, will be similar to or less than the worst-case scenario.

134.3. The probability in environmental impact assessment typically relates to the probability that a reasonably foreseeable impact of a planned project activity occurs (for example whether pollution will reach or affect a receptor). With the assessment of risks (unplanned events) such as well-blowouts or spills an additional element probability must be considered: 1) probability of the risk event occurring and 2) probability of the impact occurring if a risk event takes place. Environmental impact assessment and rating methodologies are not normally set up to deal with such risk probabilities, and the resulting impact significances from risk events are thus not directly comparable to those for foreseeable impacts. [123]

135. Importantly, mitigation measures are identified as follows:

135.1. A process of determining the economic effects and related compensation would be initiated. Such a process would typically involve government, insurers, the organisation responsible for the incident, industry organisations and the applicable legal system.

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[123] TAA pp 1706-1707 par 118.

135.2. TEEPSA will plan for and would implement responses in terms of the IPIECA-IOGP guideline document for the economic assessment and compensation for marine oil releases. TEEPSA would also ensure that damages and compensation to third parties are included in insurance cover to financially manage the consequences of any unplanned event.

135.3. TEEPSA is fully insured against such events, and any loss of earnings by the first applicant's members would be fully compensated. This insurance covers oil-spill related loss of earnings by all individuals and businesses on the coast, not merely those in Port Nolloth.[124]

136. Compensation and institutional response mechanisms are legitimate mitigation in contingency scenarios. The final ESIA's inclusion of insurance, claims administration with DFFE/SAMSA oversight, and targeted engagement with small-scale fishers, is appropriate and reasonable.

137. We therefore submit that the final ESIA and associated specialist studies comply with item (3)(1)(j) of Appendix 3 to the EIA Regulations, and that there is no merit in the third ground of review.

THE FOURTH REVIEW GROUND: ICMA CONSIDERATIONS

138. The fourth review ground is that the decision-makers failed to take into account the considerations prescribed by ICMA, specifically:[125]

[124] TAA p 1765 par 247, with reference to Record p 547. See also TAA pp 1771-1772 par 257-259.
[125] FA pp 75-76 par 244, p 78 par 248.

138.1. Whether the proposed project would affect coastal property.

138.2. The proposed project's impact on and interests of present and future generations, in the context of coastal public property.

138.3. Mitigation measures.

138.4. Prejudice to any coastal management objective.

138.5. Socio-economic justifications.

138.6. The interests of other living organisms.

138.7. The interests of the whole community.

139. This ground of review is readily disposed of:

139.1. First, the final ESIA notes that, as the proposed project falls under the definition of a 'coastal activity' and is located within 'coastal waters', the competent authority, in terms of section 63, must take a number of factors into consideration in deciding on the application for environmental authorisation, including the likely impact of the proposed activity on the coastal environment, including cumulative effect of its impact together with those of existing activities, and the likely impact of coastal environmental processes on the proposed activity.[126] The final

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[126] Record p 93.

ESIA also includes a table of the various requirements of section 63 and a summary of where it is addressed. [127]

139.2. Second, it is a question of fact whether such considerations were indeed taken into account, albeit under a different rubric. The Record reflects that the considerations in section 63 of ICMA were in fact considered in the final ESIA, and therefore by the DG and the Minister. It is immaterial that the specific sections of ICMA are not mentioned by name by the decision makers. The same is true for every piece of legislation that was considered by the DG and Minister and where specific sections were not explicitly referenced.

The applicants have not established a reviewable irregularity

ICMA considerations in the DG's decision

140. The DG's decision records that the information contained in the final ESIA and technical and specialist reports submitted were considered in making the decision.[128] Accordingly, the DG would have considered the various requirements of section 63 of ICMA by considering and assessing the relevant portions of the final ESIA and documentation mentioned therein.

141. It is submitted that the absence of express reference to section 63 of ICMA in the DG's decision is immaterial, and does not support the conclusion that the DG

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[127] Record p pp 94-96 Table 2-3.
[128] JWS8 p 593 par 1.

failed to take into account the considerations prescribed by ICMA, but in any event, the Minister did take these considerations into account.

ICMA considerations in the appeal decision

142. The Minister who considered the appeal would also have, in substance, considered the various requirements of section 63 of ICMA by considering and assessing the documents identified in the aforementioned table.

143. The Minister too would have, in substance, considered the various requirements of section 63 of ICMA by considering and assessing the documentation which served before her.

