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

CASE NO: **5676/24**

In the matter between:

THE GREEN CONNECTION	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: MINERAL RESOURCES AND ENERGY	Third Respondent
TOTAL ENERGIES EP SOUTH AFRICA BLOCK 567 (PTY) LTD	Fourth Respondent

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FOURTH RESPONDENT'S HEADS OF ARGUMENT

'The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (reasonably and rationally) a court of law cannot interfere.'[1]

[1] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 22.

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Abbreviation	Definition
Appeal Decision	Decision of the Minister of DFFE to dismiss the joint appeal by the First and Second Applicants against the Initial Decision
Appeal Regulations	National Appeal Regulations issued under NEMA
ARR	Consolidated Appeal Response Report
Block 5/6/7	Block 5/6/7 off the South-West Coast of South Africa
BOCP	Blow-out Contingency Plan
Climate Change Assessment	Climate Change and Air Emissions Impact Assessment for the project conducted by Airshed Planning Professionals
DFFE	Department of Forestry, Fisheries and the Environment
DG	Director-General of the DMRE (Third Respondent)
DMRE	Department of Mineral Resources and Energy
EA	Environmental Authorisation granted in terms of the National Environmental Management Act, 1998
EAP	Environmental Assessment Practitioner
EIA Regulations	Environmental Impact Assessment Regulations, 2014
EMPr	Environmental Management Programme Report
ER224	Exploration Right 12/3/224
ESIAs	Environmental and Social Impact Assessments
Final EIR / Final ESIA	The Final Environmental and Social Impact Assessment Report
GHG	Greenhouse Gas
ICMA	National Environmental Management: Integrated Coastal Management Act, 2008
Initial Decision	Decision of the DG of DMRE to grant an EA to TEEPSA to conduct exploration well drilling within Block 5/6/7
Minister	Minister of Forestry, Fisheries and the Environment (First Respondent)
MPRDA	Mineral and Petroleum Resources Development Act, 2002
NEMA	National Environmental Management Act, 1998
Operator	Joint Venture Partner responsible for day-to-day operations and management
OSCP	Oil Spill Contingency Plan
PASA	Petroleum Agency of South Africa
Production operation	Any operation, activity or matter that relates to the exploration appraisal, development and production of petroleum
Proposed project	The exploratory drilling off the south-west coast of South Africa as more fully described in the Initial Decision
Record	Record in terms of Rule 53 of the Uniform Rules of Court filed by the Department of Forestry, Fisheries and the Environment
SEI Report	The Socio-Economic Impact Assessment of Exploration Well Drilling Report
SLR	SLR Consulting (South Africa) (Pty) Ltd
TEEPSA	TotalEnergies EP South Africa Block 567 (Pty) Ltd (Fourth Respondent)

ESSENCE OF THE MATTER

1. This application concerns the granting of an environmental authorisation (**EA**) in terms of the National Environmental Management Act, 1998 (**NEMA**) to the fourth respondent, TEEPSA, authorising it to conduct exploration drilling to determine whether geological structures off the South-West Coast of South Africa contain oil or gas in potentially extractable amounts. The applicant's challenge is directed against the content of the Final Environmental and Social Impact Assessment Report (**Final EIR**), the purpose of which was to assess the Proposed Project for impacts and to identify appropriate mitigation measures therefor.

2. TEEPSA and its co-venture partners are the co-holders of an Exploration Right 12/3/224 (**ER224**) granted in terms of section 80 of the MPRDA in respect of the offshore areas known as Block 5/6/7 (**Block 5/6/7**).[2]

3. Block 5/6/7 is situated off the South-West Coast of South Africa, roughly between Cape Town and Cape Agulhas. The area of interest is approximately 10 000km^2 in extent. It is approximately 60km from the coast at its closest point and 170km at its furthest, at water depths of between 700m and 3 200m.[3]

4. The ER224 allows for the undertaking of various exploration operations, including two-dimensional (2D) seismic, three-dimensional (3D) seismic and controlled source electromagnetic surveys. 2D and 3D seismic surveys have been undertaken within Block 5/6/7. Based on an analysis of the acquired seismic data, TEEPSA, as Operator, intends

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[2] TEEPSA Answering Affidavit (**TAA**) pp 2936 par 8.
[3] TAA p 2936 par 9.

to drill one exploration well and, success dependent, up to four additional wells in total within the area of interest in Block 5/6/7 (up to five wells in total).[4]

5. The proposed exploration operations include activities which are listed in Listing Notices 1 and 2 of the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations**) and which therefore necessitate an application for an EA in terms of NEMA.

6. On 22 May 2022, TEEPSA lodged an application for an EA with the Department of Mineral Resources and Energy (**DMRE**).[5]

7. On 17 April 2023, the third respondent, the Director-General of the Department of Mineral Resources and Energy (**the DG**) granted an EA to TEEPSA to conduct exploration well drilling within Block 5/6/7 (**the Initial Decision**).[6]

8. On 24 September 2023, the first respondent, the Minister of Forestry, Fisheries and the Environment (**the Minister**), dismissed the joint appeal by the first and second applicants against the Initial Decision (**the Appeal Decision**). [7]

9. The applicants raise six grounds of review:

   9.1. <u>First</u>, the applicants contend that the Socio-Economic Impact Assessment for Exploration Well Drilling Report (**the SEI report**)[8] fails to: (a) focus on the anticipated impact on the fishing industry (local communities or fisheries); and

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[4] TAA p 2936 par 10.
[5] Department of Forestry, Fisheries and the Environment's Rule 53 Record (**Record**) pp 1-54 (Document 1).
[6] Annexure 'FA4' pp 95-113.
[7] Annexure 'FA6' pp 160-303.
[8] Record pp 7398-7524 (Document 9.3).

(b) present a full evaluation of the potential consequences in a range of scenarios.[9] This is not correct. The SEI Report falls to be considered together with the Fisheries Impact Assessment,[10] and is sufficiently comprehensive, given the multitude of variables that are simply not calculable.

9.2. Second, the applicants allege that the Final EIR and the decision-makers failed to take into account considerations prescribed by the National Environmental Management: Integrated Coastal Management Act, 2008 (**ICMA**), which sets out factors relevant to environmental authorisations for coastal activities.[11] However, the considerations in s 63 of ICMA were in substance considered in the Final EIR, and therefore by the DG and the Minister, since the specific and general environmental statutes overlap substantially. At the least, these considerations were taken into account by the Minister, and any irregularity in the Initial decision in relation to ICMA has been overtaken by or cured in the appeal proceedings

9.3. Third, the applicants contend that a significant part of the motivation for the Proposed Project is to identify oil and gas resources with a view to those being exploited in the future, yet there is a failure to consider climate change as part of the need and desirability assessment in the Final EIR.[12] But the Final EIR was not required to assess the potential environmental consequences of the extraction (i.e., production) of oil or gas in the project area.

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[9] Founding Affidavit (**FA**) pp 40-45 par 81-94; Replying Affidavit (**RA**) pp 3140-3146 par 20-31.
[10] Record pp 7220-7396 (Document 9.3).
[11] FA pp 45-53 par 96-119; RA pp 3146-3152 par 32-49.
[12] FA pp 54-56 par 120-127; Supplementary Founding Affidavit (**SFA**) pp 1626-1641 par 19-65; RA pp 3152-3156 par 50-62.

9.4. Fourth, the applicants say that the DG and the Minister took their decisions in the absence of what they characterise as the obligatory assessment of the impacts of the Proposed Project on Namibian waters, the Namibian shoreline, and international waters.[13] At a factual level, the impact on the whole coastline was indeed considered. However, as a matter of law, there is no such obligatory assessment.

9.5. Fifth, the applicants challenge the Environmental Management Programme report (**EMPr**) for the Proposed Project, on the basis that the Blow-Out Contingency Plan (**BOCP**) and Oil Spill Contingency Plan (**OSCP**) were not made available when the Final EIR was prepared and when the decisions under review were taken.[14] However, the BOCP and OSCP are not required to be finalised and prepared at this point, nor are they a stipulated requirement of the Environmental and Social Impact Assessment (**ESIA**) because such plans cannot be prepared in the absence of location specific technical studies and operational information, which is only factually possible closer to the intended drilling date, a few years after the ESIA process. The BOCP and OSCP must be submitted 60 days prior to the commencement of activity and approved by the South African Maritime Safety Authority (**SAMSA**) and other relevant regulatory authorities.

9.6. Sixth, the applicants say that the Appeal Response Report (**ARR**) submitted by the competent authority in terms of regulation 5 of the National Appeal Regulations under NEMA (**the Appeal Regulations**) was prepared and

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[13] FA pp 62-69 par 144-173; RA pp 3156-3157 par 66-70.
[14] FA pp 71-75 par 181-195; SFA pp 1641-1643 par 66-75; RA par 71-80.

signed by officials in the employ of the Petroleum Agency of South Africa (**PASA**) and that this amounts to material non-compliance with the Appeal Regulations.[15] This is incorrect. The facts are that (a) PASA did not purport to submit an ARR as the competent authority, but merely in its capacity as PASA as it was entitled to do, and (b) the competent authority did not submit an ARR and this too is not contrary to regulation 5 of the Appeal Regulations since it is not obligatory to submit an ARR.

10. Despite the wide-ranging nature and technical complexity of some of the issues involved, this application reduces in the end to one which concerns whether the legislative framework requires an assessment of the nature and extent contended for by the applicants.[16]

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

11.1. the applicants conflate the considerations that are only relevant to production operations with the considerations relevant to exploration operations; and

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

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[15] SFA pp 1622-1625 par 8-18; RA pp 3161-3163 par 81-91.
[16] Applicants' Heads of Argument (**HOA**) par 3 p 5.

