

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

SHELL EXPLORATION & PRODUCTION
SOUTH AFRICA B.V.

Fifth Respondent

NOTICE OF APPLICATION FOR
LEAVE TO APPEAL

PLEASE TAKE NOTICE that the fifth respondent (“**Shell**”) will apply to this Court on a date and at a time to be arranged with the Registrar, for the following order:

1. Shell is granted leave to appeal to the Supreme Court of Appeal *alternatively* the Full Court of the Western Cape Division of the High Court against the judgment and paragraphs 3 to 5 of the order handed down by Madam Justice Mangcu-Lockwood (“**the court**”) on 13 August 2025 (“**the decision**”).

2. The costs of the application for leave to appeal are to be costs in the appeal.
3. Shell is released from the obligation to provide security for the costs of the appeal to any party who opposes, as contemplated in Uniform Rule 49(13)(a).
4. Further and/or alternative relief.

TAKE FURTHER NOTICE that Shell contends that:

1. The appeal would have reasonable prospects of success and there are other compelling reasons why the appeal should be heard, as contemplated in section 17(1)(a) of the Superior Courts Act, 2013, on the grounds and for the reasons set out below.
2. If leave to appeal is granted, it is appropriate that the court should direct that the appeal be heard by the Supreme Court of Appeal since the decision to be appealed involves questions of law of importance and is of general application, and it is required by the administration of justice, generally and in the particular case, as contemplated in section 17(6)(a) of the Superior Courts Act, 2013.

TAKE FURTHER NOTICE that the grounds of and reasons for the application for leave to appeal are set out below.

Introduction

1. Paragraphs 3 to 5 of the order granted by the court on 13 August 2025 provide as follows:

“3. The decision taken by the third respondent on 17 April 2023 to grant an environmental authorization to the fourth respondent (“Total”) to conduct exploratory operations in Block 5/6/7 is reviewed and set aside.

4. The decision taken by the first respondent on 24 September 2023 dismissing the appeal of the first and second applicants is reviewed and set aside.

5. The decision of granting an environmental authorization to Total is remitted to the third respondent for reconsideration, which process must provide for the following:

5.1 Total must be afforded opportunity to submit new or amended assessments, as the case may be, to cure the deficiencies identified in the first to fifth grounds of review of this judgment.

5.2 Public participation must be conducted in regard to the new and/or amended assessments submitted by Total, before decision is made by the third respondent.”

2. The court thus reviewed and set aside both the decision of the third respondent (“**the DG**”) to grant an environmental authorisation to the fourth respondent, TotalEnergies EP South Africa Block 567 (Pty) Ltd (“**Total**”), to conduct exploration drilling in block 5/6/7 (“**the initial decision**”) and the decision of the first respondent (“**the Minister**”) to dismiss the applicants’ appeals against the initial decision (“**the appeal decision**”) (paragraph 230).
3. The court found in the applicants’ favour in respect of the first five of the six review grounds raised by the applicants (paragraph 217). The applicants’ six review grounds are summarised at paragraph 63 of the judgment as follows:

“Firstly, 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 did not assess the socio-economic impact which a well blowout and consequent oil spill may cause on the fishing industry and small scale fishers.

Secondly, the decision-makers failed to consider the factors prescribed by the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (“ICMA”).

Thirdly, 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.

Fourthly, the Final EIR failed to assess, and the state respondents failed to consider, the transboundary impacts of the proposed project, both on Namibia and on international waters.

Fifthly, neither the Final EIR nor the Environmental Management Program Report (EMPr) include Total’s Oil Spill Contingency Plan or Blow Out Contingency Plan.

Sixthly, PASA delivered an appeal response report which, at face value, was submitted on behalf of the DG and was treated as such by the Minister.”

4. The court erred with respect in finding that those first five grounds constituted reviewable irregularities for the reasons set out below. The court consequently erred in:
 - 4.1 reviewing and setting aside the initial decision and the appeal decision based on those five review grounds; and
 - 4.2 remitting the decision to the DG with directions that Total be given an opportunity to submit corrected assessments *“to cure the deficiencies identified in the first to fifth grounds of review of this judgment”* and that

there be public participation on those assessments before a decision is made.

