

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

Case no: 5676/2024

In the matter between:

THE GREEN CONNECTION NPC

First Applicant

NATURAL JUSTICE

Second Applicant

and

**MINISTER OF FORESTRY, FISHERIES AND THE
ENVIRONMENT**

First Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY

Second Respondent

**DIRECTOR GENERAL: DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

Third Respondent

**TOTAL ENERGIES EP SOUTH AFRICA BLOCK 567
(PTY) LTD**

Fourth Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This is an application to review and set aside an environmental authorisation (“the EA”) granted to Total Energies, the Fourth Respondent (“Total”) by the First and Third respondents (“the State Respondents”).¹ The environmental authorisation permits Total to conduct exploratory drilling for fossil fuels off the South West coast of South Africa (“the Proposed Project”).²
2. The Applicants are public interest organisations,³ who participated in the process which led to the granting of the EA.
3. The EA was granted on the strength of an environmental impact assessment report (“the Final EIR”) prepared on behalf of Total. The bulk of the Applicants’ review grounds are premised on the fact that the Final EIR failed to meet the standards imposed by the National Environment Management⁴ (“NEMA”) and the National Environmental Management: Integrated Coastal Management Act (“ICMA”).⁵
4. Specifically, the Applicants contend that the decisions to grant the EA were unlawful and irrational in six respects.
 - 4.1. First, that the Final EIR failed to properly assess, and State Respondents failed to consider, the socio-economic impact of the Proposed Project because it does not assess the socio-economic

¹ Amended Notice of Motion p. 5.

² Founding Affidavit (“FA”) p. 16 para. 23.

³ FA p. 14 para. 18

⁴ Act 107 of 1998.

⁵ Act 24 of 2008.

impacts which a well blowout and consequent oil spill will have on the fishing industry and small-scale fishers.⁶

4.2. Second, the State Respondents failed to consider the factors prescribed by ICMA.⁷ Third, the State Respondents failed to properly assess and consider the need and desirability of the Proposed Project in relation to the climate change impacts which will be caused by burning any gas discovered by the Proposed Project.⁸

4.3. Fourth, the State Respondents failed to assess and consider the transboundary impacts of the Proposed Project both on Namibia and on international waters,⁹

4.4. Fifth, neither the Final EIR nor the EMPR include Total's Oil Spill Contingency Plan ("OSPC") or Blow Out Contingency Plan ("BOCP").¹⁰

4.5. Sixth, the Petroleum Agency of South Africa ("PASA") impermissibly delivered an appeal response report which, at face value, was submitted on behalf of the Second Respondent.¹¹

5. We will refer to these six deficiencies as the First to Sixth Review Grounds.

⁶ FA p. 40 para. 81.

⁷ FA p. 45 para. 96.

⁸ FA p. 54 para. 120.

⁹ FA p. 57 para. 129.

¹⁰ FA p. 69 para. 175.

¹¹ Supplementary Founding Affidavit ("SFA") p. 1622 para. 8.

6. In *Fuel Retailers*, the Constitutional Court accepted that where an environmental decision maker fails to consider an environmental impact it ought to have considered, its decisions stand to be reviewed and set aside in terms of section 6(2)(b) of PAJA, for failure to comply with a mandatory and material condition.¹²
7. In a similar vein, this Court in *Philippi Horticultural*, held that where an environmental impact assessment omitted relevant information, this restricted the ability of the decision maker to consider relevant information and resulted in their decision being subject to review in terms of section 6(2)(b)(iii) and 6(2)(f)(ii) of PAJA.¹³
8. Accordingly, the Final EIR's failure to assess the impacts of an oil spill on fisheries, the factors prescribed by ICMA, the relevance of climate change impact to the need and desirability of the Proposed Project, and the transboundary impacts of an oil spill, render the decisions to grant the EA unlawful, irrational and unreasonable. Therefore, those decisions stand to be reviewed and set aside in terms of PAJA.
9. These heads of argument are structured as follows.
 - 9.1. First, a brief overview of the climate crisis.

¹² *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 89.

¹³ *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC), paras. 101 to 103. See also *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP) paras 100 to 101

- 9.2. Second, a summary of the Decisions under Review and the Proposed Project
 - 9.3. Third, an outline of the legal basis for the Applicants' review grounds.
 - 9.4. Fourth, the Applicants' first to sixth review grounds.
 - 9.5. Fifth, the relief sought.
10. This matter relates not only to environmental law but particularly to the climate crisis and the consequent impact on the Constitutional right to have the environment protected for current and future generations.¹⁴ Therefore it is apposite, at the outset, to note the following comment from the Supreme Court of Appeals in *Company Secretary, Arcelormittal South Africa*:¹⁵

As we continue to reset our environmental sensitivity barometer, we would do well to have regard to what was said about planet Earth by Al Gore, a former vice-president of the United States and an internationally recognised environmental activist engaged in educating the public about the dangers of global warming and those steps to be taken in response to reduce carbon emissions (for which he was a joint recipient of the 2007 Nobel Peace Prize):

'You see that pale, blue dot? That's us. Everything that has ever happened in all of human history, has happened on that pixel. All the triumphs and all the tragedies, all the wars, all the famines, all the major advances . . . It's our only home. And that is what is at stake, our ability to live on planet Earth, to have a future as a civilization. I believe this is a moral issue, it is your time to seize this issue, it is our time to rise again to secure our future.'

¹⁴ Constitution of the Republic of South Africa, section 24(b).

¹⁵ *Company Secretary, Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA), para. 84.

On the importance of developing a greater sensitivity in relation to the protection and preservation of the environment for future generations, Gore had the following to say:

‘Future generations may well have occasion to ask themselves, “What were our parents thinking? Why didn’t they wake up when they had a chance?” We have to hear that question from them, now.’

We would, as a country, do well to heed that warning.

THE CLIMATE CRISIS

11. There is no longer any doubt that climate change is caused by human activities and that global average warming above 1.5°C above pre-industrial levels will have profoundly harmful effects on humanity and the planet.¹⁶
12. The South African government accepts that: climate change is a measurable reality; South Africa is especially susceptible to climate change; and that climate change poses a substantial threat to the section 24 environmental right and other fundamental rights.¹⁷
13. In *Earthlife Africa, Johannesburg* this Court accepted the following explanation of climate change:¹⁸

[...] an on-going trend of changes in the earth’s general weather conditions as a result of an average rise in the temperature of the earth’s surface (global warming) due, primarily, to the increased concentration of greenhouse gases (“GHGs”) in the atmosphere that are emitted by human activities. These gases intensify a natural phenomenon called “the greenhouse effect” by forming an insulating layer in the atmosphere that reduces the amount of the sun’s heat that radiates back into space and

¹⁶ FA p. 31 para. 59; Total AA p. 3016 para. 228; State AA p. 2494 para. 147.

¹⁷ FA p. 31 para. 62; Total AA p. 3016 para. 228; State AA p. 2494 para. 147.

¹⁸ *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP), para. 4.

therefore has the effect of making the earth warmer.

14. It also accepted that climate change poses a substantial risk to sustainable development in South Africa,¹⁹ and there is a wide consensus that urgent action to limit global warming is necessary and that there is no atmospheric space left for new fossil fuel emissions.²⁰
15. South Africa is party to a number of international agreements seeking to combat climate change and has adopted numerous policies which seek to limit South Africa's contribution to global warming.²¹

THE DECISIONS UNDER REVIEW AND THE PROPOSED PROJECT

16. On 17 April 2023, the Director General of the Department of Mineral Resources and Energy ("the DG") granted an environmental authorisation ("the EA") to Total permitting it to conduct exploratory drilling in "the Project Area" of the South West coast of South Africa.²²
17. The Applicant lodged an internal appeal against this decision. The Minister for Forestry, Fisheries and the Environment dismissed that appeal.²³
18. We refer to these decisions as "the DG's Decision", "the Minister's Decision" and together as "the Decisions under Review".

¹⁹ *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP), para. 82.

²⁰ FA p. 31 para. 63; Total AA p. 3016 para. 228; State AA p. 2494 para. 147.

²¹ FA p. 34 paras 67 *et seq*; Total AA p. 3016 para. 228; State AA p. 2494 para. 147.

²² FA p. 16 para. 23.

²³ FA p. 17 para. 25.

19. The Proposed Project triggers numerous activities listed in terms of the EIA Regulations.²⁴ Therefore:
- 19.1. Total could not commence the Proposed Project without an environmental authorisation in terms of section 24(2) of NEMA.
- 19.2. Total was required to conduct an environmental impact assessment in respect of the Proposed Project.
20. The Proposed Project is an exploratory drilling project which seeks to locate offshore fossil fuel sources. Total intends to drill up to five exploration wells in the Project Area.²⁵
21. The Project Area is located between Cape Town and Cape Agulhas, 60km to 170km offshore, and in water depths between 700m and 3200m.²⁶
22. The Project Area is located in South Africa's exclusive economic zone and in the Benguela Current Large Marine Eco-System.²⁷
23. The execution of each exploratory well will take approximately 4 months.²⁸

²⁴ Environmental Impact Assessment Regulations 2014 GN R982 GG38282 4 December 2014; FA p. 28 para. 52; First Respondent's Answering Affidavit ("State AA") p. 2495; Fourth Respondent's Answering Affidavit ("Total AA") p. 3023 para. 264.

²⁵ FA p. 25 para. 44.

²⁶ FA p. 25 para. 45.

²⁷ FA p. 25 paras. 46 to 47.

²⁸ FA p. 25 para. 48.