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

13. The remainder of these Heads of Argument address:

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

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

  13.3. Third, a central misconception that runs through the applicants' review challenge.

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

  13.5. Fifth, the striking of new matter in reply.

THE APPLICANTS' FAILURE TO MAKE OUT A CASE

14. The applicants seek the review and setting aside of the Initial Decision and the Appeal Decision, and the remittal of the matter to the DG, alternatively to the Minister, for reconsideration.[18]

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[17] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) at para 26.
[18] Notice of Motion p 2.

15. At the outset, it must be emphasised that this matter calls for deference because the subject-matter is largely technical and the decisions in issue are policy-laden.[19] The decision-makers had the benefit of three technical and five specialist studies by independent experts, commissioned during the impact assessment phase to assess the key potential impacts of the exploration operations and identify mitigation measures.[20]

16. A review court may interfere where a functionary exercises a competence to decide facts but fails to get the facts right in rendering a decision, provided that the facts (a) are material, (b) were established, and (c) meet a threshold of objective verifiability.[21]

17. But the exercise of a judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.

18. For the applicants to succeed in a review based on a mistake of fact, they must demonstrate that the Minister disregarded uncontentious and objectively verifiable facts which were material, and which would have resulted in a different decision had they been taken into account. They have failed to do so.

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

[20] TAAA p 2940 par 21-24. The Technical Modelling Studies comprised: Drilling Discharges Modelling; Oil Spill Modelling; and Underwater Noise Modelling. The Specialist Studies comprised: a Marine Ecology Impact Assessment; a Fisheries Impact Assessment; a Socio-Economic Impact Assessment; a Cultural Heritage Assessment; and a Climate Change and Air Emissions Impact Assessment. An independent peer review of the Drilling Discharges Modelling and Oil Spill Modelling studies was also undertaken [Record pp 6732-6678 (Document 9.2)].

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

19. It appears that the applicants' real difficulty is the applicants' perception that the decision-makers attached insufficient weight to the impact of the proposed project. That, however, does not found a reviewable irregularity.

20. The applicants also challenge the rationality of the decisions to grant the EA.

21. The threshold for a rationality review is high. In the matter of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*, the Constitutional Court explained the rationality test as follows:

> 'Before considering the factual basis for the applicant's contentions, it is necessary to sound a note of caution. Our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of administrative decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts. And this is particularly so for rationality review under PAJA. Hoexter notes that "[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection - not a perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision … substantively incorrect.'"'.[22]

22. As a point of departure, NEMA does not require complete and absolute knowledge of all potential consequences of a project before environmental authorisation may be granted. This is supported by the fact that an applicant for environmental authorisation must indicate the possible mitigation measures that could be applied and level of residual risk, and describe any assumptions, uncertainties, and gaps in knowledge which relate to the assessment and mitigation measures proposed.

23. On the facts in evidence, the decisions to grant the EA were rationally connected to the information placed before the decision-makers.

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[22] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC) at para 78.

THE PROPER APPROACH TO THE EVIDENCE

24. Given that these are motion proceedings, where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicants' affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order. This is so, unless any of the respondent's versions consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.[23]

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

A CENTRAL MISCONCEPTION

26. Before addressing the review grounds, we first deal with a central misconception which permeates the applicants' affidavits, namely merging exploration and production activities in considering the requirements for an environmental authorisation for proposed exploration activities.

27. The applicants' failure to distinguish between these two activities leads them to further misconceive –

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

27.1. the nature (and limitations) of an impact assessment required for exploration operations (as opposed to production operations); and

27.2. the level of assessment required for an environmental authorisation for exploration.

Exploration and production are different activities for purposes of NEMA

28. Section 3(2)(a) of the Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**) provides that the State, acting through the Minister, may 'grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right'. The various permissions, rights and permits contemplated in the MPRDA have distinct purposes and requirements and confer distinct rights on holders.

29. The MPRDA, for example, distinguishes -

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

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

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

31. Similarly, exploration operations are aimed at locating a discovery and are regulated by sections 79 to 82 of the MPRDA. That would comprise *inter alia* mapping the subsurface

and trying to locate and determine the properties of a reservoir, if any. Production operations on the other hand are concerned with the 'exploration, appraisal, development and production of petroleum' and are regulated by sections 83 to 87 of the MPRDA. Whilst exploration can be undertaken under a production right to gain more data, production cannot be undertaken under an exploration right.

32. As stated, TEEPSA and its co-venturers hold an exploration right (ER 12/3/224) which has been granted in terms of section 80 of the MPRDA.[24]

32.1. On 17 August 2012, the exploration right was executed notarially, and it was registered at the Mineral and Petroleum Titles Registration Office (**MPTRO**) on 31 August 2012 under MPT 09/2012.

32.2. On 29 October 2021, the third renewal application was lodged in terms of section 79 of the MPRDA which application is still pending.

33. TEEPSA and its co-venturers are accordingly entitled to explore for petroleum (as defined in the MPRDA) in Block 5/6/7. An exploration operation is defined in the MPRDA as 'the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery'.

34. The applicants do not contend that TEEPSA will be conducting production operations and it is not in dispute that TEEPSA's proposed activities fall within the scope of an exploration operation as defined.

[24] TAA p 2936 par 8.

35. It is not in contention that section 24F of NEMA prohibits the commencement or continuation of '<u>an activity</u> listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted <u>an environmental authorisation for the activity</u>' (our emphasis).

36. In listing the activities which may be conducted pursuant to rights, permits or permissions granted under the MPRDA, the Minister for the Environment, acting under section 24(2)(a) of NEMA, maintained the definitions and distinctions of the MPRDA. For example:

36.1. Listing Notice 1 lists '[a]ny activity including the operation of that activity which requires a prospecting right in terms of section 16 of the Mineral and Petroleum Resources Development Act, as well as any other applicable activity as contained in this Listing Notice or in Listing Notice 3 of 2014, required to exercise the prospecting right'. [LN1 item 20]

36.2. Listing Notice 2 lists '[a]ny activity including the operation of that activity which requires a mining right in terms of section 22 of the Mineral and Petroleum Resources Development Act, as well as any other applicable activity as contained in this Listing Notice, in Listing Notice 1 of 2014 or Listing Notice 3 of 2014, required to exercise the mining right'. [LN2 item 17]

37. Similarly, Appendix 1 to Listing Notice 2 (GN R984) distinguishes between exploration and production activities and lists them as distinct items as follows:

37.1. '[a]ny activity including the operation of that activity which requires an exploration right in terms of section 79 of the Mineral and Petroleum Resources Development Act, as well as any other applicable activity as contained in this Listing Notice, in Listing Notice 1 of 2014 or in Listing Notice 3 of 2014, required to exercise the exploration right, excluding (a) any desktop study; (b) any aerial survey; (c) any onshore seismic survey which is included in activity 21C in Listing Notice 1 of 2014, in which case that activity applies; (d) a hydraulic fracturing activity which is included in activity 20A, in which case activity 20A of this Notice applies; and (e) the processing of a petroleum resource, including the beneficiation or refining of gas, oil or petroleum products, in which case activity 5 of this Notice applies' (LN2 item 18); and

37.2. '[a]ny activity including the operation of that activity which requires a production right in terms of section 83 of the Mineral and Petroleum Resources Development Act, as well as any other applicable activity as contained in this Listing Notice, in Listing Notice 1 of 2014 or Listing Notice 3 of 2014, required to exercise the production right' (LN2 item 20).

38. An important difference between listing notices 1 and 2 is that:

38.1. Listing Notice 1 provides that 'the investigation, assessment and communication of the potential impact of activities [listed in Listing Notice 1] must follow the procedure as prescribed in regulations 19 and 20 of the Environmental Impact Assessment Regulations published in terms of section 24(5) of the Act'. This procedure is referred to as a 'basic assessment'.

38.2. In the case of activities listed in Listing Notice (2), 'the investigation, assessment and communication of the potential impact of activities must follow the procedure as prescribed in regulations 21, 22, 23 and 24 of the Environmental Impact Assessment Regulations published in terms of section 24(5) of the Act, unless otherwise indicated by the Minister in a government notice'. In the case of activities listed in Listing Notice 2, a full scoping and environmental impact reporting process must thus be followed, which is referred to as an **S&EIR**.

39. While the ‘prospecting’ of minerals requires a basic assessment, ‘exploration’ of petroleum requires a full S&EIR. In the latter case there is thus already a higher threshold which serves as a safeguard.

40. As is apparent, the main purpose of the Listing Notices is to identify activities that would require an environmental authorisation prior to the commencement of such activity. As shown, the activities which may not commence without environmental authorisation from the competent authority are specifically identified and described in Appendix 1 of the Listing Notice.

41. The present matter concerns an application for an environmental authorisation for activities which require an exploration right. The activity for which environmental authorisation was sought, is thus <u>exploration</u>. That is the ‘project’. The intention is to locate a discovery i.e., to acquire knowledge. There is no ‘project’ here which includes ‘a production phase’ as the applicants would have it.[25] The applicants’ statement that ‘assessing the need and desirability of the proposed exploration activities, of necessity, requires some consideration of the project phase of the project’ is accordingly incorrect as a matter of law. Their statement that ‘[t]o determine whether exploration for and extraction of gas within the project area (this being the appropriate scope of this assessment) is a desirable proposal, one must have regard inter alia to the foreseeable environmental costs and risks associated with the production phase’ is similarly incorrect.[26]

[25] RA p 3138 par 9.
[26] RA p 3138 par 10. The applicants’ assertion at paragraph 19 of their replying affidavit that considerations relevant to both phases must be taken into account is also incorrect.