5. The court should have found, and there is a reasonable prospect that another court would find, that one or more or all of the above mentioned five review grounds lacked merit and that the application fell to be dismissed, *alternatively* fell to be remitted on limited grounds only. The appeal would have a practical result even if it only succeeded in respect of one of the five review grounds that were upheld by the court because a “*corrected assessment to cure the deficiencies*” identified in the context of that ground would then not have to be submitted, there would not need to be public participation in respect thereof and it would not fall to be reconsidered by the DG. It follows that leave to appeal should with respect be granted if the court is satisfied that Shell has a reasonable prospect of success in respect of a single ground of review.

Ad the first review ground: socio-economic impacts

6. The court concluded that the initial decision and the appeal decision failed to take into account relevant considerations in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of the Promotion of Administrative Justice Act, 2000 (“**PAJA**”) (paragraph 108).
7. The first basis of this conclusion was the finding of the court that the final environmental and social impact assessment report (“**the Final EIR**”) failed to “*quantify*” the economic impacts of an unplanned blow out and oil spill, and therefore contravened sections 24(4) and 24O of the National Environmental Management Act, 1998 (“**NEMA**”) and item 3(j) of appendix

3 of the Environmental Impact Assessment Regulations, 2014 (“**EIA Regulations**”) (paragraphs 107 and 108).

8. The court erred in making this finding for the following reasons:

- 8.1 The court failed to appreciate that, upon a proper interpretation of section 24(4) and 24O of NEMA and appendix 3 (both item 3(h) and item 3(j)) of the EIA Regulations, they do not require the Final EIR to “*quantify*” the economic impacts of unplanned blow out and oil spill events due to the many variables, assumptions and uncertainties involved. The court should have found, and there is a reasonable prospect that another court will find, that NEMA and the EIA Regulations do not require the Final EIR to include speculative estimates devoid of any certainty and based on unknown and uncontrollable variables.
- 8.2 Despite referring thereto in paragraphs 98 and 99, the court failed to attach sufficient weight to the fact that the Final EIR included a socio-economic impact report (“**SEI Report**”) as well as a fisheries impact assessment report (“**FIA Report**”) that assessed the socio-economic impacts of an oil spill on fisheries and communities, noted the limitations involved, and modelled the impacts based on a worst-case scenario.
- 8.3 The court, in particular, failed to place sufficient weight on the limitations identified in the FIA Report which explained that the impacts of a blow out and oil spill on the fishing industry would depend on seven unknown factors: (1) oil type; (2) characteristics of the reservoir; (3) type of well blow out; (4) well architecture; (5) spill duration; (6) seasonality; and (7)

well location (paragraph 89). The court should have found, and there is a reasonable prospect that another court will find, that the Final EIR thus could not meaningfully “*quantify*” economic impacts based on unknown factors.

- 8.4 The court failed to appreciate that the assumed 10% drop in value of fisheries contained in the SEI Report was an indicator intended to provide an idea of the relative magnitudes involved rather than an assumption that there would be a 10% drop in the value of fisheries (paragraph 92). Despite finding that the 10% estimate was not refuted by expert evidence from the applicants (paragraph 101), the court nevertheless failed to attach any weight to that evidence.
- 8.5 The court failed to take into account the undisputed evidence that the Final EIR selected the “*worst case scenario*” in respect of each factor for its modelling, and provided the mitigation measures in relation to each of those (paragraph 99). The court should have found, and there is a reasonable prospect that another court will find, that the Final EIR’s modelling on the worst-case scenario is consistent with the *cautious approach* espoused in NEMA and the EIA Regulations.
- 8.6 The court failed to appreciate that the Final EIR complied with the EIA Regulations in view thereof that the risk modelling was undertaken in the context of a low-probability blow-out and could thus proceed on “*reasonable worst-case*” assumptions. The court should have found, and there is a reasonable prospect that another court will find, that the Final EIR thus complied with the EIA Regulations.