THE LEGAL FRAMEWORK

Fundamental principles of environmental law

24. There are two primary sources of environmental law in South Africa. First, the fundamental rights provided by section 24 of the Constitution. Second, the statutory measures which have been enacted to give effect to this right, including NEMA.
25. Section 24 of the Constitution provides that everyone has the right:
- 25.1. to an environment which is not harmful to their health and wellbeing; and,
 - 25.2. to have the environment protected, for the benefit of present and future generations, through reasonable measures that prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
26. NEMA was enacted to give effect to section 24 of the Constitution.²⁹ It fulfils a number of roles, two of which are relevant to this application.
27. First, NEMA empowers the Minister to identify activities which may not commence without an environmental authorisation.³⁰ NEMA and the EIA Regulations go on to set out the process through which such authorisations may

²⁹ *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) (“*Fuel Retailers*”), para. 59.

³⁰ NEMA, section 24(2).

be obtained.

28. Second, section 2 of NEMA sets out a series of environmental management principles (“the NEMA Principles”) which apply to any actions by the State which may significantly affect the environment and which guide the interpretation of NEMA and any other law concerned with the protection of the environment.
29. The Constitutional Court has held that the social, economic and environmental impacts of proposed developments must be considered, and that decisions taken must be appropriate in the light of that consideration.³¹
30. That Court has also noted that the environment is necessary to support economic development and, accordingly, it is necessary to protect and nurture the environment so that it may support future economic development.³²

The environmental impact assessment process

31. Section 24 of NEMA provides that the potential environmental impacts of a listed activity must be assessed. This is necessary to enable the decision maker to decide whether or not to authorise the undertaking of such activities, and to select the best practicable environmental option.³³
32. The manner in which environmental impact assessments must be conducted, are regulated, principally, by sections 24(4) and 24O of NEMA and the EIA Regulations.
33. These assessments must be conducted by environmental assessment

³¹ *Fuel Retailers* 2007 (6) SA 4 (CC), para. 60.

³² *Fuel Retailers* 2007 (6) SA 4 (CC), para. 58.

³³ NEMA, section 2(4)(b).

practitioners, who are required to be independent.³⁴

34. The provisions of those sections which are most directly applicable to this application are addressed below where they become relevant.

THE LEGAL BASIS FOR THE REVIEW GROUNDS

35. The Applicants rely on six review grounds. These are:

35.1. First, that the Final EIR failed to properly assess, and the State Respondents failed to properly consider, the socio-economic impact of the Proposed Project because it does not assess the socio-economic impacts which a well blowout and consequent oil spill will have on the fishing industry and small scale fishers.³⁵

35.2. Second, that the Decision Makers failed to consider the factors prescribed by ICMA.³⁶

35.3. Third, that the Final EIR 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.

35.4. Fourth, the Final EIR failed to assess, and the State Respondents failed to consider, the transboundary impacts of the Proposed Project

³⁴ EIA Regulations, Regulations 12 and 13 (1)(a).

³⁵ FA p. 40 para. 81.

³⁶ FA p. 45 para. 96.

both on Namibia and on international waters.³⁷Fifth, neither the Final EIR nor the EMPR include Total's Oil Spill Contingency Plan or Blow Out Contingency Plan.³⁸

35.5. Sixth, the Petroleum Agency of South Africa delivered an appeal response report which, at face value, was submitted on behalf of the Second Respondent and treated as such by the Minister.³⁹

36. The First to Fifth Review Ground relate to the Final EIR's failure to consider aspects of the Proposed Project which it was required to. In this section we set out:

36.1. the prescribed requirements for an environmental impact assessment; and,

36.2. the basis on which a failure to meet those requirements renders any decisions based on a deficient assessment subject to review.

37. In the following sections we specifically address each of the review grounds.

The prescribed content of the environmental impact assessment

38. Section 24(4)(a)(iv) of NEMA provides that the procedures for the investigation and assessment of the potential consequences or impacts of activities on the environment must ensure the "*investigation of the potential consequences for*

³⁷ FA p. 57 para. 129.

³⁸ FA p. 69 para. 175.

³⁹ Supplementary Founding Affidavit ("SFA") p. 1622 para. 8.

or impacts on the environment of the activity and the assessment of the significance of those potential consequences or impacts”.

39. Section 24O(1) of NEMA provides that when an application for an environmental authorisation is considered, the decision maker must take into account all relevant factors including:

39.1. any environmental impacts likely to be caused if the application is approved or refused;⁴⁰

39.2. measures which may be taken to mitigate the detrimental environmental impacts; and,⁴¹

39.3. the ability of the applicant to implement mitigation measures.⁴²

40. Appendix 3 to the EIA Regulations prescribes that the scope of an EIA must include the following.

40.1. A motivation for the need and desirability of the project.⁴³

40.2. A full description of the impacts and risks identified including the nature, significance, extent, duration and probability of the impacts.⁴⁴

⁴⁰ Section 24O(1)(b)(i).

⁴¹ Section 24O(1)(ii)(bb).

⁴² Section 24O(1)(iii).

⁴³ EIA Regulations Appendix 3 item 3(1)(f).

⁴⁴ EIA Regulations Appendix 3 item 3(1)(h)(v).

- 40.3. A full description of the degree to which these impacts: can be reversed; may cause irreplaceable loss of resources; can be avoided, managed or mitigated.⁴⁵
- 40.4. A full description of the methodology used in determining and ranking the nature, significance, consequences, extent, duration and probability of the of the potential environmental impacts and risks.⁴⁶
- 40.5. A full description of the possible mitigation measures that could be applied and the level of residual risk.⁴⁷
- 40.6. An assessment of each identified potentially significant impact and risk, including:⁴⁸
- 40.6.1. cumulative impacts;
 - 40.6.2. the nature, significance and consequences of the impact and risk;
 - 40.6.3. the extent and duration of the impact and risk;
 - 40.6.4. the probability of the impact and risk occurring;
 - 40.6.5. the degree to which the impact and risk can be reversed;
 - 40.6.6. the degree to which the impact and risk may cause irreplaceable loss of resources; and

⁴⁵ EIA Regulations Appendix 3 item 3(1)(h)(v)(aa) to (cc).

⁴⁶ EIA Regulations Appendix 3 item 3(1)(h)(vi)

⁴⁷ EIA Regulations Appendix 3 item 3(1)(h)(viii).

⁴⁸ EIA Regulations Appendix 3 item 3(1)(h)(v)(aa) to (cc).

40.6.7. the degree to which the impact and risk can be mitigated.

The consequence of an inadequate environmental impact assessment

41. The failure to include an assessment of all the relevant information fundamentally compromises the decisions taken on the strength of that assessment, because the decision makers cannot strike the required equilibrium. This makes it impossible for the decision makers to take decisions which are lawful, rational and reasonable.⁴⁹
42. In *Fuel Retailers* the Constitutional Court accepted that where an environmental decision maker misconstrues what NEMA requires and, therefore, fails to consider an environmental impact it ought to have considered, its decisions stand to be reviewed and set aside in terms of section 6(2)(b) of PAJA for failure to comply with a mandatory and material condition.⁵⁰
43. Where an environmental impact assessment fails to address relevant information, any decisions to grant an authorisation on the strength of that assessment:
 - 43.1. contravene sections 24O(1)(a) and (b) of NEMA;
 - 43.2. contravene regulation 10(c) of the EIA Regulations and item 3 of Appendix 3 to the EIA Regulations;

⁴⁹ *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP), paras. 100 to 101. See also *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC), paras. 101 to 103

⁵⁰ *Fuel Retailers* 2007 (6) SA 4 (CC), para. 89.

- 43.3. fail to take into account relevant considerations;⁵¹ and
- 43.4. are not rationally connected to the information before the decision maker.⁵²
44. Therefore, any such decision will stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA. The First to Fifth Review Grounds establish fundamental deficiencies in the assessment of the environmental impacts of the oil and gas exploration activities. Therefore, the decisions stand to be reviewed on this basis.

THE RISK OF AN OIL SPILL

45. The Final EIR accepts that the Proposed Project carries an inherent risk of a well blowout and consequent oil spill. Its introduction to the assessment of this risk reads as follows:⁵³

Offshore drilling operations carry an inherent risk of oil entering the marine environment as a consequence of an unplanned oil spill event. The greatest environmental threat from offshore drilling operations, although unlikely, is the risk of a major spill of crude oil/condensate occurring from a well-blow. A blow-out is the uncontrolled release of crude oil and/or natural gas from a well after pressure control systems have failed. This section considers the potential impacts of an unlikely well-blow out, based on the finding of the Oil Spill Modelling reports (see Appendix 7 in Volume 2). The Oil Spill modelling considered two theoretical well sites, at locations closest to the coast and the sensitivity areas (making them worst case) at two different

⁵¹ *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP), paras. 100 to 101; *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC), paras. 101 to 103.

⁵² *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP), para. 101; *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC), paras. 101 to 103.

⁵³ Final EIR, First Record item 9.1 p. 5159.

depths. The oil spill modelling was subject to peer review by PRDW (see Appendix 9 in Volume 2).

46. In considering the impact of a well blowout on marine life the Final EIR records:

While the probability of a major spill is extremely small, the impact nonetheless needs to be considered as it would have devastating effects on the marine environment.⁵⁴

47. The potential environmental risks associated with a well blow out and consequent oil spill are directly relevant to the First, Fourth and Fifth review grounds.

48. Total's answering affidavit contends that an oil spill is a "risk" rather than an "anticipated project impact which is more typically assessed in an ESIA"⁵⁵

49. This argument does not excuse Total's failure to properly assess the potential impacts of an oil spill for two reasons.

50. First, the Final EIR did not distinguish between "risks" and "anticipated project impacts". Rather it distinguished between an impact assessment for "normal operations"⁵⁶ and an impact assessment for "unplanned events",⁵⁷ both of which it saw necessary to assess. The Final EIR also clearly records that although the risk of a blowout was small, the devastating nature of its impact required it to be assessed.⁵⁸

⁵⁴ Final EIR, Record Item 9.1 p. 5179.