42. The applicants themselves qualify their argument by saying that their 'contention is not that this entails the prediction and investigation of all production impacts, but rather an accounting for the fact of, and general nature of, these impacts'.[27]

43. They then take issue with TEEPSA's response that it is (in any event) impossible to anticipate the form, nature and extent of a production operation, and say that there are predictable characteristics of a production operation with respect to infrastructure and the manner in which it is conducted.[28]

44. What the applicants gloss over, however, is that an exploration project does not include a 'production phase', nor does it guarantee that exploration would result in production.

45. Item 1(2) of Appendix 3 to the EIA regulations makes it clear that the environmental impacts, mitigation and closure outcomes as well as the residual risks of <u>the proposed activity</u> must be set out in the environmental and social impact assessment report (**EISA report**). We emphasise that 'impacts' and 'risks' are mentioned (a topic which is dealt with more fully below). They also relate to the 'proposed activity'. The relevant statutory provisions and regulations mean, plainly, that the impacts of the <u>exploration operation</u> must be set out in the EIA report, not the impacts of a potential future production operation. The latter is simply not the 'proposed activity'. Item 2(b) of Appendix 3 to the EIA regulations for example clearly states that the objective of the environmental impact assessment process is to 'describe the need and desirability of <u>the proposed activity</u>…'. This is dealt with more fully below under the third review ground.

[27] RA p 3138 par 11.
[28] RA p 3138 par 12, pp 3139-3140 par 14-18.

The level of assessment required for an environmental authorisation for exploration

46. The applicants' review application is primarily directed at alleged shortcomings in the Final Environmental and Social Impact Assessment Report (**the Final EIR** or **the final ESIA**).[29] Yet the applicants fail to meaningfully engage with the scientific and factual evidence placed before the court. As set out below, the applicants have misconceived the level of assessment required for an environmental authorisation for exploration.

47. In the SLR report attached as annexure 'TAA1' to TEEPSA's answering affidavit (**the SLR report**), Mr Blood and Ms Reuther have explained the proper approach to the preparation of ESIAs, including that:

    47.1. ESIAs by their very nature predict potential impacts of a project, i.e. a change in the baseline condition due to the project implementation. The assessment predicts the nature and significance of each impact, where the impact is a function of the expected impact extent, intensity, duration and probability.[30]

    47.2. The impact assessment should give information that puts interested and affected parties and the decision-makers in a position to understand the nature, extent, duration and consequences of identified Project impacts.[31]

48. Mr Blood and Ms Reuther also say the following in relation to the Final EIR:

    48.1. The desktop-based impact identification methods used in the Final EIR were (a) professional experience, in this case a combined 438 years; (b) modelling; (c) quantitative analysis; (d) qualitative analysis; and (e) literature review. [32]

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[29] Record pp 4637-6139 (Document 9.1).
[30] TAA p 2941 par 26.
[31] TAA p 2946 par 30.
[32] TAA pp 2941-2942 par 27.

48.2. There is extensive experience with this kind of project both nationally and internationally. Furthermore, since drilling uses techniques and methods that are commonly applied across the world, international experience is relevant and appropriate to understanding project impacts.[33]

48.3. In terms of understanding the receiving environment and baseline, the distribution of species, fishing effort and sensitive areas and the physio-chemical properties of the offshore environment are well understood within the natural fluctuations that occur in such systems. [34]

48.4. The impact receptors primarily include resident and migratory marine species and the fishing and shipping industries, and are relatively well understood. [35]

48.5. Due to the extensive number of exploration wells (as well as appraisal and production) drilled in South Africa and globally, a lot of direct and indirect evidence of project impacts (or absence thereof) is available for analysis by specialists. [36]

48.6. A number of international scientific studies have investigated the impacts of drilling and associated noise impacts on marine fauna, and where possible these have been referenced in the Marine Ecology Impact Assessment. [37]

48.7. Although not in South African waters, numerous wells have been drilled across the Namibia / South African border by Shell Namibia Upstream B.V. and TotalEnergies EP Namibia B.V. within their capacities as operators. The

[33] TAA p 2943 par 29.1.
[34] TAA p 2944 par 29.2.
[35] TAA p 2944 par 29.3.
[36] TAA p 2944 par 29.4.
[37] TAA pp 2944-2945 par 29.5.

baseline environment in the Project area is well understood as noted above. In addition, while the marine environment in the Project area has certain unique characteristics, as do all other marine environments, these are taken into account through, for example, project-specific modelling and identification of sensitivities in the baseline. The impact on marine species due to physical impacts or changes in noise or water quality is sufficiently comparable between similar species across the oceans that observations from projects or studies in other areas provide a reasonable and sufficient foundation for the prediction of impacts of this Project in Block 5/6/7. [38]

48.8. The natural South African offshore environment is comparatively stable and well understood, and there are few large-scale fluctuations (as could be expected from, for example, major storm systems, current variations, seismic or volcanic activity). Human activity in the offshore environment (for example fishing, shipping, mining / exploration) requires considerable effort and is typically well understood and regulated, and unpredictable changes at a meaningful scale are unlikely within the exploration Project timeframe. Cumulative impacts from other projects can thus be reasonably inferred during the ESIA. [39]

49. Mr Blood and Ms Reuther conclude that 'they are highly confident that the approach undertaken in the Final EIR for assessment of potential impacts was adequate to provide sufficient information for decision-making'.[40]

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[38] TAA p 2945 par 29.6.
[39] TAA pp 2945-2946 par 29.7.
[40] TAA p 2946 par 31.

50. As to the challenges in quantifying the consequence of an oil spill, which is highly unlikely to occur, Mr Blood and Ms Reuther explain that: [41]

50.1. Impact assessment typically relates to the determination of consequences of predictable impacts from proposed project activities. An oil spill is a risk rather than an anticipated project impact more typically assessed in ESIA.

50.2. The key challenges associated with the assessment of potential impacts from an oil spill relate to the fact that such spills are not a normal part of project operations. The exact timing and nature of a spill – in the highly unlikely event that it occurs – cannot be reasonably anticipated, modelled and assessed.

50.3. This is the case for any project risk, such as a dam break or explosion risks. As such, a reasonable 'worst-case' scenario is typically modelled and assessed, with an inference that actual impacts, should the risk event take place, will be similar to or less than the worst-case scenario.

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

[41] TAA pp 2946-2947 par 32-33.

51. It is for all these reasons that an impact assessment at the level called for by the applicants would be of little direct value.[42]

52. Mr Blood and Ms Reuther also address the limitations of any assessment of the impact of a blow-out and oil spill on the fishing industry. They explain that any model relies on assumptions which affect the nature of, and confidence in, the model outcomes, in this case the predicted spread and concentration of an oil spill, and thus the receptors that could be potentially impacted. [43]

53. Assumptions made to predict the potential extent of an unlikely well blow-out relate to the following seven factors:[44]

53.1. Hydrocarbon profile (oil type). As the oil type can only be determined as an outcome of the proposed exploration operations, the Oil Spill Modelling study undertook a modelling comparison of a 'crude oil' scenario versus a 'condensate' scenario in order to determine the potential 'worst-case' oil type. These results confirmed that the 'crude oil' scenario was the most impacting in terms of shoreline oiling and was thus used in the modelling.

53.2. Characteristics of the reservoir: The pressure and structure of the reservoir will influence the volume and flow rate of any spill. As these can only be determined as an outcome of the proposed exploration operations, the release discharge rate defined for this study conservatively considered the potential blow-out rate from the Venus exploration well in southern Namibia, which

[42] TAA p2947 par 33.
[43] TAA p 2949 par 41-42
[44] TAA pp 2949-2951 par 43.

targeted a similar burial and geology as the Block 5/6/7 prospect and was thus deemed a good and reasonable proxy for the ESIA-related analysis.

53.3. Type of well blow-out: There are different types of well blow-outs, which would also influence the volume and flow rate of any spill. For this study, an uncontrolled release from the well was modelled assuming 100% open hole flow (i.e. no obstruction in the well opening).

53.4. Well architecture: The well architecture is normally only finalised closer to the drilling date and seldom at the time when the ESIA is undertaken. This will also have an impact on the flow rates of a blow-out. For the presently relevant study, a conservative assumption was used based on other wells drilled in the region.

53.5. Spill duration: The duration of a spill (until the leaking well is plugged) determines the volume of oil released into the sea. In the event of a blow-out, a well would be plugged as quickly as possible. It was conservatively assumed that it would take 20 days to cap the well and stop the leak, based on the time estimated to deploy the capping stack from Saldanha Bay (~170 km away from the Block at is closest point).

53.6. Seasonality: Seasonality and associated metocean conditions influence the direction of drift and potential for shoreline oiling. As it was initially unknown which season might present the worst case, four different seasons were conservatively modelled.

53.7. Well location: As the final location of the wells within Block 5/6/7 was not known at the time of the ESIA, two locations representative of the metocean conditions, proximity to the coast and sensitive marine areas were selected for modelling. Essentially, the points selected for modelling were the worst-case scenario within the area of interest.

54. In relation to the extent of oiling, Mr Blood and Ms Reuther explain that the Oil Spill Modelling study indicates that the most impacting scenario in terms of shoreline oiling is a crude oil spill in Season 3 for Location 1.[45]

55. Both deterministic and stochastic simulations were undertaken during the oil spill modelling study:

55.1. The deterministic plots show the trajectory of a single spill event over time modelled under specific conditions considering various spill responses.