- 8.7 The court erred in finding that the distinction between “*risk*” and “*impact*” is not supported by the legislation and that both are required to be assessed in equal measure (paragraphs 102 and 104). The court should have found, and there is a reasonable prospect that another court will find, that NEMA and the EIA Regulations distinguish between “*risk*” (an unplanned event, for example, an oil spill or ship collision) and “*impact*” (a known effect of the activity, for example, generation of underwater noise whilst drilling or discharge of drill cuttings) and that the assessments are different: a risk assessment (in the case of an unplanned event) first requires an evaluation of the probability of the risk event occurring and then the probability of the impact occurring if the risk event takes place.
- 8.8 The court misconstrued the precautionary principle explained in *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* 2025 (2) SA 31 (SCA) at paragraph 11 and erred in finding that this “*was an occasion for the application of this principle*” (paragraph 106). The court should have found, and there is a reasonable prospect that another court will find, that the *precautionary principle* does not require the Final EIR to “*quantify*” with exactness the economic impacts of unplanned blow out and oil spill events given the high range of variables, assumptions and uncertainties involved that cannot be accurately quantified.
- 8.9 The court also erred in finding that the failure of the Final EIR to “*quantify*” the economic impacts of an unplanned blow out and oil spill

amounted to a “relevant consideration” that should have been taken into account. The court erred by embarking in effect upon an evaluation of the merits of the initial decision and the appeal decision despite correctly identifying the principle that when a functionary is entrusted with a discretion, the weight to be attached to particular factors is a matter for the functionary to decide and, if she acts in good faith (reasonably and rationally), the court cannot interfere (paragraph 82). The court erred in not applying this principle and there is a reasonable prospect that another court will apply it.

9. If the court had not erred as set out above, the court should have found, and there is reasonable prospect that another court will find, that section 24(4) and 24O of NEMA and appendix 3 of the EIA Regulations do not require the Final EIR to “*quantify*” the economic impacts of unplanned blow out and oil spill events for the reasons set out above. The court would then have concluded, and there is reasonable prospect that another court will conclude, that the initial decision and the appeal decision did not fail to take into account relevant considerations in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

Ad the second review ground: ICMA considerations

10. The second basis for the court’s conclusion that both the initial decision and the appeal decision stood 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 was that they had allegedly failed to consider the factors in the Environmental Management: Integrated Coastal Management Act, 2008 (“**ICMA**”) (paragraphs 123 and 127).

11. The court erred in making this finding, for the following reasons:

- 11.1 The Final EIR considered the substance of the factors in section 63 of ICMA (paragraphs 118). This was demonstrated by Total in the table forming part of the consolidated internal appeals response report compiled by the Department of Forestry, Fisheries and the Environment and in Total's answering affidavit which sets out the applicable ICMA sections and the sections in the Final EIR where these factors were in substance considered. The court erred in not taking this evidence into account. The court only concluded that it is unable to find that the Final EIR considered the ICMA factors (paragraphs 119 to 121).
- 11.2 The court's distinction between the factors being contained in the Final EIR and not in the initial decision is of no moment (paragraph 119). The DG evaluated the Final EIR in making the initial decision. The initial decision would therefore have considered the ICMA factors. The absence of an express reference to ICMA in the initial decision is immaterial.
- 11.3 Even if the initial decision had not considered the ICMA factors (which is denied), this alleged defect was cured on appeal. The table mentioned above served before the Minister on appeal, was dealt with in the documentation that served before the Minister and referenced in the appeal decision. The court should have found and there is a reasonable prospect that another court will find that the Minister did consider the ICMA factors (paragraph 124). The court erred in finding that the appeal decision only "purported" to have considered the ICMA

factors (paragraph 125) when there was with respect no basis for this finding in view of the documents that served before the Minister.