⁵⁵ Total AA p. 2946 para. 32.1.

⁵⁶ Final EIR, Record Item 9.1 p. 5019.

⁵⁷ Final EIR, Record Item 9.1 p. 5145.

⁵⁸ Final EIR, Record Item 9.1 p. 5179.

51. Accordingly, the Final EIR clearly did consider the consequences of well blowout and oil spill to be a species of impact which it was required to assess. Given the Final EIR's acceptance that a major oil spill is the greatest environmental threat from offshore drilling, any other position would be absurd.
52. Second, the EIA Regulations do not distinguish between risks and impacts or between likely and unlikely risks.
53. As set out above, Appendix 3 to the EIA Regulations provides that an environmental impact assessment must include an assessment of “*each identified potentially significant impact and risk*” including:⁵⁹
- 53.1. the cumulative impact;
 - 53.2. the nature, significance, and consequence of the impact and risk;
 - 53.3. the extent and duration of the risk;
 - 53.4. the probability of the impact and risk occurring;
 - 53.5. the degree to which the impact and risk can be reversed;
 - 53.6. the degree to which the impact and risk may cause irreplaceable resources; and
 - 53.7. the degree to which the impact and risk can be mitigated.

⁵⁹ EIA Regulations Appendix 3 Item 3(1)(j).

54. This is dispositive of Total's argument for two reasons.

54.1. Firstly, the EIA regulations clearly apply to risks and impacts.

54.2. Secondly, the seven sub clauses of item 3(1)(h) of Appendix 3 are joined by the conjunctive "and" indicating that each factor must be considered.⁶⁰ Thus, the Final EIR was required to consider each of the factors listed in item 3(1)(h).

54.3. Accordingly, once the Final EIR identified the potential blow out and oil spill as a potentially significant impact or risk, it was obliged to assess the consequences and the probability of the impact or risk. As such, a low degree of probability does not excuse a failure to properly assess the consequences of a blow out or oil spill. This includes the consequences of an oil spill on fisheries (including small scale fishers and dependent communities) and the transboundary impacts of the oil spill.

1ST GROUND: FAILURE TO CONSIDER SOCIO-ECONOMIC IMPACTS

55. The Applicant's first review ground relates to the Final EIR's failure to properly assess the potential socio-economic impacts of the Proposed Project.⁶¹

⁶⁰ *Ncobo v Salimba* CC 1999 (2) SA 1057 (SCA), para. 11.

⁶¹ FA p. 40 para. 81.

56. As set out above, the Final EIR identifies the risk of a blowout and oil spill as the greatest environment threat from offshore drilling. It then notes the following in relation to the impacts of an oil spill.⁶²

56.1. Large scale effects on fishing operations would include the exclusion of fisheries from areas that may be polluted by oil or the chemicals used to clean oil spills.

56.2. Based on the extent of a large-scale blowout, the operations of most commercial fisheries would be affected on a regional to international scale.

56.3. The potential impact on fisheries is rated as “very high” before mitigation and “high” after mitigation.⁶³

57. We note that the Fisheries Report also identifies that small scale fisheries would be directly affected by an oil spill – as does Total itself.⁶⁴

58. Despite this, the Final EIR does not assess the socio-economic consequences of such a spill. The Final EIR’s inquiry into these consequences is encapsulated by following paragraphs:⁶⁵

Reduction in recreational, small-scale, and commercial fishing in the impacted area, including near-shore and offshore fishing. This may result in undermining fishing by the public at large.

Large scale effects on fishing operations would also be likely to include area closures and exclusion of fisheries from areas that

⁶² FA p. 41 paras. 83 to 84.

⁶³ FA p. 41 para. 84.

⁶⁴ RA p. 7, para 24

⁶⁵ FA p. 43 para. 90.

may be polluted or closed to fishing due to contamination of surface waters by oil or the chemicals used for cleaning oil spills. Based on the possible extent of surface oiling (including major fish spawning and nursery areas), the intensity of the impact on most commercial fisheries would be high. As an indicator, assuming a 10% drop in value of fisheries, sustained over a full three years, the revenue lost would be about R600m a year. The percentage drop is however difficult to estimate.

Reduction in income for secondary and tertiary sectors that support tourism, recreational, fishing and other coastal economies.

Reduction in income and livelihoods impacts on those dependent on small scale fisheries.

59. This is a wholly inadequate assessment of the socio-economic consequences of an oil spill as:

59.1. it does not assess the impact on local communities or small-scale fisheries (“SSFs”) despite the fact that they play a crucial role in sustaining communities and that any disruption of these fisheries could have devastating consequences for fishers and dependent communities;⁶⁶ and,

59.2. it does not attempt to quantify the consequences of the potential impacts. Rather, it simply postulates an assumed figure of a drop of 10% in the value of fisheries for three years. This is deficient in two respects. First, no basis is provided for this figure. Second, there is no assessment of the consequences which such a reduction would have on small scale fishers, fishing operators or local communities.

⁶⁶ Replying affidavit, p. 3145, para. 27

The State's response

60. The State's response is, essentially, that Total has allocated financial resources to compensate the fisheries sector.⁶⁷
61. NEMA and Appendix 3 to the EIA Regulation clearly required the Final EIR to assess the potential consequences of an oil spill caused by the Proposed Project. Even if Total has allocated financial resources to compensate fisheries for an oil spill, this does not excuse a failure to conduct a legally compliant risk assessment.

Total's response

62. Total's response to the first review ground is, essentially, the following.
- 62.1. The Final EIR does not assume that there will be a 10% drop in value. Rather this figure is an indicator "*intended to provide an idea of the relative magnitudes involved*".⁶⁸
- 62.2. The actual impacts are likely to be far lower as the only major fisheries likely to experience serious impacts are the West Coast rock lobster fishery and the small pelagic fishery on the West Coast, and these currently produce relatively little output.⁶⁹
- 62.3. An oil spill would present a shock to the environment akin to some naturally occurring phenomena such as heat waves and red tides.⁷⁰

⁶⁷ State Respondent's AA p. 2486 para. 117.

⁶⁸ Total AA p. 2957 para. 55.

⁶⁹ Total AA p. 2957 para. 55, p. 2958 para. 58.3, p. 2960 para. 65.

⁷⁰ Total AA p. 2959 para. 60.

63. These contentions have no merit.
64. Firstly, there is no legal basis to excuse an inadequate assessment on the basis that natural phenomena may have a similar effect. Where a proposed project will have an effect on the environment, the law requires that those effects be assessed.
65. Secondly, there is no factual basis to Total's contention that an oil spill would only affect low production fisheries.
66. The contention that an oil spill would any only affect fisheries which have relatively little output is directly contradicted by the Fisheries Impact Assessment Report ("the Fisheries Report"). Total's reference to the "small pelagic fishery" is a reference to the "small pelagic purse-seine fishery". Total accepts that this fishery would be directly affected by a spill.⁷¹
67. However, there is no basis to argue that the small pelagic fishery produces relatively little output. The Fisheries Report records that:
- 67.1. This is the largest South African fishery by volume and the second most important in terms of economic value,⁷² accounting for 22% of the total value of South Africa's offshore fishery and 59% of the total catch.⁷³

⁷¹ Total AA p. 2958 para. 58.2.

⁷² Replying Affidavit ("RA") p. 3142 para. 24.3.1.

⁷³ RA p. 3142 para. 24.2

67.2. The wholesale catch value for this fishery (for 2017) was R 2.164 billion.⁷⁴

67.3. The abundance and distribution of this fishery fluctuates but fish are primarily targeted along the South and West Coasts of the Western Cape and the Eastern Cape.⁷⁵

68. As such, there is no basis to the contention that an oil spill caused by the Proposed Project would only affect fisheries which produce relatively little output. Accordingly, there is no basis for its argument that the assumed 10% loss of value would clearly be higher than the actual impact of such an oil spill.

Conclusion regarding the 1st review ground

69. Therefore, the Final EIR failed to properly assess the socio-economic impacts which an oil spill caused by the Proposed Project would have on the relevant fisheries or on small scale fishers and dependent communities. The Final EIR relies on an assumed figure of 10% loss of value but does not provide a basis for that figure and there is no basis to assume that the figure is clearly higher the likely impact. Furthermore, the socio-economic impacts which an oil spill would have on vulnerable small-scale fishers and dependent communities are complex and cannot be quantified by way of a percentage reduction in the market value of total fish catches.

⁷⁴ RA p. 3143 para. 24.3.2.

⁷⁵ RA p. 3143 para. 24.3.3.

70. Accordingly, the Final EIR did not comply with the requirements of sections 24(4) and 24O of NEMA or Appendix 3 to the EIA Regulations.
71. Therefore, the Decisions under Review stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

2ND REVIEW GROUND: THE FAILURE TO CONSIDER THE ICMA FACTORS

72. The Applicants' second review ground is that the Final EIR failed to consider the mandatory considerations prescribed by ICMA. We address this review ground as follows:

- 72.1. First, we provide an overview of ICMA and the relevant mandatory considerations.
- 72.2. Second, we identify the ICMA Factors relevant to Proposed Project.
- 72.3. Third, we address the failure of the State Respondents to consider the mandatory considerations.
- 72.4. Fourth, we address the defences raised by the respondents.

An overview of ICMA

73. The National Environmental Management: Integrated Coastal Management Act ("ICMA"),⁷⁶ is one of the specific environmental management Acts contemplated by NEMA.⁷⁷ It was enacted to:⁷⁸

⁷⁶ 24 of 2008

⁷⁷ NEMA section 1 "specific environmental management Act"; ICMA section 5(2).

⁷⁸ ICMA, section 2.