55.2. The stochastic simulation is a statistical calculation based on results from many sets of similar deterministic simulations using the same weathering model. These probability plots do not depict the extent of a single spill.[46]

56. Although the stochastic simulations provide an indication of which fishery sectors could potentially be impacted, it is unlikely that all sectors will be impact during a single spill scenario. Thus, it is important to consider the deterministic plots when assessing the impact of an unlikely well blow-out, and Figures 1 and 2 in the SLR report indicated that a spill may only affect selected fisheries and fishing areas, and not all fisheries in all fishing grounds.[47]

57. Mr Blood and Ms Reuther conclude that conservative model inputs and approaches were adopted to (a) mitigate inherent uncertainties of models and (b) result in a

[45] TAA p 2953 par 47, with reference to Figure 1 and Figure 2 of the SLR report.
[46] TAA p 2953 par 48.
[47] TAA p 2954 par 49.

conservative and robust outcome that informed the assessment of impacts in the unlikely event of an oil spill. [48]

58. The remote possibility of a blow-out and spill also bears on the required level of detail of the assessments that had to be undertaken. The probability of a well blow-out occurring is considered to be extremely unlikely. In a South African context, 358 wells have been drilled in the offshore environment to date and no well blow-outs have been recorded. Global data maintained by Lloyds Register indicates that frequency of a blow-out from normal exploration wells is in the order of 1.43 x 10^4 per well drilled[49] (i.e., a 1 in 7000 chance).

59. TEEPSA has stated that the probability is lowered further as TEEPSA has gained valuable experience and is well aware of the local conditions and requirements to operate in these conditions, as it has successfully drilled two wells off the South Coast (in 2019 and 2020) with the metocean conditions off the South Coast (strong Agulhas Current) considered to be more extreme than those in Block 5/6/7.[50]

60. Moreover, globally there have been no major well blow-outs with uncontrolled surface flow for deep offshore drilling since the Deep Water Horizon incident in the Gulf of Mexico in 2010. Since 2010, both the technology and mitigation measures have significantly improved to prevent blow-outs and minimise their impacts.[51]

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[48] TAA p 2954 par 51.

[49] TAA p 2962 par 70; Record p 4682 and p 5262, par 7.2.4 and 12.2.4 (Final EIR). Mr Blood reports that PASA has provided more updated information, which indicates that some 381 wells had been drilled in the South African offshore environment by June 2024, without any well blow-outs (TAA p 2963 par 76).

[50] Record p 4689 par 7.6, p 5269 par 12.6 (Document 9.1); Record pp 8824-8825; see also p 8826 (Document 34.1).

[51] TAA p 2964 par 77.

61. The applicants provide no answer by a qualified expert to the scientific evidence in the SLR report.[52] Indeed, in their replying affidavit, the applicants only dispute the characterisation of an oil spill as a risk, rather than an anticipated project impact which is more typically assessed in ESIA. [53]

62. In the circumstances, the Court must accept this evidence, including on the issues of foreseeability and the sufficiency of information necessary for decision-making of this nature.

SOCIO-ECONOMIC IMPACT OF OIL SPILL ON FISHERIES

63. The applicants' first review ground is a challenge to the assessment of the socio-economic impacts of an oil spill on fisheries in the SEI report and in the Final EIR.[54]

64. The applicants allege non-compliance with ss 24(1) and 24O(1) of NEMA and Appendix 3 to the EIA regulations based on the following central contentions:[55]

    64.1. The impact of a blow-out on the fishing industry in particular is rated as 'very high' before mitigation and 'high' after mitigation. The EIA regulations require that the nature, significance, consequences, extent, and duration of the identified potentially significant impact be assessed.

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[52] 'TAA1' pp 30273050; TAA pp 2940-2947 par 20-33, pp 2953-2954 par 47-51, pp 2963-2964 par 76-77.

[53] TEEPSA's experts, at TAA p 2946 par 32.1, say that: '*Impact assessment typically relates to the determination of consequences of predictable impacts from proposed project activities. An oil spill is a risk, rather than an anticipated project impact which is more typically assessed in ESIA.*'

In response, at RA p 3164 par 94, the applicants deny this allegation and state that '*[t]he Final EIR clearly treats the prospects of a well blow out, and the consequent oil spill, as a potential impact. This is assessed in section 10.4 of the Final EIR (Record p. 5159), which is part of section 10, which is headed "Impact Assessment- Unplanned Events*"' (Record p. 5145).

[54] The SEI Report is Appendix 13 to the final EIR (annexure 'FA8.2') pp 1373-1498.

[55] FA pp 40-45 par 81-95; RA pp 3140-3146 par 20-29.

64.2. The SEI report fails to: (a) focus on the anticipated impact on the fishing industry (local communities or fisheries); and (b) present a full evaluation of the potential consequences in a range of scenarios.

64.3. TEEPSA's contention that the only fisheries likely to experience major impacts currently produce very little output is unsustainable, and given the significance of the fisheries and economic activity involved, an unsubstantiated indicative figure of a 10% drop in the value of fisheries for three years could never be an acceptable assessment of the impacts under investigation.

65. In advancing this review ground, the applicants disregard the evidence:

65.1. First, NEMA makes it clear that probability is a relevant consideration.[56] TEEPSA's experts have explained why it would be challenging and of little assistance in the impact assessment process to attempt to assess the economic impacts of unplanned events due the many variables, assumptions and uncertainties that will be involved. The outputs of an assessment are likely to be so broad as to be of little direct value in informing the impact assessment process or the development of mitigation measures and ultimately decision-making.[57]

65.2. Second, the Final EIR must be read with the SEI report and the Fisheries Impact Assessment. These documents contain an assessment of the socio-economic impacts of an oil spill on fisheries that focussed on the anticipated impact on the fishing industry (local communities or fisheries), and presented a full evaluation of the potential consequences in a range of scenarios.

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[56] Appendix 3 to the EIA Regulations.
[57] TAA p 2957 par 53.

65.3. Third, the identification of the fisheries likely to experience major impacts and their output is based on reliable independent source data, and it has been fully explained that the figure of 10% addresses the question of what the financial implications would be if there were a sustained drop in the output of the nation's fisheries.[58]

The applicants have not established a reviewable irregularity

66. The applicants' summary of TEEPSA's response is inaccurate and incomplete, and their submissions fail to address the real issues. [59]

67. TEEPSA's experts explain the difference between an impact (being a consequence of a predictable impact from the proposed activity) and a risk (an unplanned event not being a 'normal' part of project operations) and state that an oil spill is a risk rather than an impact of the proposed activity in the normal course. In their replying affidavit, the applicants dispute the characterisation of an oil spill as a risk, rather than an anticipated project impact which is more typically assessed in ESIA. [60]

68. The applicants in their heads of argument misconstrue the point TEEPSA makes in this regard.[61] TEEPSA does not at all rely on the distinction as an 'excuse' - both the risk and the impacts if the risk eventuates were in fact assessed as the applicants themselves state in paragraph 50 of their Heads of Argument.

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[58] TAA p 2957 par 55.
[59] Applicants' HOA par 62-65.
[60] TEEPSA's experts, at TAA p 2946 par 32.1, say that: '*Impact assessment typically relates to the determination of consequences of predictable impacts from proposed project activities. An oil spill is a risk, rather than an anticipated project impact which is more typically assessed in ESIA.*' In response, at RA p 3164 par 94, the applicants deny this allegation and state that '*[t]he Final EIR clearly treats the prospects of a well blow out, and the consequent oil spill, as a potential impact. This is assessed in section 10.4 of the Final EIR (Record p. 5159), which is part of section 10, which is headed "Impact Assessment- Unplanned Events*"' (Record p. 5145).
[61] Applicant's HOA par 48-49.

69. The applicants are also incorrect that the EIA regulations do not distinguish between these concepts. It is apparent from the mere fact that both the word 'impact' and the word 'risk' are used in the regulations that they mean different things. However, TEEPSA's point is not that an assessment of each identified potentially significant impact and risk is not required by the regulations, but that the assessments are different and that this is relevant in considering the particular assessment.

70. Against the background of s 24O(1) of NEMA[62] and item 3(1) of Appendix 3 to the EIA regulations,[63] TEEPSA's experts explain that:

70.1. With the assessment of risks such as spills an additional element of probability must be considered: 1) probability of the risk event occurring <u>and</u> 2) probability of the impact occurring if a risk event takes place. Environmental impact assessment and rating methodologies are not normally set up to deal with such risk probabilities, and the resulting impact significances from risk events are thus not directly comparable to those for foreseeable impacts.[64]

70.2. There are limitations in assessing the potential impacts of a blow-out and oil spill on the fishing industry in view of the assumptions that any model has to rely on to predict the spread and concentration of an oil spill and thus the receptors that could be potentially impacted. [65]

70.3. Assumptions necessary to predict the potential extent of an unlikely well blow-out relate to the (a) hydrocarbon profile (oil type), characteristics of the

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[62] S 24O(1) refers to environmental impacts '<u>likely</u>' to be caused.
[63] Which requires an assessment of each identified potentially significant impact and risk, including 'the <u>probability</u> of the impact and risk occurring'.
[64] TAA p 2947 par 32.4.
[65] TAA p 2949 par 42.

reservoir, type of well blow-out, well architecture, spill duration, seasonality, and well location.[66] The Fisheries Impact Assessment described the potential impacts for the worst-case scenario. [67]

71. For the same reasons, there are limitations in quantifying the consequences of the potential impacts and the consequences of a drop in value on fishing operators or local communities. An assessment to the level contended for by the applicants would be of little value given the above-mentioned limitations and the multitude of variables. NEMA does not require the impossible.

72. The context which should be borne in mind is that, according to the source data, the figure for the probability of a major oil spill happening is 0.000143 per well.[68] Put differently, there is a 1 in 7000 chance of the risk eventuating.