12. The court also erred in reviewing and setting aside the appeal decision in terms of sections 6(2)(e)(iv)¹ and 6(2)(f)(ii)(aa) to (cc) of PAJA on the basis that it did not provide adequate reasons, for the following reasons:

12.1 The appeal decision was not required to identify the portions of the initial decision which considered the ICMA factors: the appeal decision was a wide appeal, and any defect in the initial decision could be, and was, cured on appeal. The court accordingly erred in finding that the appeal decision reasons were “*woefully deficient*” (paragraph 125).

12.2 The appeal decision reasons complied with *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at para 63. The applicants had no difficulty in making out a reasonably substantial case for review.

Ad third review ground: climate change impacts of production activities

13. The third basis for the court’s conclusion that the initial decision and the appeal decision fell to be set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA was that -

¹ It appears that the reference to section 6(2)(e)(iv) (unauthorized dictates) in the judgment is a typographical error and it was meant to be a reference to 6(2)(e)(vi) (arbitrary).

- 13.1 exploration and production are “*intertwined*” (paragraph 151) and, thus, the Final EIR’s assessment of need and desirability was required to take into account climate change impacts of production activities;
 - 13.2 the Final EIR’s assessment of need and desirability failed to take into account the climate change impacts of production activities (paragraphs 151 to 157).
14. This ground raises an important question of law because the findings of the court will potentially affect all applicants for exploration rights (for petroleum) and even for prospecting rights (for onshore minerals) under the MPRDA, and will have a far reaching effect.
 15. The court misconstrued the relevant provisions of the MPRDA, NEMA and EIA Regulations in finding that exploration and production activities are *intertwined*.
 16. The court should have found, and there is a reasonable prospect that another court will find that, upon a proper interpretation of NEMA and the MPRDA:
 - 16.1 The MRPDA distinguishes between “*exploration operations*” and “*production operations*”.
 - 16.2 Section 24F of NEMA prohibits the commencement or continuation of an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity.

- 16.3 The listing notices, which identify the activities which may not commence without an environmental authorisation, maintain the distinction between exploration and production operations adopted in the MRPDA.
- 16.4 Item 1(2) of Appendix 3 of the EIA Regulations makes it clear that the environmental impacts, mitigation, and disclosure outcomes as well as the residual risks of the proposed activity, must be set out in the environmental and social impacts assessment report. Item 2(b) of appendix 3 also clearly states that the objective of the environmental assessment process is to “*describe the need and desirability of the proposed activity*”.
- 16.5 Total was granted an environmental authorisation to conduct exploration drilling, not production (paragraph 151). Exploration is the activity for which the environmental authorisation was granted. The EIA Regulations only require the environmental assessment to describe the needs and desirability of the “*proposed activity*” i.e. exploration.
17. The court should accordingly have found that the need and desirability assessment had to, and did, assess the need and desirability for exploration: it emphasised that exploration is necessary to understand the economic potential of the resource and that the knowledge is desirable. It should further have found that the overview of the broader context of oil and gas in South Africa and the benefits thereof that were included in the assessment sought in addition to situate exploration within the broader policy and economic framework in South Africa, highlighting its role as a necessary step

toward understanding and potentially realizing the country's resource potential. It did not detract from the fact that exploration was shown to be necessary and desirable.

18. In finding that exploration was aimed as “locating gas to be burnt to create electricity”, the court failed to take into account the evidence that such a scenario may or may not eventually transpire depending on myriad factors including inter alia on (a) the type of product found, (b) whether this product is exported at source and (c) the applications for which the product may be used etc. In fact, the court erred by conflating production (upstream) activities with refining and end-use (downstream) activities, which are distinct and separately regulated. The judgment's reference to the “burning of the gas” pertains to downstream activities, far removed from the scope of the current environmental authorisation, which is limited to exploration. Even if climate change impacts from production had to be considered, these would relate only to emissions from operating the production platform - not the full lifecycle or downstream use of the hydrocarbons. Assessing downstream (scope 3) emissions at this stage is highly speculative, as the final use, refinement, and even export of the product cannot be meaningfully predicted at this stage. The court's approach incorrectly assumes a single scenario—domestic gas discovery and use—while ignoring the possibility of oil discovery, multiple end uses, or export, but none of which in any event fall to be considered at the exploration phase.
19. The court erred in relying on the following cases as authority for the proposition that climate change impacts of *production* activities must be

taken into account in the need and desirability assessment of *exploration* activities.