144. The Minister variously referenced her consideration of the matters that bear on section 63, including for instance in relation to the second ground of appeal, relating to '*Marine Ecology, Noise and Spills*',[129] and the sixth ground of appeal, headed '*Socio-economic, Tourism and Fisheries*'.[130]

145. The Minister determined that the potential impacts and mitigation measures in respect of the project and environmental receptors have been adequately identified, considered and addressed in the ESIA, the SEI report, the Fisheries Impact Assessment, and the Cultural Heritage Impact Assessment. [131]

[129] JWS11 pp 702-822 par 2.16 to 2.36.
[130] JWS11 pp 880-913 par 2.64 to 2.72.
[131] JWS11 p 911 par 2.67

146. The Minister stated that she is satisfied '*that the socio-economic impacts and mitigation measure on inter alia, tourism, marine fauna, small-scale and commercial fishing have been considered and addressed. The Social Impact Assessment concludes that the social impacts related to the proposed exploration project are considered to largely be of negligible or low significance with mitigation. Virtually all negative impacts may be mitigated via the adoption of suitable management measures and advanced planning. Social impacts will be substantive in the case of catastrophic events; however such events are unlikely.*'[132]

147. The Minister also explained that she had '*only considered the impacts of exploration which are far less significant and far less invasive than they will be if extraction and production takes place. As has been a recurring theme in this appeal, this is not the time to consider the possible impacts of a project that is not yet planned*'.[133]

148. Finally, the Minister acknowledged the potential for long-term harm to the environment and the living resources, and imposes a new condition at paragraph 5.5.9 of the EA.[134]

149. It is accordingly submitted that the that the considerations of the ICMA and section 63 were taken into account in substance.

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[132] JWS11 p 911 par 2.68
[133] JWS11 p 912 par 2.70
[134] JWS11 pp 912-913 par 2.72

Nature of the appeal and reasons

150. The appellants lodged their appeals under section 43(1) of NEMA.[135] An appeal under section 43 of NEMA is a wide appeal involving a determination *de novo* where the decision in question is subjected to reconsideration, if necessary, on new or additional facts, with the body exercising the appeal power free to substitute its own decision for the decision under appeal.[136]

151. In *Philippi Horticultural Area*, this Court has held that where there is a wide appeal, the appeal decision supersedes and replaces the first-order decision. The appeal decision is one which '*must stand or fall on its own merits and therefore that it is the only one of the two decisions to be reviewed*'.[137]

152. On a proper consideration of the Record, any irregularity in the DG's decision in relation to ICMA has been overtaken by or cured in the appeal proceedings.[138]

153. The applicants also say that the *decisions* do not contain adequate reasons for any findings in relation to section 63 of the ICMA.[139]

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[135] JWS11 p 669 par 1.9.
[136] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] 2 All SA 519 (GP) (***Earthlife***) para 107, citing *Kham and others v Electoral Commission and another* 2016 (2) SA 338 (CC) at para 41. See also NEMA s 43(6).
[137] *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others* 2020 (3) SA 486 (WCC) para 86.
[138] *Earthlife* para 76, where the Court said that '*Irregularities committed by the Chief Director are relevant to the extent that they have not been overtaken by or cured in the appeal proceedings.*'
[139] Applicants' HOA par 252,

154. On the question of the sufficiency or adequacy of reasons, in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)*,[140] the Constitutional Court observed that although the reasons must be sufficient they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. According to the Constitutional Court, what constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant is able on the basis of such reasons to make out a reasonably substantial case for a ministerial review or an appeal.

155. The applicants have clearly had no difficulty in formulating their case.

Future generations

156. The applicants further allege that the decision makers failed to consider the interests of future generations when authorising the exploration activities.[141]

157. This allegation is (a) based on a mischaracterisation of the nature of the exploration activities and the import of such activities in the long-term, (b) not supported by the facts, and (c) disregards the decision makers' measured assessment of the risk of an oil spill.

158. The findings of the ESIA show that the identified impacts for normal operations are not expected to have long-term impacts that would affect future generations.

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[140] *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 63.
[141] SFA pp 1248 to 1249 par 30 to 35.

The applicants contend that the purported future GHG emissions (and associated climate change impacts) would have inter-generational impacts. However, for reasons already set out above, the legally relevant assessment is in respect the impact of the proposed exploration activities, which are generally of a short-term nature. There is also no reason to believe that either South Africa or the rest of the world will consume more oil and gas if a viable reserve is found off the country's Southwestern coast.

159. Furthermore, Prof Leiman confirms that there is abundant evidence that the effects of oil spills do not persist inter-generationally.[142]

160. Finally, both present and future generations will benefit from the knowledge of petroleum resources that are likely to be of use or benefit to the state.