73. In their heads of argument, the applicants contend that the Final EIR inquiry into the socio-economic consequences of an oil spill is encapsulated in four quoted paragraphs, and that this is a wholly inadequate assessment thereof.[69] They fail to refer to the contents of the SEI report which falls to be considered with the Fisheries Impact Assessment report.

74. Contrary to what the applicants say, the assessment of the socio-economic impacts of an oil spill on fisheries focussed on the anticipated impact on the fishing industry (local communities or fisheries), and presented a full evaluation of the potential consequences in a range of scenarios:

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[66] TAA pp 2949-2951 par 43.
[67] TAA pp 2951-2954 par 44-51.
[68] TAA p 2962 par 70, p 2963 par 75.
[69] Applicants' HOA par 58 ff.

74.1. The Final EIR clearly sets out the 'method for assessing impact significance' and considers the nature, significance, consequence, extent, duration and probability are considered and clearly presented for each potential impact.[70]

74.2. The impacts of an oil spills are also described in the Fisheries Impact Assessment.[71]

74.3. The SEI Report, attached as Appendix 13 to the Final EIR, further addresses the impact on fisheries.[72]

74.4. The impacts on fishers and their families and communities are specifically addressed in the SEI report.[73]

75. The intensity of socio-economic impacts would also depend on the presence or absence of compensation (a key measure in mitigation of oil spill impacts) in the event of an oil spill. Since TEEPSA is fully insured by international firms, a key mitigation measure of the Final EIR is the payment of compensation to counter-balance any negative macro-economic impacts of an oil spill.[74]

76. Finally, the applicants argue that there is no factual basis to TEEPSA's contention that an oil spill would only affect low production fisheries.[75] They ignore the scientific data in the SLR report that underpin the statement that the impacts would be far lower than the 10% quantification of the impact used as an indicator, since the only major fisheries likely to experience serious impacts are the ones that are currently producing relatively little

[70] Record p 5346 (Appendix 4 of the Final ESIA Report).
[71] Record pp 7227-7228, pp 7354-7355.
[72] Record pp 7398-7524 (Document 9.3). See in particular p 7408, pp 7498-7499.
[73] Record p 7497 third bullet point, pp 7498-7499 points 4-5.
[74] TAA p 2960 par 63
[75] Applicants' HOA par 65-68.

output, most noticeably fisheries targeting West Coast rock lobster and the small pelagic fishery on the West Coast.[76]

77. For the sake of completeness, TEEPSA does not rely on the fact that natural phenomena may have a similar effect as an 'excuse' for an inadequate assessment. It mentioned this fact for perspective.[77]

78. The factual basis for Prof Leiman's conclusion is source data similar to that referenced in the Fisheries Impact Assessment,[78] including Statistics South Africa reports on Ocean (marine) fisheries and related services industry and the South African Government Department of Fisheries, Forestry and the Environment report: Status of the South African Marine Fishery Resources 2023[79]. The applicants proffer no expert evidence that engages with these facts.

79. For all these reasons, we submit that there is no merit in the first ground of review.

ICMA CONSIDERATIONS

80. The second review ground is that the Final EIR and the decision-makers failed to take into account the considerations prescribed by ICMA, specifically:[80]

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[76] TAA pp 2960-2961 par 65.
[77] TAA pp 2959-2960 par 60-63.
[78] 'TAA1' pp 3036-3049 par 3.2-3.3.4.
[79] The Fisheries Assessment (Appendix 12 of the Final ESIA Report) relies heavily on DFFE 2019 and DEFF 2020 (these are effectively the same as the 2023 DEFF report referred to here). Overview of fisheries is presented in Section 3.1 of the Fisheries Assessment, which uses DEFF 2019 data/information (refer to Fisheries Assessment):

- Figure 3.1(right hand diagram) on pg 9; and
- Tables 3.1 & 3.2 on pg 10

[80] RA pp 3146-3147 par 32.

80.1. Whether coastal public property will be affected by the activity and, if so, the extent to which the proposed development or activity is consistent with the purpose of establishing and protecting these areas (s 63(1)(c)).

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

80.3. Whether the activity would be contrary to 'the interests of the whole community' (s 63(1)(h)(vi1)).

80.4. The objects of ICMA (s 63(1)(k))

81. This ground of review is readily disposed of:

81.1. First, the Final EIR notes that, as the proposed project falls under the definition of a 'coastal activity' and is located within 'coastal waters', the competent authority, in terms of s 63, must take a number of factors into consideration in deciding on the application for environmental authorisation in respect of activities within coastal waters, and these factors are then dealt with in the report and its annexures.[81]

81.2. Second, it is a question of fact whether such considerations were indeed taken into account, albeit under a different rubric. The Record reflects that the considerations in s 63 of ICMA were in fact considered in the Final EIR,[82] and therefore by the DG and the Minister.

[81] TAA pp 2966-2971 par 87-88.
[82] TAA pp2966-2971 par 88.

The applicants have not established a reviewable irregularity

ICMA considerations in the Initial Decision

82. The Initial Decision records that the information contained in the Final EIR and technical and specialist reports submitted were considered in making the decision.[83] Accordingly, the DG would have considered the various requirements of s 63 of ICMA by considering and assessing the relevant portions of the Final EIR and documentation mentioned therein.

83. It is submitted that the absence of express reference to s 63 of ICMA in the Initial Decision is immaterial, and does not support the conclusion that the DG failed to take into account the considerations prescribed by ICMA, but in any event, the Minister did take these considerations into account.

ICMA considerations in the Appeal Decision

84. In the Minister's answering affidavit, it is explained that:[84]

    84.1. The Final EIR considered the ICMA factors and discharge of the State's duties as trustees of coastal property.

    84.2. To the extent that the Block overlaps with Brown's Bank Coral and Southeast Atlantic, the areas of interest or drilling areas do not overlap with any Marine Protected Areas.

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[83] Record p 7672 par 1 (Reasons for Decision).
[84] Minister's Answering Affidavit (**MAA**) pp 2465-2466 par 55-59, pp 2477-2478 par 94, pp 2486-2487 par 122-123.

84.3. The Final EIR reviewed Critical Biodiversity Areas and Ecologically or Biologically Significant Marine Areas, and TEEPSA is obliged to conduct a pre-drilling site survey to gather information on seabed habitats, including mapping sensitive areas within 1000m of proposed wells. If vulnerable habitats are identified, the well position will be adjusted, or appropriate technologies and monitoring surveys will be implemented to minimise risks and assess potential damage to seabed habitats.

85. Contrary to what is alleged,[85] nowhere does the Minister contradict TEEPSA's account of where the Final EIR deals with the ICMA factors.

86. The Minister who considered the appeal would also have, in substance, considered the various requirements of s 63 of ICMA by considering and assessing the documents identified in the table in TEEPSA's answering affidavit at paragraph 88.

87. The table is not an exhaustive account of the consideration given to the ICMA factors, and in asserting that TEEPSA has failed to show that the Final EIR undertook the necessary assessment,[86] the applicants disregard the Record references in the table – these documents show that the ICMA factors were considered to the extent necessary.

88. The Minister determined that the grant of the EA, read together with the general and specific conditions and the identification of the potential impacts of the Proposed Project, as well as the mitigation measures, was rational and reasonable and that the considerations of the ICMA and s 63 were taken into account. Furthermore, the Minister

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[85] RA p 3151 par 46, p 3152 par 49; Applicants' HOA par 104, par 108.

[86] RA pp 3147-3149 par 34-41. Applicants' HOA par 80, par 98. Three factors are relied on the by the applicants: whether the Proposed Project would affect coastal public property; whether the Proposed Project is consistent with the object of conserving and enhancing coastal public property for the benefit of current and future generations; and whether the Proposed Project is contrary to the interests of the whole community.

specifically states that, in any event, she had considered the reasons for the decision and was satisfied that the authorisation was rational and reasonable.[87]

89. On a proper consideration of the record of the Appeal Decision, any irregularity in the Initial decision in relation to ICMA has been overtaken by or cured in the appeal proceedings. [88]

90. The applicants say that the Minister's statement is not sufficient in law.[89] On the question of the sufficiency or adequacy of reasons, in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)*,[90] the Constitutional Court observed that although the reasons must be sufficient they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. According to the Constitutional Court, what constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant is able on the basis of such reasons to make out a reasonably substantial case for a ministerial review or an appeal.

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

92. The applicants also say that while the Minister's Decision purports to be a decision on appeal in the wide sense, when it is read as a whole it is clearly structured as a response to the appeal grounds raised by the various appellants.[91]

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[87] Record p 10308 par 2.80 (Appeal Decision).
[88] *Earthlife* para 76, where the Court said that 'Irregularities committed by the Chief Director are relevant to the extent that they have not been overtaken by or cured in the appeal proceedings.'
[89] RA p 3151 par 45.3.
[90] *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 63.
[91] Applicants' HOA para 84.

93. Without conceding that there was any such defect, we point out that the applicants ignore that the law has evolved from the position that a defect at first instance cannot be cured on appeal.[92] With reference to SCA authority, Plasket J concludes:

> 'A similar reconsideration of the Leary general rule has occurred in South Africa. In *Slagment v Building, Construction and Allied Workers' Union*[93] Nicholas AJA agreed with the view expressed by Lord Wilberforce, stating that "(i)t is not possible to lay down a general rule in this connection". *Slagment* was approved in the *Scenematic Fourteen*[94] case, Scott JA holding that whether or not an appeal can or cannot cure a failure of natural justice is fact-specific and "(n)o purpose would be served by attempting to formulate some all-embracing rule".'