19.1 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) (“**Earthlife**”) (paragraph 148):

19.1.1 *Earthlife* is not authority for the proposition that climate change impacts of production activities must be taken into account in the assessment of exploration activities.

19.1.2 In *Earthlife* the court found that the assessment did not deal with the project’s full life cycle climate impacts. *Earthlife* clearly confines the assessment of the climate change impacts to the specific project. The specific project concerned in *Earthlife* was for building a coal-fired power station i.e., it concerned a production-like activity.

19.1.3 In the present case, the specific project is exploration drilling, not production. The climate change impact assessment was thus only required to consider the impact of the exploration activities. It is common cause that exploration itself has no climate change impacts.

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

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

production activities must be taken into account in the assessment of exploration activities.

19.2.2 *Wild Coast* HC further relied on *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) (“**Save the Vaal**”) for the statement that:

“exploration and production are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities’ livelihoods and access to food”.

19.2.3 The court quoted this passage at paragraph 150. However, the quoted passage does not appear anywhere in *Save the Vaal* and *Wild Coast* HC incorrectly cited it. This court in turn erred in relying on *Wild Cast* HC and *Save the Vaal*.

19.2.4 Importantly, on appeal, the Supreme Court of Appeal in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) (“**Wild Coast SCA**”), did not endorse the proposition that climate change impacts of production activities must be taken into account in the assessment of exploration activities. The SCA in fact struck down the High Court’s prior finding that “*authorizing new oil and gas exploration, with its goal of finding exploitable and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments*”, and noted that such a “*far-reaching finding, which*

has a sterilising effect and for which there can be no warrant, cannot be endorsed”.

19.3 The court should instead have placed reliance on *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others* [2022] ZAGPPHC 741 (“**South Durban**”), which dismissed a similar ground of review on the basis that -

19.3.1 such a broad consideration of ‘upstream effects’ would likely create an almost impossible situation;

19.3.2 consideration of impacts in this regard would need to be included with the separate EIA process to be undertaken for the gas supply infrastructure; and

19.3.3 the consideration of the GHG emissions, as a whole and incorporating both the pipeline as well as the CCGPP, will be considered when the EA for the construction of the pipeline is sought.

20. The court furthermore erred in relying on the definition of production operation in the MPRDA to confirm the “*interrelatedness*” of the two activities (paragraph 153). The definition only mentions “exploration” because further exploration can be undertaken under a production right for various reasons, whereas production cannot be undertaken under an exploration right.

21. The court should according have found, and there is a reasonable prospect that another court will find, that -

- 21.1 Total, Shell and PetroSA are the holders of an exploration right (“**ER224**”) and not the holders of a production right.
- 21.2 ER224 was granted in terms of section 80 of the Mineral and Petroleum Resources Development Act, 2002 (“**MPRDA**”) and not in terms of section 84 of the MPRDA.
- 21.3 ER224 only allows for various exploration operations to be undertaken within Block 5/6/7; not production operations.
- 21.4 At this stage, only the proposed exploration drilling activity requires an environmental authorisation in terms of NEMA. No environmental authorisation is at this stage required for any production operations. That may or may not become necessary in future, depending on the outcome of the exploration activities.
- 21.5 The initial decision correctly granted Total an environmental authorisation to conduct exploration drilling in Block 5/6/7 (paragraphs 2 to 7).
- 22. The court’s finding that the Final EIR was required to take into account the climate change impacts of production activities (paragraph 154) also disregarded the uncontested evidence that:
 - 22.1 The existence of a resource, if any, the type of resource, the size of the potential discovery and quality of the reservoirs, the economic and technical feasibility to produce from such potential discovery in the future and the spatial extension of the area to be developed, to mention but a few, are all unknown at this stage.