- 73.1. provide for the co-ordinated and integrated management of South Africa's coastal zone.
- 73.2. preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans including future generations.
- 73.3. secure equitable access to the opportunities and benefits of coastal public property.
- 73.4. to provide for the establishment, use and management of the coastal protection zone.
- 73.5. to give effect to the Republic's obligations in terms international law regarding coastal management and the marine environment.
- 74. ICMA provides that coastal public property includes South Africa's coastal waters,⁷⁹ which is defined as including South Africa's territorial waters and South Africa's exclusive economic zone.⁸⁰
- 75. The Proposed Project is planned to take place within South Africa's exclusive economic zone,⁸¹ and therefore falls within coastal public property and is subject to ICMA.
- 76. ICMA obliges the State to:

⁷⁹ ICMA section 7(1)(a).

⁸⁰ ICMA section 1 "coastal waters".

⁸¹ FA p. 46 para. 98; Total AA p. 2965 para. 84.

- 76.1. ensure that coastal public property is used, managed, protected, conserved and enhanced in the interest of the whole community.⁸²
- 76.2. take reasonable legislative and other measures necessary to protect coastal public property for the benefit of present and future generations.⁸³
- 76.3. control and manage activities in coastal waters in the interests of the whole community and in accordance with South Africa's obligations under international law.⁸⁴
- 77. Consideration of the interests of the whole community is a concept unique to ICMA. It is defined as meaning the collective interests of the community determined by:⁸⁵
 - 77.1. prioritising the collective interests in coastal public property of all persons living in South Africa of the interests of any particular group;
 - 77.2. adopting a long-term perspective the takes into account the interests of future generations in inheriting coastal public property characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable; and
 - 77.3. taking into account the interests of other living organisms that are dependent on the coastal environment.

⁸² ICMA section 12.

⁸³ ICMA section 12.

⁸⁴ ICMA section 21.

⁸⁵ ICAM section 1 "interest of the whole community".

78. Section 63 of ICMA prescribes certain factors which must be taken into account when a competent authority considers granting an environmental authorisation for coastal activities. These include:
- 78.1. whether coastal public property will be affected and, if so, the extent to which the proposed development is consistent with the purpose of protecting that property;⁸⁶
 - 78.2. if an activity affects coastal public property then whether it is inconsistent with the objective of conserving coastal public property for the benefit of current and future generations;⁸⁷
 - 78.3. whether the activity would be contrary to the interests of the whole community;⁸⁸ and
 - 78.4. the objects of ICMA.⁸⁹
79. In *Sustaining the Wild Coast* the Makhanda High Court held that a failure to consider ICMA renders the decisions at issue reviewable.⁹⁰

⁸⁶ ICMA section 63(1)(c).

⁸⁷ ICMA section 63(1)(h)(i).

⁸⁸ ICMA section 63(1)(h)(vii).

⁸⁹ ICMA section 63(1)(k).

⁹⁰ *Sustaining the Wild Coast NPC v Minister of Mineral Resources* 2022 (6) SA 589 (ECMk), para. 130. This finding was not disturbed on appeal, see *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA), para. 25.

ICMA and the Proposed Project

80. As the Proposed Project is subject to ICMA, the Decision Makers were required to consider (amongst other requirements) the following ICMA Factors.

80.1. Whether the Proposed Project would affect coastal public property.

80.2. Whether the Proposed Project is consistent with the object of conserving and enhancing coastal public property for the benefit of current and future generations.

80.3. Whether the Proposed Project is contrary to the interests of the whole community.

(“the ICMA Factors”)

The DG’s failure to consider the ICMA Factors.

81. The DG’s Decision does not consider the ICMA Factors.⁹¹ The DG’s Decision:

81.1. lists the information considered. While this is not a closed list, it does not mention ICMA.⁹²

81.2. lists the key findings made. None of these relate to ICMA or the ICMA Factors.⁹³

⁹¹ FA p. 50 para. 106. This finding was not disturbed on appeal, see *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA), para. 25.

⁹² FA Annexure FA 4 p. 110.

⁹³ FA Annexure FA 4 p. 111.

82. Accordingly, the DG's Decision completely failed to consider the ICMA Factors.

83. Therefore the DG Decision stands to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

The Minister's Decision

84. While the Minister's Decision purports to be a decision on appeal in the wide sense,⁹⁴ when it is read as a whole it is clearly structured as a response to the appeal grounds raised by the various appellants.

85. The failure to consider ICMA was raised before the Minister.⁹⁵ The Minister dismissed this issue in a single paragraph which reads:⁹⁶

Having considered the grounds of appeal and the responses thereto, I determine that the grant of the EA read together with the general and specific conditions and the identification of the potential impacts and mitigation measure of the project, the authorisation was rational and reasonable and that the provisions of the ICMA and section 63 were considered. In any event, I have considered in the appeal and I am of the view that the authorisation is rational and reasonable.

86. The Minister's Decision in this regard is woefully deficient in a number of ways.

87. Firstly, the Minister's Decision does not identify any portions of the DG's Decision which considered the ICMA Factors. It could not do so because the DG's Decision failed to consider the ICMA Factors at all.

⁹⁴ FA Annexure FA 6 p. 165 para. 1.18.

⁹⁵ FA Annexure FA 6 p. 292 para. 2.77.2.

⁹⁶ FA Annexure FA 6 p. 298 para. 2.80.

88. Second, the Minister purports to have considered the ICMA Factors in the Minister's Decision but fails to set out any findings in respect of the ICMA Factors.
89. Accordingly, the Minister's Decision also clearly failed to consider the ICMA Factors. Therefore, the Minister's Decision also stands to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.
90. Even if it were found that the Minister's Decision did consider the ICMA Factors, the Minister's Decision would remain reviewable.
91. Section 5(3) of PAJA obliges an administrative decision maker to provide adequate reasons for their decision. The Minister's Decision plainly includes the reasons for the Minister's Decision. The Minister is bound by those reasons and cannot, after the fact, provide additional reasons.⁹⁷
92. In *Gavric*, the Constitutional Court held that reasons must be more than mere conclusions and must refer to the relevant facts and law as well as the reasoning process which led to the conclusions in question.⁹⁸
93. Similarly *Phambili Fisheries*⁹⁹ and *Sprigg Investment*,¹⁰⁰ accepted the following explanation of adequate reasons:

⁹⁷ *Umgeni Water v Sembcorp Siza Water (Pty) Ltd* 2020 (2) SA 450 (SCA), para. 52.

⁹⁸ *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC), para. 69.

⁹⁹ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA), para. 40.

¹⁰⁰ *Commissioner, South African Revenue Service v Sprigg Investment* 117 CC 2011 (4) SA 551 (SCA), 12.

[...] the decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact, on which conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matter will depend upon considerations such the nature and importance of the decision, its complexity and the time available to formulate the statement. Often these facts may suggest a brief statement of one or two pages only.

94. To the extent the Minister considered the ICMA Factors, the Minister's Decision does not provide anything other than a mere conclusion, and even that is expressed in the vaguest possible terms.
95. Therefore, the Minister's Decision does not provide adequate reasons and the Minister's Decision's stands to be reviewed and set aside in terms of sections 6(2)(e)(iv)¹⁰¹ and 6(2)(f)(ii)(aa) to (cc)¹⁰² of PAJA.

Total's Response

96. Total's response to this review ground comprises:

¹⁰¹ *Minister of Justice v SA Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC), para. 55; *Bapedi Marota Mamone v Commission on Traditional Leadership Disputed and Claim* 2015 BCLR 268 (CC), para. 62.

¹⁰² *Bapedi Marota Mamone v Commission on Traditional Leadership Disputed and Claim* 2015 BCLR 268 (CC), para. 62.

- 96.1. a tabulated list of various portions of the Final EIR which it contents amounts to a consideration of the ICMA Factors.¹⁰³
- 96.2. a contention that the DG's Decision considered the Final EIR and, therefore, considered the ICMA Factors.¹⁰⁴
- 96.3. a contention that the Minister's Decision took the ICMA Factors into account.¹⁰⁵
- 97. The highwater mark of Total's case is that the Final EIR referred to some of the effects which the Proposed Project will have on various components of the marine environment.
- 98. On that basis it contends that the Final EIR, the DG's Decision, and the Minister's Decision considered the ICMA Factors. However, this contention is patently unsustainable because none of those documents make any attempt to explain their findings relating to:
 - 98.1. whether coastal public property would be affected by the Proposed Project;
 - 98.2. whether the Proposed Project is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations; or,

¹⁰³ Total AA pp. 2966 to 2971.

¹⁰⁴ Total AA p. 2971 para. 89 to 90.

¹⁰⁵ Total AA p. 2972 pp. 93 to 96.

- 98.3. whether the Proposed Project would be contrary to the interests of the whole community.
99. Furthermore, ICMA confers a special legal status on coastal public property, which afforded that environment a particularly high level of protection.¹⁰⁶ As such, ICMA's requirements cannot be satisfied by generic consideration of NEMA.
100. That the ICMA's approach to coastal public property is unique is self-evident.
- 100.1. It expressly provides that the State holds the coastal public property in trust for current and future generations.
- 100.2. It creates the concept of the interests of the whole community, which specifically recognises the need to take into account the interests of other living organisms which are dependent on the coastal environment.
101. These concepts are not present in NEMA or other aspects of environmental law.
102. Accordingly, it cannot be held that the Decisions under Review considered the ICMA Factors incidentally without providing any reasoning relating to these factors. Such an approach would fundamentally circumvent ICMA.

¹⁰⁶ *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk), paras. 128 to 132. This finding was not disturbed on appeal (see: *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA), para. 35).

103. Therefore, Total's response to the second review ground has no merit.

The State's response

104. The State's response to the second ground of review is notable for two reasons. First, it is manifestly unsound. Second, it directly contradicts Total's response.

105. The State contends that there is no merit to this ground of review because:¹⁰⁷

105.1. the areas of interest or drilling do not overlap with any marine protected area.