94. In *Philippi Horticultural Area*, this Court has held that where there is a wide appeal, the appeal decision supersedes and replaces the first-order decision. The appeal decision is one which 'must stand or fall on its own merits and therefore that it is the only one of the two decisions to be reviewed'.[95]

95. The appellants lodged their appeals under section 43(1) of NEMA.[96] An appeal under section 43 of NEMA is a wide appeal involving a determination *de novo* where the decision in question is subjected to reconsideration, if necessary, on new or additional

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[92] *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG) para 42-44 discusses the evolution of the law from *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) which relied on the dictum by Megarry J in *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 (Ch) ('If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?'). A more nuanced approach has now replaced Megarry J's 'general rule' in England. In *Calvin v Carr and Others* [1980] AC 574 (PC) ([1979] 2 All ER 440) 448d–e, Lord Wilberforce held that the dictum was 'too broadly stated'.

[93] *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others* 1995 (1) SA 742 (A) ((1994) 15 ILJ 979; [1994] 12 BLLR 1) at 756G.

[94] *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen* (Pty) Ltd 2005 (6) SA 182 (SCA) ([2005] 2 All SA 239).

[95] *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others* 2020 (3) SA 486 (WCC) para 86.

[96] Record p 10174 par 1.10 (Appeal Decision).

facts, with the body exercising the appeal power free to substitute its own decision for the decision under appeal.[97]

96. This ground of review is therefore without merit.

ASSESSMENT OF CLIMATE CHANGE IMPACTS

97. The third review ground is a challenge to the need and desirability assessment in the Final EIR, in relation to the climate change impacts of <u>production</u>.

98. The applicants identify the following alleged shortcomings in the Final EIR:[98]

98.1. The report does not comply with the obligation to assess production emissions when assessing the need and desirability of an exploration project.

98.2. The report presents only the alleged positive effects of the project without considering the associated negative effects, in that it does not consider that if the oil or gas is exploited for electricity generation, this will unavoidably involve greenhouse gas emissions.

98.3. There is a failure to consider climate change as part of the need and desirability assessment in the Final EIR. As a result, relevant impacts and issues were excluded from consideration in the Final EIR and in the DG and the Minister's decision-making process, including:

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[97] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] 2 All SA 519 (GP) (***Earthlife***) para 107, citing *Kham and others v Electoral Commission and another* 2016 (2) SA 338 (CC) at para 41. See also NEMA s 43(6).
[98] FA p 30 par 56, p 54 par 120-121, pp 54-56 par 122-126. See also SFA p 1626 par 19-20, and RA pp 3152-3154 par 50-58.

98.3.1. the incompatibility of the project (comprising both exploration and production) with relevant policy on climate change;

98.3.2. the potential long-term impact of the project on the fishing sector;

98.3.3. increased operational risks over the long term; and

98.3.4. whether or not the project is necessary and desirable.

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

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

99.2. Second, TEEPSA evaluated the climate change impacts of exploration. The level of assessment contended for by the applicants would not be meaningful given the range of variables and uncertainties that are associated with production activities that very possibly might never eventuate.

99.3. Third, the need and desirability criterion in an exploration project is essentially the need for, and desirability of, knowledge gained through exploration. The desirability of knowledge is a policy issue, and the State has determined that gas exploration must be looked into.

The applicants have not established a reviewable irregularity

<u>No obligation to assess the climate change impacts of production at the exploration stage</u>

100. For the reasons addressed in Part 0, the applicants' failure to distinguish between exploration and production activities leads to them further misconceiving the nature (and limitations) of an impact assessment required for exploration operations (as opposed to production operations).

101. As the Minister pointed out in the Appeal Decision: [99]

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

102. Consonant with s 24(1) of NEMA, the Minister determined that TEEPSA is only required to assess the potential impact and mitigation measures in respect of the activity for which it has sought an authorisation (i.e., exploration), and need not assess the potential impact and mitigation measures in respect of an activity for which it has not yet sought an authorisation (i.e., production), even though it might one day seek to do so.[100]

103. It is not correct that in the context of oil and gas exploration, the need and desirability assessment must consider the full lifecycle of the project including the intended extraction of the resource.[101] The extraction of the resource is by no means inevitable.

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[99] Record p 10190 par 2.7 (Appeal Decision).
[100] Record p 10190 par 2.8 (Appeal Decision).
[101] RA p 3153 par 52.

104. The applicants cite the case of *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others* [2024] UKSC 20: [102]

104.1. Unlike the present matter, in *Finch,* the developer had sought planning permission from the Council to retain and expand an existing onshore oil well site and to drill four new wells, which would enable the production of hydrocarbons from six wells over a period of 25 years, a project for which EIA was mandatory. The issue the Court had to consider was whether the Council was required as part of the EIA to assess the impacts of 'downstream' or scope 3 (categorised under the GHG Protocol as emissions that arise as a consequence of the activities of the entity but occur from sources not owned or controlled by the entity) greenhouse gas emissions which would arise from the end use of the refined crude oil.

104.2. In dealing with the need for sufficient evidence, the Court said that to determine that a potential effect is 'likely' requires evidence on which to base such a determination. 'If evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is "likely". Such agnosticism is not the same as judging the event to be unlikely. It reflects a belief that there is too little knowledge on which to base a judgment.' [103]

104.3. The Court went on to state that implicit in the regulatory provisions it had regard to is the criterion that material should be included in the environmental statement and taken into account in the procedure only if it is information on

[102] Applicants' HOA par 118.
[103] *Finch* at para 74.

which a reasoned conclusion could properly be based. 'Conjecture and speculation have no place in the EIA process. Thus, if there is insufficient evidence available to found a reasoned conclusion that a possible environmental effect is "likely", there is no requirement to identify, describe and try to assess this putative effect. This criterion must also govern, where a possible effect is regarded as "likely", the nature and extent of the assessment of the effect.' [104]

104.4. The Court held that '[t]he oil produced from the well site will not be used in the creation of a different type of object, in the way that a component part is incorporated - along with many other different and equally necessary components - in manufacturing a motor vehicle or aircraft. Refining the oil is simply a process that it inevitably undergoes on the pathway from extraction to combustion. <u>Nor is there any element of conjecture or speculation about what will ultimately happen to the oil. It is agreed that it will inevitably be burnt as fuel</u>. And <u>a reasonable estimate can readily be made of the quantity of GHGs which will be released</u> when that happens.'[105] (our emphasis). In contrast, in the present matter, an assessment of production impacts at this stage would be highly speculative. There is no 'inevitability' of production as was the case in *Finch*.

[104] *Finch* at para 77.
[105] *Finch* at para 123.

104.5. Importantly, the Court affirmed that 'only effects which evidence shows are likely to occur and which are capable of meaningful assessment must be assessed'.[106]

105. Our Courts have taken the same position.

105.1. The Court's findings in *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* [2017] 2 All SA 519 (GP) (***Earthlife***) are confined the project itself. The Court determined that the EIR did not deal with the project's full life-cycle emissions, the carbon footprint of the project calculated for construction and decommissioning, the activities associated with the project - mining and coal transportation, and the project's resilience. The Court went on to accept that 'an abstract, macro-level assessment of the climate change impact of additional coal-fired power could not cast any light on the specific climate change impacts and mitigation strategies of specific coal-fired power stations located at specific sites. These relevant considerations are context specific and have to be distinctively considered.'[107] *Earthlife* clearly confines the assessment of the climate change impact to the specific project. In the present matter, the project is confined to exploration activities, and a macro-level assessment of the climate change impact of production activities is unattainable and unhelpful.

105.2. The case of *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others* (17554/2021) [2022] ZAGPPHC 741 (6 October 2022) concerned an environmental

[106] *Finch* at para 167.
[107] *Earthlife* at para 94-95.

authorisation for the construction of a mid-merit combined cycle gas power plant (**CCGPP**). The applicants claimed that there was an inadequate climate change impact assessment, including the failure to assess the full life-cycle greenhouse gas emissions which will be caused by the CCGPP in consequence of a failure to assess the emissions associated with the extraction of gas and its transport to the CCGPP in Richards Bay.[108] The High Court dismissed this ground of review on the basis that (a) such a broad consideration of 'upstream effects' would likely create an almost impossible situation, (b) 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 (c) 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. The EA for the CCGPP is but the first link in a chain of EA's required before any construction can commence.[109]

105.3. The applicants' reliance on the High Court decision in *Sustaining the Wild Coast* is misplaced.[110] The Supreme Court of Appeal did not endorse the finding that it was necessary to assess the climate change impacts of burning any fossil fuels discovered, and in fact held that there was no warrant for the High Court's far-reaching finding that '[a]uthorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa

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[108] *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others* (17554/2021) [2022] ZAGPPHC 741 (6 October 2022) (***SDCEA***) at para 12-13, and 17.2. The applicants sought leave to appeal the judgement, which was refused in January 2023.
[109] *SDCEA* at para 26-34.
[110] Applicants' HOA par 118.

complying with its international climate change commitments', which finding has a sterilising effect.[111]

The uncertainties associated with production activities

106. On the question of whether a meaningful assessment of the climate change impacts of production is even possible, as appears from the Appeal Decision, TEEPSA explained that given the large uncertainties at the stage of exploration regarding the type of hydrocarbons, the size of the discovery, the quality of the reservoirs, the spatial extension of the area to be developed, the way to develop and economically produce the targeted discovery in a success case cannot be assessed in advance. The possible future production activities that may or may not arise vary hugely in scope, location, extent, and duration and cannot be reasonably defined until the proposed exploration project has been completed. It is not reasonable to undertake an assessment of the environmental impacts of an undefined project. The Minister concluded *inter alia* that there is no legal requirement to conduct a full life cycle impact assessment for GHG beyond the exploration activities. [112]

107. A related issue raised is whether 'the costs associated with the extraction, infrastructure development, and environmental damage could offset any potential gains that the Final EIR assumes is likely to follow from a successful find'.[113] The evidence in regard to the applicants' mooted calculations are denied as speculative,[114] and there is no reason to reject TEEPSA's evidence that:

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[111] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) at para 26.
[112] Record pp 10181-10182.
[113] FA p 56 par 126.
[114] SFA p 1631 par 36, Trollip Affidavit p 2345 par 21; TAA pp 2986-2988 par 122-125, p 3023 par 267.