- 22.2 The way to develop and economically produce the targeted discovery in a success case cannot be assessed in advance and prior to conducting exploration drilling.
- 22.3 The scope, location, extent and duration of future production activities, which may or may not eventuate, cannot be reasonably defined until the proposed exploration project has been completed.
- 22.4 It is unreasonable in the circumstances to require the assessment of the climate change impacts of an undefined project.
23. If the court had not erred as set out above, the court would have found, and there is a reasonable prospect that a different court may find, that the Final EIR's assessment of need and desirability for an EA in relation to an exploration right was not required to take into account the climate change impacts of *production* activities and that this was not a relevant consideration which justified the review and setting aside of the initial decision and the appeal decision in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

Ad the fourth ground: transboundary impacts

24. The court furthermore concluded that the initial decision and the appeal decision fall 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 on the basis that -
- 24.1 NEMA, read in light of sections 232 and 233 of the Constitution, "*placed on obligation for the Final EIR to assess the environmental impact of*

the transboundary impacts it predicted may be caused by the proposed projected" (paragraph 189); and

24.2 the Final EIR failed to assess transboundary impacts (paragraph 189).

25. This ground too raises an important question of law because the decision seriously expands the scope of NEMA to include obligations in international instruments that are not part of domestic law, and will have a far reaching effect.

26. The court erred in interpreting NEMA as imposing a duty on an applicant for an environmental authorisation to assess transboundary impacts when the applicable South African legislation, being NEMA and the EIA Regulations, do not impose such an obligation, as the court acknowledged (paragraph 160).

27. The court erred in interpreting NEMA by reading in international law obligations to this effect for the following reasons:

27.1 The separation of powers doctrine precludes a court from embarking on an interpretative exercise which in effect re-writes the text under consideration since it amounts to usurping the legislative function through interpretation.

27.2 The Rio Declaration and the Abidjan Convention, which the court relied upon to interpret NEMA to require environmental impact assessments to assess transboundary impacts (paragraphs 180 to 186), are not part of municipal law and are therefore not enforceable at the instance of private individuals in South African courts.

- 27.3 The Abidjan Convention on which the court relies to interpret NEMA to require environmental impact assessments to assess the transboundary impacts, does not impose such an obligation (paragraph 185). Article 13(2) of the Abidjan Convention only requires the contracting parties (being the state parties) to endeavour to include an assessment. Endeavour does not translate into a mandatory obligation and certainly not in an obligation on an applicant for an EA in terms of municipal law as opposed to a state party.
28. The court erred in finding that the absence of an express provision in NEMA and the EIA Regulations that requires an environmental impact assessment to assess the transboundary impacts creates a “*dangerous, and easily exploitable, lacuna*” (paragraph 188).
- 28.1 Chapter 6 of NEMA makes specific provision for the incorporation of international obligations and agreements.
- 28.2 There is thus no lacuna in NEMA and the EIA Regulations.
- 28.3 Despite mentioning the respondents’ submissions in respect of chapter 6 of NEMA (paragraph 168), the court failed to take them into account.
29. The court furthermore erred in conflating “*an obligation arising from customary international law and international law upon South Africa to not allow its territory to be used in a manner which causes transboundary harm*” (paragraph 186) with an obligation resting on a citizen of South Africa. If such an obligation exists, it rests on the South African state. There is no

customary international law obligation that requires the subjects of the South African state to assess such impacts as part of municipal law.

30. If the court had not erred as set out above, the court would have found, and there is a reasonable prospect that another court will find, that NEMA and the EIA Regulations do not require environmental impact assessments to assess transboundary impacts; and that it is impermissible to interpret NEMA, in light of sections 232 and 233 of the Constitution, as requiring such an obligation. The court therefore would not have reviewed and set aside the initial decision and the appeal decision for the failure to take into account relevant considerations and on the basis of a material error of law in terms of sections 6(2)(b), 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

Ad the fifth ground: BOCP and OSCP

31. The court concluded finally that -

- 31.1 the Final EIR and the Environmental Management Programme (“**EMPr**”) did not comply with section 24N(2)(g) of NEMA and item 1(1)(f) of appendix 4 to the EIR Regulations since it failed to include a “*description of the proposed management action*” (paragraph 203); and
- 31.2 the initial decision and the appeal decision stood 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.