105.2. the Final EIR reviewed the critical biodiversity areas and ecologically or biologically significant marine areas.

105.3. the EA conditions mandate Total to conduct a pre-drilling survey to gather information on seabed habitats and if sensitive habitats are detected this will be addressed.

106. None of these contentions amount to an allegation that the Director General or the Minister considered the ICMA Factors. In fact, these contentions have nothing to do with the ICMA Factors.

107. Therefore, the State's response to the second review ground has no merit.

108. However, it is notable that the State has not alleged that the DG or the Minister took into account the ICMA Factors in the manner which Total contends (i.e.

¹⁰⁷ State AA p. 2486 para. 122

through the various passage of the Final EIR identified by Total). This directly contradicts Total's response and is destructive of that response.

Conclusion regarding the second review ground

109. We submit that the Applicants have established that DG and the Minister failed to consider the ICMA Factors.

110. Therefore, the Decisions under Review stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

3RD REVIEW GROUND: THE FAILURE TO CONSIDER CLIMATE CHANGE AS PART OF NEED AND DESIRABILITY

111. The Applicant's third review ground is that the Final EIR's assessment of need and desirability was fatally flawed because it failed to take into account the climate change impacts which will be caused by burning any fossil fuels discovered by the Proposed Project¹⁰⁸

112. In essence, the entire approach adopted by the Final EIR is flawed because it acknowledges that the need for the Proposed Project stems from the objective of locating gas to be burnt to create electricity.¹⁰⁹ However, it fails to consider the climate change impacts that combustion will cause. In other words, its assessment of need and desirability relies on the positive impact of burning gas but excludes the negative impacts which that would cause.

¹⁰⁸ FA p. 55 para. 122 and 123.

¹⁰⁹ FA Annexure FA6, p. 240 para 2.39; FA p. 55 para. 123.2.

The obligation to consider need and desirability

113. In *Fuel Retailers*, the Constitutional Court held that a decision to grant an environmental authorisation would be reviewable where the decision makers did not consider the need and desirability of the proposed project.¹¹⁰ The consideration of need and desirability is also specifically required by the EIA Regulations.¹¹¹

114. The consideration of need and desirability is a key factor in a decision to grant an environmental authorisation.¹¹²

115. *Fuel Retailers* indicates that the following considerations ought to inform the inquiry into need and desirability.

115.1. Environmental decisions must balance environmental and socio-economic developmental considerations through the concept of sustainable development.¹¹³

115.2. The need for development must be determined by: its impact on the environment; sustainable development; and, social and economic interests. Environmental authorities must integrate these factors into their decision-making.¹¹⁴

¹¹⁰ 2007 (6) SA 4 (CC).

¹¹¹ EIR Regulations Appendix 3, item 3(1)(j).

¹¹² *Pine Glow Investments (Pty) Ltd v Brick-On Brick Property Investments 23 (Pty) Ltd* 2019 JDR 1681 (MN) para. 49.

¹¹³ *Fuel Retailers*, para. 61.

¹¹⁴ *Fuel Retailers*, para. 79.

115.3. The objectives of integrated environmental management.¹¹⁵ This includes that the effects of activities on the environment must be considered before actions are taken in connection with them.¹¹⁶

115.4. Unsustainable developments are inherently detrimental to the environment especially if they entail potential threats to the environment.¹¹⁷

116. Put simply, the evaluation of need and desirability is concerned with whether the broader public need that the activity in question proposes to address justifies the environmental risks or impacts that would accompany it, and whether authorising the activity concerned represents an appropriate balancing of developmental and environmental considerations.

The deficient consideration of need and desirability

117. The Final EIR's assessment of need and desirability is deficient in that it fails consider the climate change impacts which will be caused by burning any fossil fuels discovered by the Proposed Project

118. In *Sustaining the Wild Coast* the Makhanda High Court accepted that a need and desirability assessment for a fossil exploration project ought to consider the consequence of burning any fossil fuels discovered.¹¹⁸ The Supreme

¹¹⁵ *Fuel Retailers*, para. 63 to 69.

¹¹⁶ NEMA, section 23(2)(c).

¹¹⁷ *Fuel Retailers* para. 74.

¹¹⁸ *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk), paras. 120 to 125.

Court of Appeal did not disturb the finding that it was necessary to assess the climate change impacts of burning any fossil fuels discovered.¹¹⁹

119. The Final EIR does not consider the greenhouse gas emissions which will be caused by burning any gas discovered by the Proposed Project and by any fugitive emissions.¹²⁰

120. As the Supreme Court of the United Kingdom accepted in *Surrey County Council*.¹²¹

The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming.

121. The need and desirability inquiry undertaken by both the EAP and the decision-makers treated the exploration activities as an end in and of themselves and an activity directed at the “generation of information on possible indigenous resources”.¹²² Adverse consequences related to the production stage were postponed to a future environmental impact assessment process.

¹¹⁹ We note that the SCA indicated that it could not endorse a finding that the suggestion that authorizing new oil and gas exploration is not consistent with South Africa complying with its international climate changes commitments.

¹²⁰ FA p. 54 para. 122; Total AA p. 2975 para. 106, para. 112.2 p. 2981.

¹²¹ *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20, para. 2

¹²² Total AA para 110.2.1, p. 2976 to 2977.

122. The respondents contend that this was the appropriate and correct scope for the assessment. They rely on a purported distinction between exploration and production¹²³ and contend that “*large uncertainties*” regarding “*the type of hydrocarbons, size of the discover, quality of the reservoirs, the spatial extension of the area to be developed and the way to develop and economically produce the targeted discovery in a success case*” mean that it is unreasonable to consider factors relating to the production phase in this context.¹²⁴
123. Notwithstanding this stance, the decision-makers determined that the exploration activities were “needed” and “desirable” by reference to the benefits that would be realised at production phase.
124. The particular need that the exploration activities were said to cater to was the need for gas to generate electricity in South Africa.¹²⁵
125. As a result, the Final EIR’s assessment of need and desirability is fundamentally flawed. The need it seeks to address is the discovery of gas, for the purpose of burning that gas to generate electricity. However, it fails to balance need against the associated climate change impacts. In other words the Final EIR includes the benefits of burning the gas but not the negative environmental impacts of doing so.

¹²³ FA Annexure FA6 para 2.4 to 2.7; p 179 to 180; Total AA para 106 to 107 p. 2975.

¹²⁴ Total AA, para 110.2.1 p. 2976 to 2977.

¹²⁵ FA Annexure FA6, para 2.39 p. 240; FA para. 123.2 p. 55.

126. In consequence of this incomplete and asymmetric assessment of need and desirability, the Decision Makers approved the exploration activities (with all of the attendant environmental risks and impacts) without giving any consideration to the following highly material considerations:

126.1. Any gas field developed on the project area would produce gas far in excess of what is “needed” to satisfy the gas requirements of the IRP. Mr. Hilton Trollip, an engineer and energy systems expert with over 40 years of relevant experience, has calculated that, to be commercially feasible, a gas field on the project area would need to be capable of producing 50 to 100 petajoules of gas per annum.¹²⁶ On the other hand, the new gas utilisation envisaged by the IRP 2019 represents demand of approximately 6 petajoules per annum from 2024 and thereafter 19 petajoules per annum from 2027.¹²⁷ The production phase would accordingly produce 5 to 10 times what is required for domestic electricity generation.

126.2. The gas, once produced, would inevitably be consumed generating greenhouse gasses. If the consumption occurs in South Africa, it would have significant implications for compliance with the country’s emissions reduction targets. It would also be calculated to worsen the global climate crisis with ramifications for environmental conditions in South Africa. This consideration was omitted from consideration

¹²⁶ Hilton Trollip Affidavit p. 2345 para 21.

¹²⁷ Hilton Trollip Affidavit p. 2346 para 24.

entirely on the basis that it would only become relevant when Total applies for environmental authorisation of the production phase.¹²⁸

126.3. The ecological impact associated with predictable aspects of a production operation, namely, the establishment of infrastructure, the drilling of wells, and the operation of transportation facilities.

127. Total disputes Mr. Trollip's evidence and asserts that it is not possible to predict the volumes of gas that could in future be extracted from a field on the project area. According to Total, this exercise amounts to speculation and cannot produce an accurate result due to unknown variables relating to the scale of the development,¹²⁹ the type of resource,¹³⁰ the costs of extracting and processing the gas.¹³¹ These contentions are implausible in light of Mr. Trollip's detailed evidence to the effect that the economics of oil and gas production demand that feasibility assessments are conducted at every juncture of the project based on cost elements and revenue elements, which in turn requires projections as to volume.¹³²

128. In the circumstances, the Final EIR plainly premised the need and desirability of the Proposed Project on the assumption that any gas discovered will, in due course, be combusted to produce energy. As such, the climate change impacts are plainly relevant to need and desirability. Any other conclusion would, effectively, permit consideration of applications for environmental

¹²⁸ FA Annexure FA 6, pp. 179 to 180 para 2.4 to 2.7.

¹²⁹ Total's AA p. 2988 para 125.1.

¹³⁰ Total's AA p. 2988 para 125.2.

¹³¹ Total's AA p. 2988 para 125.3.

¹³² Trollip RA p. 3185 para 21.

authorisation to take into account the positives of a proposed project while excluding the negatives. That is not permissible in law.

129. Therefore, the Decisions under Review stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

4TH REVIEW GROUND: FAILURE TO ASSESS TRANSBOUNDARY IMPACTS

130. The Applicants' fourth review ground is that the Final EIR failed to consider the transboundary impacts of an oil spill caused by the Proposed Project.¹³³

131. Total¹³⁴ and the State¹³⁵ do not dispute that these impacts were not considered. Rather they contend that there was no obligation to consider transboundary impacts.¹³⁶

132. In what follows we:

132.1. set out the transboundary impacts which were predicted, but not assessed, in the Final EIR; and,

132.2. set out the basis of the obligation to assess transboundary impacts.