108. Before exploration and appraisal wells are drilled, it is premature to work out or define the scale of a development scenario: well type, count, and produced fluids can only be defined after the initial exploration work has been completed.

109. Further uncertainties include the type of hydrocarbons, the size of the discovery, the quality of the reservoirs, the spatial extension of the area to be developed, and the way to develop and economically produce the targeted discovery.

110. The economic viability of a find depends on the price and the costs of (a) extracting and (b) processing the gas. If it is going to be used directly and piped as an industrial feedstock, then the subsequent costs are going to be lower than if, say, the gas had to be compressed or liquified.

111. The product could also be oil which would completely change the assessments of feasibility as well.

Knowledge

112. Finally, the applicants contend that the generation of information on possible indigenous resources has no relevance outside of the extraction and subsequent utilisation of the resources.[115] This is an oversimplification. In section 5 of the Final EIR, dealing with need and desirability:[116]

112.1. It is acknowledged that the proposed exploration project, itself, would not result in the production of oil and gas, but rather the generation of information

[115] RA p 3153 par 53.
[116] Record p 4803.

on possible indigenous resources. By gaining a better understanding of the extent, nature and economic feasibility of extracting these potential resources, the viability of developing indigenous gas resources would be better understood.

112.2. The proposed exploration project, as contemplated (i.e. not including possible production), has no direct influence on South Africa’s reliance on fossil fuels and whether consumers use more or less oil or gas, nor on which types of fossil fuels contribute to the country's energy mix. The proposed exploration project will not necessarily change how fossil fuels are used in South Africa and has no direct influence on GHG emissions that would arise from the consumption of fossil fuels. These aspects are influenced by South Africa’s energy and climate change related policies, the financial costs of the various energy sources and consumer choices in this regard.

113. The applicants argue that the climate change impacts are plainly relevant to need and desirability, and that any other conclusion would, effectively, permit consideration of applications for environmental authorisations to take into account the positives of a proposed project while excluding the negatives, which is not permissible in law.[117]

114. But the applicants lose sight of what the Proposed Project is, and that an assessment of exploration emissions was undertaken as required by NEMA.[118] It would be unlawful to take into account irrelevant considerations not authorised by the provisions of the empowering statute.

[117] Applicants’ HOA par 128.
[118] TAA pp 2976-2981 par 109-112.2

115. In his answering affidavit, the Minister explains the need and desirability of gas exploration activities with reference to various policy instruments.[119] In the circumstances, the Minister's determination of need and desirability calls for an appropriate level of deference.

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

ASSESSMENT OF IMPACTS INTERNATIONALLY

117. The fourth review ground is premised on the alleged common cause failure to assess impacts outside South Africa.

118. The Final EIR records that an oil spill caused by a well blow out may in certain circumstances (depending on the metocean) lead to oil contaminating Namibian waters, the Namibian shoreline, and international waters.[120]

119. In the Appeal Decision, the Minister stated that:

> '2.69. I have had regard to the SEIA *(sic) and* I am satisfied that the impacts of the exploration of oil/gas have been fully identified, assessed and mitigated. In this regard a precautionary approach has been adopted.
>
> 2.70. I have noted the indications in the ESIA report of the possibility of potential impacts on Namibian territorial waters in the event of an oil spill, however I determine that there was no requirement for the applicant to conduct a "detailed assessment" of any impacts on Namibian waters, or its coast and coastal communities. I find that this does not render the process deficient.'[121] (our underlining).

120. The applicants challenge the Minister's determination, and contend that:[122]

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[119] MAA p 2453 par 22, p 2456 par 31, pp 2456-2457 par 33.
[120] As noted by the applicants in paragraphs 129, 130, 137, 139, 140, 141 of the founding affidavit.
[121] Record p 10300 (Appeal Decision).
[122] FA pp 65 to 69 par 154-172; RA pp 3156-3157 par 66-69.

120.1. Because NEMA does not expressly include or exclude the consideration of transboundary impacts of projects which take place in South Africa (and therefore are subject to NEMA), it is necessary to interpret NEMA to determine whether or not there is an obligation to assess those transboundary impacts.

120.2. At least four international obligations are relevant - being the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region ('**the Abidjan Convention**'), the Benguela Current Convention, the United Nations Convention on the Law of the Sea ('**the UNCLOS**'), and general international law as confirmed in the *Pulp Mills* case) - which oblige the South African state to assess the environmental impact for activities which are likely to cause adverse impacts on (certain) marine and coastal environments.

120.3. In interpreting NEMA, section 233 of the Constitution requires the Court to prefer reasonable interpretations of legislation which are consistent with international law. South Africa's international legal obligations indicate that NEMA must be interpreted as requiring the assessment of transboundary impacts. [123]

120.4. TEEPSA was therefore obliged to assess the impacts of the proposed Project on Namibian waters, the Namibian shoreline, and international waters, and failed to do so.

[123] This section provides that 'when interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

120.5. The DG and the Minister took their decision in the absence of the obligatory assessment of these impacts.

120.6. TEEPSA seeks to create a dangerous lacuna in environmental law. If the country which has jurisdiction over a proposed project does not require the assessment of the transboundary impacts, there will be no effective way of ensuring those impacts are assessed.

121. This ground of review is unsustainable:

121.1. First, it is axiomatic that there can only be a failure to assess and consider impacts outside South Africa where such legal obligations are shown to exist. But the international conventions relied on by the applicants do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment. And the principle of international law the applicants rely on is a principle of NEMA.

121.2. Second, even if such legal obligations are established (which we do not concede), there is no lacuna in NEMA. Chapter 6 of NEMA makes specific provision for the incorporation of international obligations and agreements, and the applicants do not challenge NEMA or any failure to act in terms of Chapter 6 of NEMA. In fact, they ignore chapter 6.

121.3. Third, the applicants in effect ask this Court to read-in to NEMA the obligation to assess and consider extra-territorial impacts in accordance with the prescripts of NEMA and its regulations. Such a reading-in would in the circumstances amount not to interpreting but legislating, and so implicate the separation of powers doctrine. Even if it were permissible in the present circumstances (in particular also in view of Chapter 6 of NEMA), acceptance of the applicant's formulation of this obligation would pose the problem of vagueness and legal uncertainty which should be avoided.

121.4. Fourth, at the level of fact, the EA does not engage the international instruments relied on. Deterministic modelling suggests that even a worst-case scenario would only impact small portions of the coastline. The remote possibility of a blow-out and spill also bears on the required level of detail of the assessments that had to be undertaken, as the Minister confirmed.

The applicants have not established a reviewable irregularity

122. The applicants' argument is threefold: [124]

122.1. The applicants accept, that NEMA and its regulations do not require an applicant for an EA to conduct an ESIA (assessment) of transboundary impacts.

122.2. They then say that the court must however interpret NEMA to require it, notwithstanding the absence of explicit requirements, based on South Africa's international obligations.

122.3. These obligations include that an environmental impact assessment must be conducted where an activity poses a risk of transboundary harm.

123. The case pleaded by the applicants to sustain this ground of review is woefully inadequate, as we illustrate below with reference to the basic principles pertaining to (public) international law in South African law.

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[124] Applicants' HOA par 139, 154 and 157.

No binding international legal obligations

124. International agreements (also referred to as treaties or conventions) negotiated and signed by the national executive,[125] will only bind the Republic on the international plane once they have been approved by resolution in both the National Assembly and the Council of Provinces or if they were binding on the Republic when the Constitution took effect.[126]

125. An exception is created in s 231(3) of the Constitution in the case of 'technical, administrative or executive' treaties, or treaties not requiring 'ratification or accession'. However, none of the international agreements on which the applicants rely are technical, administrative or executive - the Abidjan Convention, the Benguela Current Convention and the UNCLOS all require ratification or accession.

126. However, the international conventions relied on by the applicants do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.

127. The case of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* 2021 (11) BCLR 1263 (CC) (***Zuma III***) explains the correct approach to the legal instruments relied on by the applicants.

[125] Section 231(1) of the Constitution.
[126] See sections 231(2) and s 231(5) of the Constitution.