32. The court erred in this regard for the following reasons:

- 32.1 The court agreed with Total's contention that it was impossible to prepare the Blow-Out Contingency Plan ("**BOCP**") and Oil Spill Contingency Plan ("**OSCP**") without the information that would only become available after obtaining the environmental authorisation. The court found that the applicants "*do not dispute Total's evidence regarding the impossibility of making the BOCP and the OSCP available at the stage of applying for an EA*". And that "*the evidence shows the issue is not merely about costs, but impossibility, which is not refuted*" (paragraph 198).
- 32.2 The court nevertheless found that, given the BOCP and OSCP will only be produced in accordance with the 60-day conditions in the environmental authorisation, it is difficult to conclude that there had been a full assessment as contemplated in section 24N(2)(g) of NEMA and appendix 4 of the EIA Regulations (paragraph 199). The court therefore essentially found that the BOCP and the OSCP are required to be produced at the stage of applying for the environmental authorisation.
- 32.3 The court's finding that the BOCP and the OSCP are required to be produced at the stage of applying for the environmental authorisation contradicts the finding that it is impossible for the BOCP and the OSCP to be produced at that stage. The court's finding essentially renders it impossible for Total to be granted an environmental authorisation because it cannot produce the BOCP and the OSCP at the stage of

applying for an environmental authorisation, which the court itself accepts is impossible.

32.4 The court further found that the BOCP and OSCP will not be part of a public participation process, and that the lack of public participation in connection with the process “*that is yet to ensue*” is problematic (paragraph 200). The court erred in making that finding. The initial decision and the appeal decision cannot be reviewed and set aside based on the procedural unfairness of a process “*that is yet to ensue*”. The court does not have the power to review a future process that has not yet taken place.

33. The court also failed to take into account or attach the necessary weight to the following evidence:

33.1 **The Generic OSCP:** The court overlooked the fact that a detailed generic OSCP was made available to interested and affected parties during public consultation as specifically requested by them. The applicants dismissed it as too generic without even considering its content. Had the court considered the contents, it would have found that it was sufficiently comprehensive and only omitted operational details which can only be finalised at a later stage of the operation (such as rig support vessels, well location, logistics base, and supply contracts).

33.2 **Conditionality of the EA:** The court failed to attach any weight to the conditions in the EA. It also failed to defer to the decision maker who has the necessary knowledge and experience of the practicalities of these kinds of plans and who saw fit to impose a condition in the EA

requiring the submission and approval of final contingency and management plans before activities commence.

33.3 Other approvals: Apart from the conditionality of the EA, the court failed to acknowledge the further safeguard that the OSCP falls to be approved by another authority, SAMSA, in terms of other legislative provisions.

33.4 The Role of the OSCP: The court incorrectly treated the OSCP as the sole mitigation measure and failed to take into account that the primary focus is on the prevention of a blowout. The OSCP is a last-resort response plan, not the only safeguard.

34. If the court had not erred as set out above, the court would have found that the Final EIR and the EMPr complied with section 24N(2)(g) of NEMA and item 1(1)(f) of appendix 4 to the EIR Regulations and that the initial decision and the appeal decision were not procedurally unfair. The court therefore would not have reviewed and set aside the initial decision and the appeal decision 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.

Ad remedy and costs

35. As the court erred in reviewing and setting aside the initial decision and the appeal decision, the court consequently also erred in remitting the decision to the DG with directions that Total be given an opportunity to submit corrected assessments “*to cure the deficiencies identified in the first to fifth*

grounds of review of this judgment” and that there be public participation on those assessments before a decision is made.

35.1 The court’s just and equitable remedial power in terms of section 172(1) of the Constitution and section 8 of PAJA is only triggered upon a finding that the administrative action is constitutionally invalid. The court erred in declaring the initial decision and the appeal decision invalid (paragraph 217) for the grounds set out above. Therefore, the court’s just and equitable remedial power was not engaged, and the court erred in remitting the decision with directions.