133. As will become apparent, the critical question is whether NEMA should be interpreted to require the assessment of transboundary impacts. We show, unequivocally, that it does.

¹³³ FA p. 57 para. 129.

¹³⁴ Total AA p. 2991 para. 140.

¹³⁵ State AA p. 2490 para. 130.

¹³⁶ Total AA p. 2992 para. 140; State AA p. 2490 para. 130.

The predicted transboundary impacts

134. A well blowout and consequent oil spill caused by the Proposed Project would pose a risk of oil reaching international waters, Namibian waters and the Namibian shoreline.

135. The Final EIR records the following regarding the potential impacts of an oil spill caused by the Proposed Project:

135.1. Modelling results show that, depending on the time of year, the coast from southern Namibia to Gqeberha could be at risk in the event of an oil spill.¹³⁷

135.2. In the event of a blow out at the postulated Release Point 1, there would be a probability of shoreline oiling from Plettenberg Bay to north of the Namibian border.¹³⁸

135.3. In the event of blowout in June to August the strong currents and winds would result in oil from Release Point 1 entering Namibian waters and oil from Release Point 2 would enter international waters beyond South Africa's exclusive economic zone.¹³⁹

136. The Oil Spill Report also records that:

136.1. where the response to a blow out at Release Point 1 was limited to capping only, there would be:

¹³⁷ FA p. 57 para. 130.

¹³⁸ FA p. 59 para. 137.1.

¹³⁹ FA p. 59 para. 137.2

136.1.1. a risk of oil reaching the surface of Namibian or international waters in seasons 1, 2, 3, and 4.¹⁴⁰

136.1.2. a risk of shoreline oiling in Namibia in seasons 3 and 4.

136.2. Where the response to a blow out at Release Point 1 was capping, surface response and SSD, there would be a risk of oil reaching the surface of Namibian or international waters in seasons 1, 2, 3, and 4.¹⁴¹

137. The Socio-Economic Impact Reports records that both pre and post mitigation socio-economic effects of a well blowout would have an international extent.¹⁴²

138. None of this is disputed by Total or the State.

The obligation to assess transboundary impacts

139. Neither NEMA nor the EIA Regulations expressly address whether or not an environmental impact assessment must assess the transboundary impacts of a proposed project.

140. Accordingly, this Court must interpret NEMA to determine whether this is nonetheless required in the absence of an explicit requirement.

¹⁴⁰ FA p. 60 para. 140.

¹⁴¹ FA p. 60 para. 140.

¹⁴² FA p. 62 para. 142.

141. In *Capitec* the Supreme Court of Appeal provided the following summary the process of statutory interpretation.¹⁴³

The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself'.

142. When NEMA is interpreted in the light of its context and purpose it is clear that an assessment of transboundary impacts is required.
143. As set out above, NEMA and the EIA Regulations create the legal obligation to conduct an environmental impact assessment for the Proposed Project. This obligation originates in the concept of integrated environmental management created by Chapter 5 of NEMA.
144. The objectives of integrated environmental management indicate transboundary impacts must be assessed. NEMA defines the object of integrated environmental management to include the following.

¹⁴³ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA), para. 25.

- 144.1. The identification, prediction, and evaluation of the actual and potential impact of an activity on the environment, socio-economic conditions, and cultural heritage.¹⁴⁴
- 144.2. Ensuring that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them.¹⁴⁵
145. Section 2(1) of NEMA provides that the NEMA principles apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. These principles also indicate that transboundary impacts must be assessed. Specifically, the NEMA principles provide *inter alia* that:
- 145.1. pollution and degradation of the environment should be avoided or, where this cannot be avoided, minimised and remedied.¹⁴⁶
- 145.2. that the negative impacts on the environment (and on people's environmental rights) should be anticipated and prevented or, where they cannot be prevented, minimised and remedied.¹⁴⁷
- 145.3. global and international responsibilities to the environment must be discharged in the national interest.¹⁴⁸

¹⁴⁴ NEMA section 23(2)(b).

¹⁴⁵ NEMA section 23(2)(e).

¹⁴⁶ NEMA section 2(4)(a)(ii).

¹⁴⁷ NEMA section 2(4)(a)(viii).

¹⁴⁸ NEMA section 2(4)(n).

146. Accordingly, both the objectives of integrated environmental management and the NEMA principles place emphasis on anticipating, considering, and preventing (or minimising) harmful effects on the environment.

147. Notably, the definition does not limit the “environment” which is protected by NEMA as the environment within the borders of South Africa. NEMA’s definition of the environment reads:

the surroundings within which humans exist and that are made up of:

- (i) the land, water and atmosphere of the earth.*
- (ii) micro-organisms, plant and animal life.*
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and*
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.*

148. Accordingly, the text of NEMA, read in context, clearly supports an interpretation which requires the assessment of transboundary impacts.

149. This is reinforced by the decision of the Mpumalanga High Court in *Mining and Environmental Community of South Africa*¹⁴⁹ which found an environmental decision to be reviewable on the basis of a failure to consider South Africa’s international responsibilities.

¹⁴⁹ *Mining and Environmental Community of South Africa v MEC for Agriculture, Rural Developments and Environmental Affairs* 2024 JDR 3051 (MN), para. 8

150. Even if there were any ambiguity in this regard, it is removed when regard is had to the role South Africa's international obligations have on the interpretation of NEMA. This is addressed below.

International obligations and the interpretation of NEMA

151. Section 2(1) of NEMA provides that the NEMA principles must guide the interpretation of NEMA. Therefore, section 2(4)(n) of NEMA indicates that South Africa's international obligations have an important role to play in interpreting NEMA.
152. This is also reinforced by the Constitution. Section 232 of the Constitution provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.
153. Section 233 of the Constitution provides that when interpreting legislation every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation which is inconsistent with international law.
154. South Africa is subject to numerous international obligations which require the assessment of transboundary impacts of projects which take place in South Africa.

155. The *Trail Smelter Arbitration*,¹⁵⁰ is one of the foundation cases on international environmental law, dating back to 1941.¹⁵¹ It concerned a claim for damages for environmental harm caused in the United States by a zinc and lead smelter in Canada.¹⁵² It accepted that international law provided that no state could use, or permit its territory to be used in a manner which causes injury in or to the territory of another state.¹⁵³
156. This is a recognition of a substantive international law obligation on a state not to allow its territory to be used in a manner which causes transboundary harm.
157. In the *Pulp Mills Case*, the International Court of Justice accepted that international law requires an environmental impact assessment to be conducted where an activity poses a risk of transboundary harm.¹⁵⁴ Specifically it held:

[...] In this sense, the obligation to protect and preserve, under article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environment impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, the duty of due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning work liable to affect the regime of the river or the quality of its waters

¹⁵⁰ *Trail Smelter Case (United States, Canada)* Reports of International Arbitral Awards Vol. 3 (1905 – 1982) p. 1907.

¹⁵¹ Glazewski (Ed) *Environmental Law in South Africa* October 2023 SI 11, p. 2-12.

¹⁵² *Trail Smelter Case (United States, Canada)* Reports of International Arbitral Awards Vol. 3 (1905 – 1982) p. 1907, at pp. 1938 and 1941.

¹⁵³ *Trail Smelter Case (United States, Canada)* Reports of International Arbitral Awards Vol. 3 (1905 – 1982) p. 1907, at p. 1965.

¹⁵⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment* I.C.J. Reports 2010 p. 14, at para 204.

did not undertake an environmental impact assessment on the potential effects of such works.

158. This is a well-established rule of customary international law. The *Pulp Mills* Case also held that:¹⁵⁵

The Court points out that that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” [...]. A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing damage to the environment of another State. This Court has established that this obligation “is now part of the of the corpus of international law relating to the environment”.

159. The need to address transboundary impacts is also addressed in the United Nations *Rio Declaration on Environment and Development*.¹⁵⁶ Article 2 of this Declaration reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.

¹⁵⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment* I.C.J. Reports 2010 p. 14, at para 101.

¹⁵⁶ *Rio Declaration on Environment and Development* A.CONF/151.26 (Vol. 1).

160. South African courts have frequently cited the Rio Declaration.¹⁵⁷ In *Fuel Retailers* the Constitutional Court held that:¹⁵⁸

[...] The Rio Declaration is especially important because it reflects a real consensus in the international community on some core principles of environmental protection and sustainable development. [...]

161. The Rio Declaration is the most generally accepted formulation of the main principles of international environmental law.¹⁵⁹
162. South Africa is also subject to a number of specific international agreements which require the assessment of transboundary impacts.
163. Most notably, South Africa is a party to the Abidjan Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central Africa Region.¹⁶⁰ Article 13(2) of this Convention obliges South Africa to endeavour to include an assessment of the potential environmental effects of an activity within South Africa on the Convention Area. The Convention Area includes the marine environment off the coast of Namibia.

¹⁵⁷ See e.g. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC), para. 49; *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries* 2024 JDR 4540 (SCA), para. 11; *Forestry South Africa v Minister of Human Settlements, Water & Sanitation* 2021 JDR 1905 (WCC), para. 185.

¹⁵⁸ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC), para. 49

¹⁵⁹ Dupuy & Vinuales *International Environmental Law* Second Edition Cambridge University Press, p. 15

¹⁶⁰ FA p. 65 para. 158.

164. Accordingly, international law clearly recognises that:

164.1. States have a duty not to allow activities in their territory to cause transboundary harm.

164.2. States have a duty to ensure that where activities in their territory may cause transboundary harm, this harm is assessed as part of an environmental impact assessment.