REMEDY

161. The applicants ask for a substitution order on the basis that the final ESIA '*is fatally flawed by reason of its limited scope and cannot serve as a basis for lawful decision-making*'.[143]

162. It is well-established that substitution is an extraordinary remedy. The position is usefully summarised in *Mochebelele v Director of Public Prosecutions, Gauteng and Others* 2019 (2) SACR 231 (SCA) as follows:

> '*It is trite that a court should be slow to substitute its own decision for that of an administrative authority, and should do so sparingly and in exceptional*

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[142] TAA pp 1781-1782 par 302.
[143] FA p 79 par 258.

circumstances. In considering whether such exceptional circumstances are present warranting substitution in a given case, the Constitutional Court in Trencon Construction v Industrial Development Corporation of South Africa (Pty) Ltd & another *[2015] ZACC 22; 2015 (5) SA 245 (CC) paras 44- 55, stated two key factors to be considered in such an enquiry: whether a court is in as good a position as the administrator to make the decision, and whether the decision of an administrator is a foregone conclusion. Other relevant factors would include delay, bias or the incompetence of an administrator.*

The court further explained that a court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and it would merely be a waste of time to order the administrator to reconsider the matter. There can never be a foregone conclusion unless a court is in as good a position as the administrator.'[144]

163. In the event that the applicants are successful in the review, we respectfully submit that there are no exceptional circumstances justifying a substitution order:

163.1. First, whether exploration drilling should proceed is a polycentric determination that turns on technical, environmental, safety and policy matters suited to the specialised regulator. This Court is not similarly placed.

163.2. Second, the refusal of the EA is not a foregone conclusion, and any alleged shortcomings in the placed information before the decision-makers may be remedied by way of an appropriately crafted order. As noted above, in *Green Connection* the Court remitted the decision on

[144] At para 27 and 28.

whether to grant TEEPSA an EA to the DG for reconsideration, and provided for the submission of new or amended assessments to cure the identified deficiencies, and public participation.

163.3. Third, such an order would be disproportionate, when regard is had to the following:

163.3.1. By the time this review is heard in March 2026, more than three years would have passed since the application was made for the EA. This is a substantial delay considering the duration of exploration right licencing periods in terms of the MPRDA, and there has been notable financial expenditure. From inception to September 2024, TEEPSA and its joint venture partners have expended USD 59,341,874 in Block DWOB. [145]

163.3.2. A moratorium has since been placed on the granting of new exploration rights over the entire South African coast (as published in the Government Gazette No. 41743, dated 28 June 2018). [146]

163.3.3. There are also adverse consequences for the public in whose interest the decision-maker must act. The final ESIA contains evidence of the economic and social benefits that

[145] TAA p 1801 par 391.1.
[146] TAA p 1801 par 391.2.

may fail to materialise eventually without the exploration being undertaken. [147]

164. Remittal is almost always the prudent and proper course.[148] We accordingly submit that in the event that the review is successful, the just and equitable remedy would be for the Court to craft a structured remittal order that directs and limits reconsideration to the successful ground(s) of review.

CONCLUSION

165. For the reasons set out above, the applicants have not made out a case for the review and setting aside of the impugned decisions, and the application falls to be dismissed with costs.

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13 February 2026

[147] TAA p 1801 par 391.3.
[148] *The Municipal Manager: The City of Johannesburg Metropolitan Municipality and Others v San Ridge Heights Rental Property (Pty) Ltd* (517/2022) [2023] ZASCA 109 (11 July 2023) at para 18.

List of Authorities

1. *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ).
2. *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC).
3. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).
4. *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).
5. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP).
6. *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
7. *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* (5676/2024) [2025] ZAWCHC 349 (13 August 2025).
8. *International Trade Administration Alliance Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).
9. *Kham and others v Electoral Commission and another* 2016 (2) SA 338 (CC).
10. *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC).
11. *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA).
12. *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA).
13. *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA).

14. *Mochebelele v Director of Public Prosecutions, Gauteng and Others* 2019 (2) SACR 231 (SCA).
15. *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others* 2020 (3) SA 486 (WCC).
16. *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A).
17. *President of the Republic of South Africa & others v M & G Media Ltd* 2012 (2) SA 50 (CC).
18. *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).
19. *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* 2020 (4) SA 453 (SCA).
20. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk).
21. *The Municipal Manager: The City of Johannesburg Metropolitan Municipality and Others v San Ridge Heights Rental Property (Pty) Ltd* (517/2022) [2023] ZASCA 109 (11 July 2023).
22. *Van Zyl and others v Government of the RSA and others* 2008 (3) SA 294 (SCA) [[2008] 1 All SA 102 (SCA)].
23. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).
24. *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* 2021 (11) BCLR 1263 (CC).