35.2 The court’s direction that Total must be given an opportunity to submit corrected assessments “*to cure the deficiencies identified in the first to fifth grounds of review of this judgment*” entails that Shell need only be successful on any one of the five review grounds taken in isolation for the appeal court’s decision to have practical effect. Success on any one of the five review grounds will limit the “*deficiencies*” Total must cure in corrected assessments.

36. Consequently, if the court had not erred as set out above, the court would have dismissed the application with an order that each party pay their own costs.

TAKE FURTHER NOTICE that if leave to appeal is granted, it is appropriate that the court direct that the appeal be heard by the Supreme Court of Appeal as contemplated in section 17(6)(a)(i) of the Superior Courts Act 10 of 2013, for the following reasons:

- 1 The decision to be appealed involves, amongst others, the following important questions of law of general application:
 - a. The court expanded NEMA, in light of sections 232 and 233 of the Constitution, to “*place[d] an obligation for the Final EIR to assess the environmental impact of the transboundary impacts it predicted may be caused by the proposed project*”. Whether this is correct and whether NEMA falls to be interpreted as (a) including provisions of international law instruments that are not part of domestic law and (b) placing obligations on subjects of the South African state applying for EAs under municipal law (as opposed to the South African state) are important questions of law that ought to be decided by the Supreme Court of Appeal. They raise important of separation of powers issues including what the boundaries of the court’s functions are and when it would impermissibly be usurping the legislative function through interpretation.
 - b. The court furthermore reinterpreted the distinct activities of exploration and production under NEMA and the MPRDA to constitute two phases of a single project, and held that assessments relating to the whole “project” should be conducted at exploration stage. This is a serious expansion not only of the obligations of applicants for EAs at exploration stage but also potentially of applicants for prospecting rights under the MPRDA and will have far reaching consequences.

- 2 The Supreme Court of Appeal is also required to resolve the differences of opinion in the various High Court decisions on the scope of the impact assessment of exploration activities, namely *South Durban*, *Wild Coast HC* and *Earthlife*. In addition, *Wild Coast HC* is a full bench decision of the Makanda High Court that relies on *Save the Vaal* as authority for a proposition that cannot be found in *Save the Vaal*. It would be appropriate for the Supreme Court of Appeal to resolve these issues.

TAKE FURTHER NOTICE Shell applies to be released from the obligation to provide security for the costs of the appeal to any party who opposes, as contemplated in Uniform Rule 49(13)(a). The decision sought to be appealed does not require Shell to pay the costs of the review application (paragraph 6 of the order). Shell advances genuine constitutional issues on appeal, and even if unsuccessful should not be ordered to pay the applicants' cost in accordance with the *Biowatch* principle. In any event, there is no risk of the applicants being unable to recover their costs from Shell, if costs are awarded against them.

DATED AT CAPE TOWN ON THIS THE 3rd DAY OF SEPTEMBER 2025.

 Digitally signed
by André Vos
Date: 2025.09.03
12:58:28 +02'00'

Norton Rose Fulbright South Africa Inc

5th Respondents' attorneys

9th floor, 117 on Strand

117 Strand Street, Cape Town

Tel: 011 685 8500

Email: andre.vos@nortonrosefulbright.com

Ref: ANA51/ Mr AP Vos/ Mr P Rogers

TO:

The Registrar

Western Cape High Court
30 Keerom Street

AND TO:

Cullinan & Associates Inc

Applicants' attorneys

19A Ascot Road

Kenilworth

Cape Town

Email:

lesai@greencounsel.co.za

Ref: T057-003

AND TO:

The State Attorney Pretoria

1st to 3rd Respondents'
attorneys

SALU Building

316 Thabo Sehume Street

Pretoria Central

Tel: 012 309 1528

Email:

smathebula@justice.gov.za

Ref: S Mathebula 1849/21/Z51