165. Interpreting NEMA and the EIA not to require environmental impact assessment to assess and predict transboundary harm would clearly be inconsistent with international law. An interpretation requiring such an assessment would not be unreasonable, particularly given that the NEMA principles themselves recognises the need to discharge global and international responsibilities. Therefore, section 233 of the Constitution obliges this Court to prefer an interpretation of NEMA which requires an assessment of Proposed Project's transboundary impacts.

166. In any event, these international obligations are part of customary international law and, therefore, are South African law in terms of section 232 of the Constitution. Lastly, common sense dictates that the state in which a project will take place must ensure that transboundary impacts are assessed. The Proposed Project is located in South Africa. Namibia has no jurisdiction to exercise any control over the Proposed Project and, accordingly, it powerless to force Total to assess the impacts which the Proposed Project would have

on Namibia. To hold otherwise would create a dangerous, and easily exploitable, lacuna.

Subsidiarity is not relevant

167. Total contends that the fourth review ground falls foul of the principle of subsidiarity.¹⁶¹

168. The principle of constitutional subsidiarity provides that where legislation has been enacted to give effect to a constitutional right, then a litigant must rely on the legislation to enforce that right or challenge the constitutionality of the legislation.¹⁶²

169. In *New Clicks* the operation of the subsidiarity principle as follows:¹⁶³

*Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question. Thus in *Bato Star* this Court held that '(t)o the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant in the context of PAJA, they erred'. A fortiori here where the cause of action is expressly founded on PAJA.*

¹⁶¹ Total AA p. 2993 para. 144.

¹⁶² *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), para. 73.

¹⁶³ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), para. 437; *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC), para. 165.

170. The Applicants do not rely directly on section 24 of the Constitution. The Applicants' case is advanced on the basis that NEMA, properly interpreted, requires that transboundary impact of projects located in South Africa to be assessed.
171. There is nothing in the Applicants' case which triggers the principle of subsidiarity.
172. That sections 24, 232 and 233 of the Constitution are relevant to the interpretation of NEMA does not implicate subsidiarity.
 - 172.1. Section 232 imports customary international law into South Africa.
 - 172.2. The wording of section 233 clearly indicates that it is intended to be used to interpret South African legislation.
 - 172.3. Section 39(2) of the Constitution provides that when courts interpret South Africa legislation they must promote the spirit, purport, and objects of the Bills of Rights. Accordingly, the relevance of section 24 of the Constitution to the interpretation of NEMA is consistent with the Constitution.
173. In any event the ICMA expressly requires the State Respondent to give effect to international law. One of the objects of ICMA is to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment (section 2(e)) and section 21

requires the State to control and manage activities within coastal waters in accordance with the Republic's obligations under international law.¹⁶⁴

Subsidiarity is simply not relevant because the Applicant's do not rely directly on the Constitutional Rights but rather refer to these provisions in the context of interpretation of NEMA.

Conclusion on the fourth review ground

174. Therefore, NEMA required the Final EIR to assess the environment impact of the transboundary impacts it predicted may be caused by the Proposed Project.

175. The Final EIR failed to assess those transboundary impacts and the DG's Decision and the Minister's Decision failed to take those impacts into account.

176. Therefore, the Decisions under Review stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

5TH REVIEW GROUND: BLOW OUT AND OIL SPILL CONTINGENCY PLANS

177. The Applicant's fifth review ground relates to the failure to include the Blow Out Contingency Plan ("BOCP") or the Oil Spill Contingency Plan ("OSCP") for the Proposed Project in the Final EIR.

¹⁶⁴ "21. **Control and management of coastal waters.**—An organ of state that is legally responsible for controlling or managing any activity on or in coastal waters, must control and manage that activity—
(a) in the interests of the whole community; and
(b) in accordance with the Republic's obligations under international law."

178. The Final EIR describes the OSCP as specifying:¹⁶⁵

178.1. how best to control an oil spill.

178.2. how to prevent certain sensitive environments from exposure to oil.

178.3. what can be done to minimise the damage done by an oil spill.

179. The Final EIR provides that the BOCP will set out the detailed response plan to be implemented in the event of a well blowout.¹⁶⁶

180. Together the OSCP and BOCP set out Total's plans for how it will respond to a well blowout and oil spill.

181. The Oil Spill Report notes that because the OSCP has not been prepared, the Oil Spill Report is prepared on the assumption that the OSCP will accord with the oil spill contingency plan prepared for a different project.¹⁶⁷

182. Both the OSCP and the BOCP are listed in the Final EIR as "*Project Control / Key Mitigation*".¹⁶⁸

183. However, the OSCP and BOCP were:¹⁶⁹

183.1. not prepared for the Final EIR and were not available to the Decision Makers;

¹⁶⁵ FA p. 70 para. 176.

¹⁶⁶ FA p. 70 para. 179.

¹⁶⁷ FA p. 70 para. 180.

¹⁶⁸ FA p. 70 para. 177.

¹⁶⁹ FA p. 71 para. 181.

- 183.2. not available as part of the public participation process for the Proposed Project;
- 183.3. not available to the Decision Makers when the Decisions under Review were taken; and
- 183.4. not included in the environmental management program (“EMPR”) for the Proposed Project.
184. The DG’s Decision does not give any consideration to the OSCP, the BOCP, or their absence, save for a vague references to Total having strategies in place to deal with a well blow out.¹⁷⁰
185. The Minister’s Decision records that she is satisfied that the OSCP and BOCP will be put in place and will adequately mitigate the severity of an unplanned oil spill.¹⁷¹
186. Condition 5.5.5 of the EA required Total to prepare OSCP and BOCP 60 days prior to commencing drilling operations.¹⁷² It obliges Total to submit these plans. Although, the condition is silent on who these plans should be submitted to (presumably it is the DG) or what powers the recipient has in relation to those plans.

¹⁷⁰ FA p. 71 para. 182.

¹⁷¹ FA p. 72 para. 187.

¹⁷² FA p. 71 paras. 183 to 185.

187. The manner in which the OSCP and BOCP have been handled has two significant flaws. These are addressed below.

No public participation regarding the OSCP and BOCP

188. One of the foundational principles of NEMA is that the participation of all interested and affected parties must be promoted and the participation of disadvantaged people must be ensured.¹⁷³

189. Public participation must provide interested and affected parties with a reasonable opportunity to influence the outcome of the decision at hand.¹⁷⁴

190. Section 24(4)(a)(v) of NEMA provides that interested and affected parties must be given a reasonable opportunity to participate in the environmental impact assessment process.

191. As set out above, the OSCP and BOCP are the documents which will define Total's plans manage and mitigate a well blowout and oil spill caused by the Proposed Project.

192. Section 24(4)(b)(ii) of NEMA provides that the environmental impact assessment process must include an investigation of the mitigation measures to keep adverse impact to a minimum.

193. Accordingly, the environmental impact assessment process for the Proposed Project ought to have included public participation in respect of the BOCP and OSCP.

¹⁷³ NEMA, section 2(4)(f). See also: Regulation 41(6) of the EIA Regulations.

¹⁷⁴ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), para. 171.

194. In this instance, the failure to provide for such public participation has been compounded. The Oil Spill Report expressly records that it has been prepared on the assumption that the OSCP will be consistent with the oil spill contingency plan for another project.
195. Accordingly, the Oil Spill Report is only a relevant assessment of the impacts of an oil spill if the OSCP eventually adopted accords with the oil spill plan which underlies Oil Spill Report. However:
- 195.1. the public participation process for the Final EIR and the Oil Spill Report did not, and could, include the OSCP.
- 195.2. condition 5.5.5 of the EA (which mandates the preparation and submission of the OSCP) does not cater for any public participation in respect of the OSCP.
196. Accordingly interested and affected parties were not afforded a reasonable opportunity to participate in the assessment of the impacts (and mitigation measures) in respect of an oil spill caused by the Proposed Project. Therefore, there has not been a proper public participation process.

The OSCP and BOCP ought to have been part of the EMPR

197. Section 24N(2)(g) of NEMA provides that an EMPR must include a description of the manner in which it intends to control, stop or remedy any activity or process which cause pollution.

198. Item 1(1)(f) of Appendix 4 to the EIA Regulation provides that an EMPR must include a description of the proposed impact management actions relating to activities or process which causes pollution.
199. The OSCP and the BOCP are Total's plans to control pollution caused by the Proposed Project and they ought to have formed part of the EMPR. Their absence is yet another indication of a flawed process.

The defences regarding public participation.

200. The State contends that the EA conditions mandate that OSCP and BOCP be subject to a public participation process before the commencement of drilling operations.¹⁷⁵ Tellingly, it does not refer to where this requirement is located in the EA. That is because the EA does not contain such a requirement.
201. Total does not appear to respond directly to the question of public participation. However it does allege that its generic Oil Spill Contingency Plan was made available to interested and affected parties.¹⁷⁶
202. This allegation does not refute the fifth review ground. The central tenet of Total's answer to this review ground is that its oil spill contingency plan could not be prepared at the same time as the Final EIR as a site specific plan was required.¹⁷⁷ Accordingly Total contemplates filing an OSCP which differs (or at least may differ) from its generic plan. Therefore, in the absence of mechanism to cater for public participation in the OSCP the fact that a generic

¹⁷⁵ State AA p. 2492 para. 136.

¹⁷⁶ Total AA p. 3002 para. 175.

¹⁷⁷ See e.g. Total AA p. 3002 para. 176.

plan was made available does not establish that a reasonable public participation process has been followed.

203. Furthermore, Total's response to the internal appeal indicates that it has no intention of allowing public participation in respect of the OSCP and BOCP. That response denies there is a legal obligation to provide for such public participation and alleges, without evidence, that the OSCP and BOCP will contain proprietary information.¹⁷⁸ These documents relate to how Total will respond to an oil spill caused by the Proposed Project. There is no basis for them to be secret, much less for such a contention to be accepted without evidence.

The defences relating to practicality

204. The main thrust of Total's response regarding the fifth review ground is that the OSCP and BOCP are significantly influenced by the location of the wells to be drilled and it would be impractical and overly burdensome to prepare these plans based on preliminary locations and then revise them for the final location.¹⁷⁹

205. There is no merit to this argument for three reasons.

205.1. First, inconvenience or expense to Total does not warrant failing to comply with the prescripts of NEMA and the EIA Regulations.

¹⁷⁸ RA p. 3159 para. 75.

¹⁷⁹ See e.g. Total AA p. 2999 para. 164.

205.2. Second, even if this were not the case, Total would need to put up evidence as to the time and cost involved in preparing preliminary and the final plans and contextualise this to the overall cost of the Proposed Project. It has not done so.

205.3. Third, even if it was necessary to delay preparing the OSCP and BOCP this could only be done reasonably and lawfully if some mechanism was created to allow for public participation in respect of those documents. This was not done.

Conclusion on the fifth review ground

206. Therefore the Decisions under Review were procedurally unfair and did not comply with sections 24(4)(a)(v) and 24N(2)(g) of NEMA and the relevant provisions of the EIA Regulations. They therefore stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

6TH REVIEW GROUND: THE INVOLVEMENT OF PASA

207. The Applicant's sixth review ground is that the Petroleum Agency of South Africa delivered an appeal response report which, at face value, was submitted on behalf of the Second Respondent ¹⁸⁰

208. The appeal to the Minister was governed by the National Appeal Regulations ("the Appeal Regulations") published under NEMA.¹⁸¹

¹⁸⁰ SFA p. 1622 para. 8.

¹⁸¹ GNR.993 of 8 December 2014

209. The Appeal Regulations provide for a process in which interested and affected parties and organs of state are entitled to respond to an appeal.

210. Regulation 5 of the Appeal Regulations provides:

The applicant, the decision-maker, interested and affected parties and organ of state must submit their responding statement, if any, to the appeal authority and the appellant within 20 days from the date of receipt of the appeal submission.

211. The Minster's Decision relies on information which it describes as having been provided by the competent authority.¹⁸²

212. It appears from the Rule 53 Record that PASA filed a response to the Applicant's appeal and the DG did not.¹⁸³

213. A comparison of the responding statements submitted by PASA with the material presented under the heading "CA's Response" in the Appeal Decision reveals that the source of the purported input from the DG was PASA's responding statements.

214. For example, at page 15 of PASA's responding statement in respect of the Applicants' joint appeal it is recorded:¹⁸⁴

The Agency is not able to comment on the suggested rating of the likelihood of a blow-out occurrence, because the WildTrust report does not provide the methodology used to generate the rating. Therefore, it is not clear if it considered all components considered in the Oil Spill Drift Report submitted with ESIA.

¹⁸² SFA p. 1623 to 1625 paras. 10 to 12.

¹⁸³ Record Items 34.1 to 34.5.

¹⁸⁴ Record Item 34.1 p. 8992

215. This is in response to material put up by the Applicants in a document titled “WildTrust Report” disputing the calculation in the Final EIR of the likelihood of a blowout.
216. The Minister’s Decision, in dealing with the corresponding ground of appeal, records at paragraph 2.17.11 under the heading “CA’s response”, “*the Competent Authority states that it is unable to comment on the suggested rating of the likelihood of a blow-out occurrence in the WildTrust report because the appellants did not provide the methodology used to generate the rating*”.¹⁸⁵
217. Self-evidently, this passage was taken from PASA’s appeal response report, and was treated by the Minister as originating from the DG.
218. The Minister’s reliance on PASA’s responding statement as if it was that of the DG taints her decision in two respects.
219. Firstly, this means that there was no proper compliance with regulation 5. Where an administrative decision is impugned on the basis of a procedural defect, the proper inquiry is whether the non-compliance had the effect of undermining the purpose of the provision. This is not the same as asking whether compliance with the provisions would have led to a different result.¹⁸⁶

¹⁸⁵ FA Annexure FA6 p. 210 para. 2.17.11.

¹⁸⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC), para 30.

220. In the present context, the purpose of regulation 5 was to place the DG's comments on the Applicants' appeal before the Minister. The Minister took her decision in ignorance of the DG's comments and instead relied on the those of PASA. This fundamentally undermines the purpose of regulation 5.
221. PASA's function in terms of section 71(a) of the MPRDA is to "*promote onshore and offshore exploration for and production of petroleum*". By its institutional nature, PASA is manifestly unsuited to defending what is meant to be an impartial decision regarding the environmental impacts of a petroleum exploration project.
222. Secondly, to the extent that the Minister took account of PASA's responses in formulating his decision, which she plainly did based on the structure of the Minister's Decision, she took account of irrelevant considerations.
223. In the premises, the Minister's Decision falls to be set aside in terms of section 6(2)(b) of PAJA and section 6(2)(e)(iii) of PAJA.

THE RELIEF SOUGHT

224. The Applicants have established that the Decisions under Review do not comply with the standards required by PAJA.
225. Section 8(1)(c) of PAJA caters for the setting aside of administrative decision which do not comply with provision of PAJA.
226. Furthermore, PAJA is the legislation through which the constitutional right to just administrative action is implemented. Accordingly, failures to comply with PAJA

involve the impairment of a Constitutional right. Similarly, NEMA is the legislation enacted to protect the Constitutional environmental rights.

227. As such, section 172(1)(a) of the Constitution requires that the Decisions under Review be declared to be unlawful and invalid. The mandatory nature of this section was confirmed by the Constitutional Court in *All Pay*.¹⁸⁷

228. Therefore, the Decisions under Review fall to be set aside.

CONDONATION

229. Although the founding affidavit (excluding 8 of 12 annexures) was issued and served electronically on the respondents within the 180-day time limit in terms of section 7(1) of the PAJA, formal service of the complete application occurred outside of this period. Service on Total was effected on 10 April 2024 (10 days late); service on the DG and the Second Respondent (the Minister of Mineral Resources) was effected on 9 May 2024 (29 days late); service on the Minister was effected on 21 May 2024 (51 days late).

230. On 25 October 2024, the Applicants brought an application for the condonation of the late service of the complete founding affidavit. This application is not opposed.

¹⁸⁷ *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA (1) 604 (CC), para. 25

231. The reasons for the delay in serving the complete founding affidavit are fully explained in the supporting affidavit.¹⁸⁸ In brief, a sequence of clerical errors resulted in a situation in which the annexures to the founding papers (running to some 1500 pages), already signed by a commissioner of oaths, were completely out of order and required a significant period of time to re-order. The problem was thereafter compounded by the refusal of the State Attorney's office in Pretoria to accept service of the complete founding papers on 25 April 2024, notwithstanding that the State respondents' notice of intention to oppose indicated that this was the office that would be handling the application.
232. In terms of section 9(2) of PAJA, a court may extend the period allowed for instituting a review if it is in the interests of justice to do so. Considerations that are germane to this inquiry are the prospects of success the length of the delay, the explanation for the delay, the importance of the issues raised by the matter, prejudice to the other parties and the effect of the delay on the administration of justice.¹⁸⁹
233. We submit that these factors militate strongly (if not decisively) in favour of extending the 180-day period to 231 days as required in this case. A full explanation has been given for the delay. None of the respondents was prejudiced because in each case they were in receipt of an electronic copy of the founding affidavit and were able to access all missing annexures (which either emanated from the respondents themselves or were readily accessible

¹⁸⁸ Condonation FA, p. 2383 to 2390, paras 21 to 54.

¹⁸⁹ Grootboom v National Prosecuting Authority and Another [2013] ZACC 37; 2014 (2) SA 68; 2014 (1) BCLR 65 (CC) at para 50.

on the internet).¹⁹⁰ There was ultimately no delay occasioned to the administration of justice because the State respondents had to be compelled to produce the rule 53 record and did so significantly out of time on 2 September 2024 (almost four months after the complete founding affidavit was served on the last respondent).

234. In the circumstances we submit that condonation for the delay should be granted by this Court.

COSTS

235. Both Total and the State request that this application be dismissed with costs.¹⁹¹

236. The Applicants' founding affidavit squarely explains that they are public interest organisations whose activities include protecting, preserving, and conserving the environment. The Applicants' founding affidavit alleges that in addition to bringing this application in their own interest they do so in the public interest and in the interest of preserving the environment.¹⁹² This is admitted by the State¹⁹³ and not denied by Total.¹⁹⁴

¹⁹⁰ See "CC9", p. 2406.

¹⁹¹ Total AA p. 3025 para. 281; State AA p. 2498.

¹⁹² FA p. 14 para. 18.

¹⁹³ State AA p. 2493 para. 142;

¹⁹⁴ Total AA p. 3012 para. 212.

237. The *Biowatch*¹⁹⁵ principle provides that where a private party pursues litigation to vindicate constitutional rights, even if it is not successful no costs should be awarded against it.
238. Section 32(2) of NEMA provides a similar rule in respect of litigation brought in the public interest or in the interest of protecting the environment.
239. This application clearly seeks to vindicate the right to have the environmental rights contained in section 24 of the Constitution and the right to just administrative action contained in section 33 of the Constitution.
240. According, this is litigation to vindicate Constitutional rights and it brought in the public interest. Therefore, even if the Applicants do not succeed, each party should bear their own costs.

CONCLUSION

241. In the circumstances the Applicants have established that:
- 241.1. the Final EIR did not comply with requirements of NEMA, ICMA, and the EIA Regulations; and,
- 241.2. therefore that the Decisions under Review are irrational, unlawful, and procedurally and stand to reviewed and set aside in terms of PAJA.

¹⁹⁵ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC), para. 22.

242. Accordingly the Applicants are entitled to the relief sought in their amended notice of motion.

N Rajab-Budlender SC
I Learmonth
J Blomkamp
Counsel for the Applicant
Chambers
March 2025