128. In *Zuma III* the relevant unincorporated treaty at issue was the International Covenant on Civil and Political Rights ('**ICCPR**'). In addressing the import of the ICCPR, the majority held that:

> '[108] It is trite that international treaties, like the ICCPR, do not create rights and obligations automatically enforceable within the domestic legal system of the member State that ratifies and signs them. The architecture of international law is constructed around the recognition of State Sovereignty. That is why it is a cardinal tenet of international law, that to be given force and effect on the domestic plane of a dualist State, international treaties must be incorporated into a State's body of domestic law by way of an implementing provision enacted by that State's Legislature. This principle is put on a textual footing in our own Constitution by virtue of section 231(4), which maintains that a South African court cannot treat any international law as directly applicable on the domestic front unless it is first incorporated into domestic law by an enactment of national legislation. It is worth noting that while South Africa has signed and ratified the ICCPR, it has not incorporated it into domestic law. And, of course, it goes without saying that section 39(1)(b) does not, in and of itself, incorporate international law into domestic law. What this means is that, although the ICCPR binds the Republic at the international level, its provisions, which are not self-executing, do not create domestic rights and obligations that are capable of binding domestic courts or being invoked by litigants in this Court, or any court in this country. Even my Brother accepts, as of course he must, that the ratification of international law instruments does not make them enforceable in our domestic courts, but rather, binds the Republic at the international level.
>
> [109] On a conspectus of all of the above, the simple truth that ossifies is that the ICCPR, an international treaty not incorporated into South African law, has no place being invoked in a national court, like this one, and litigants cannot purport to rely on section 39(1)(b) of the Constitution as the basis upon which to attempt to invoke its provisions. The parties at hand have not invoked the relevant ICCPR provisions – for they simply cannot – and it would be wholly inappropriate for this Court to do so on their behalf. I, unlike my Brother, am not satisfied that it is possible to resort to the direct application of international treaty law in this Court, namely certain of the provisions of the ICCPR.'[127]

129. Importantly, the majority affirmed that:

> '[116] Furthermore, and this cannot be overemphasised: no matter which international provision may be relevant, section 39(1)(b) enjoins us only to "consider" it. What section 39(1)(b) does not do is import some obligation on our domestic courts to depart from South African constitutional rights jurisprudence merely because similar or duplicative provisions exist, and their interpretations

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[127] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State & Others* 2021 (11) BCLR 1263 (CC) *(**Zuma III**)* at para 108-109.

have been propounded, at the international level. As this Court itself noted in *Glenister II*:

> "[T]reating international conventions as interpretative aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to 'incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door'."

[117] Lest international law be incorporated through the back door, section 39(1)(b) must not be conflated with section 233 of the Constitution, which applies to the interpretation of legislation, and requires something quite different of our domestic courts. Section 233 provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[118] Section 233 is markedly distinct from the interpretative injunction captured in section 39(1)(b) of the Constitution. According to the former, when interpreting legislation, courts must "prefer" an interpretation consonant with international law, over any other interpretation. According to the latter, when interpreting the Bill of Rights, our courts need only "consider" international law. Importantly, this is not the same as saying that courts are enjoined to defer to international law or prefer an interpretation of rights consonant with it. Once this distinction is properly understood, so can my main point be: international law is an interpretative tool to assist in the interpretation of our Bill of Rights and it does not oblige this Court to prefer a position taken in international law. I therefore take issue with my Brother's interpretation of section 39(1)(b), because he holds that it enjoins this Court to "consider international law and prefer a meaning consistent with that law". What the ICCPR is not, is some supreme body of law that the Constitution ushers in to trump any and all application of our own domestic law. It must be considered, not necessarily preferred.'[128]

130. What the applicants thus attempt to do, in fact, is to import an international obligation into municipal law which is not part of municipal law, and to enforce it against the respondents as a matter of municipal law. This is not permissible.

131. The applicants' reliance on 'the principle of prevention, as a customary rule' is misplaced.[129] The principle is already a part of the national environmental management

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[128] *Zuma III* at para 116-118.
[129] Applicants' HOA par 157-158, with reference to the *Pulp Mills* case.

principles in NEMA. The preventive principle is reflected in the concept that the disturbance of ecosystems and loss of biological diversity are to be '…avoided, or … minimised and remedied'; and in the precept that the negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.[130]

No *lacuna* in NEMA

132. Before dealing with Chapter 6 of NEMA, we emphasise that the applicants do not refer to any specific provision in NEMA which they say falls to be interpreted in terms of section 233 of the Constitution. Their starting point is that 'nothing' in NEMA provides that the assessment of impacts of activities is limited to impacts arising in South Africa.[131] That is not so.

132.1. Section 2(1) of NEMA (which introduces the national environmental management principles) provides that 'the principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment'.

132.2. Indeed, the applicants accept that NEMA gives effect to the constitutional right to the environment as entrenched in section 24 of the Constitution.[132] Section 24 forms part of chapter 2 of the Constitution, containing the Bill of Rights which operates within the territory of South Africa. It does not, for example, entitle citizens of Namibia or the Namibian state to the rights entrenched in section 24. As a point of departure, therefore, NEMA operates within the

[130] NEMA s 2(4)(a)(i), and s 2(4)(a)(viii).
[131] FA p 65 par 154.
[132] FA p 19 par 33.

territory of South Africa unless specific provision is made to impose specific obligations on anyone in municipal law in respect of certain extraterritorial areas pursuant to certain international obligations of the state.

133. Section 231(4) of the Constitution provides that 'any international agreement becomes law in the Republic when it is enacted into law by national legislation'. Because municipal law does not contain an obligation to assess transboundary impacts nor an obligation to consider them, the applicants opted for incorporating these obligations by way of interpretation. An interpretation, however, cannot go that far, especially not in view of the provisions of chapter 6 of NEMA which expressly deal with the incorporation of international environmental instruments.

133.1. Section 25(1) provides that where the Republic is <u>not yet bound</u> by an international environmental instrument, the Minister may make a recommendation to the Cabinet and Parliament regarding accession to and ratification of such an international environmental instrument in respect of matters listed in subparagraphs (a) to (k).

133.2. Section 25(2) provides that 'where the Republic is a party to an international environmental instrument the Minister, after compliance with the provisions of section 231(2) and (3) of the Constitution, may publish the provisions of the international environmental instrument in the Gazette and any amendment or addition to such instrument. Sections 231(2) and (3) of the Constitution provide that:

133.2.1. An international agreement <u>binds</u> the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

133.2.2. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

133.3. Section 25(2) thus authorises the Minister for the Environment to publish international environmental instruments which become binding on South Africa in the Gazette.

133.4. Importantly, section 25(3) of NEMA provides that the Minister may introduce <u>legislation</u> in Parliament or make such <u>regulations</u> as may be necessary to give effect to an international environmental instrument to which the Republic is a party and such legislation and regulations may deal with the matters set out in subparagraphs (a) to (h). As far as could be established, no legislation or regulations have been promulgated pursuant to give effect to the (alleged) international law obligations contended for by the applicants, and none are relied upon by the applicants. To contend that NEMA should nonetheless be 'interpreted' to incorporate such obligations in municipal law, on the basis of an interpretation under section 233 of the Constitution, is with respect a stretch too far.

134. There is no *lacuna* in NEMA because Chapter 6 of NEMA makes specific provision for the incorporation of international obligations and agreements The applicants do not challenge NEMA or any failure to act in terms of Chapter 6 of NEMA. In fact, they ignore Chapter 6.

Impermissible reading-in

135. Under the guise of interpretation, the applicants seek a reading in of international obligations to legislate for the alleged '*lacuna*' in NEMA. We have addressed why there is no such lacuna.

136. But to read-in to NEMA the obligation to assess and consider extra-territorial impacts in accordance with the prescripts of NEMA and its regulations would amount not to interpreting but legislating.

137. Separation of power considerations require that courts should not embark on an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation. [133]

138. Moreover, even if it were permissible in the present circumstances (in particular also in view of the provisions of NEMA discussed above), acceptance of the applicant's formulation of this obligation would pose the problem of vagueness. As a consequence of such an invasive interpretation it may become impossible, notwithstanding legal guidance, for a person to know how a given provision will operate.

The conventions and rule of customary international law do not impose the obligations contended for by the applicants or are not triggered in the factual circumstances of the matter

139. In the event that the court should find that the applicants can competently place reliance on the international law obligations referred to and uphold the argument that such an international law obligation can be incorporated into municipal law where it does not

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[133] See *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC) at para 123-125. See also *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) at para 54.

otherwise exist by way of an interpretation under section 233 of the Constitution, we submit that the international instruments and rule relied upon in the applicants' founding affidavit papers in any event do not support the applicants' contentions for the reasons set out below.

The facts

140. The TEEPSA Appeal Response records that there is no obligation on the decision-makers to consider such impacts, in particular also because the likelihood of a well blow out occurring is very low and is even less likely to affect Namibian territories.[134]

141. The applicants argue that TEEPSA and the Minister do not dispute that these impacts were not considered but that they contend that there was no obligation to consider transboundary impacts.[135] This statement is not entirely accurate or complete. There is no admission by TEEPSA that the transboundary impacts were not considered at all.

142. In its answering affidavit TEEPSA specifically referred to the SEI report which records that:

> 'All coastal communities and activities along the South-West coastline (key area affected) are considered to be of very high sensitivity to major oil spills: it is a high value coastline that services extensive regional tourism, recreation, residential development, and near-shore and offshore fishing. Although modelling undertaken for this study shows that a spill could affect areas between southern Namibia on the West Coast to Gqeberha on the South-East Coast, importantly, deterministic modelling suggests that even a worst case scenario would only impact small portions of the coastline' [Record p 7498]
>
> In worst-case scenario, the socio-economic impacts associated with an unlikely large oil spill will likely be focused along portions of the coastline between southern Namibia and Gqeberha depending on the well location and season. Specifically, if the blowout were to happen in mid-winter when there are westerly winds blowing, and the emergency response from Saldanha does not cap it, oil

[134] Record pp 9678-9680 (Document 35.3).
[135] Applicants' HOA par 131

could reach the shores in the densely populated areas between Saldanha and Cape Agulhas' [Record p 7498].[136]

143. Indeed, on applicants' own version there was an assessment in the Final EIR on transboundary impacts.[137]

144. We also point out that the Minster determined that there was no requirement for the applicant to conduct a '<u>detailed assessment</u>' of any impacts on Namibian waters, or its coast and coastal communities. [138]

145. Contrary to the applicants' absolute statement, the true debate is thus about the level of assessment that is required in terms of South Africa's international obligations (assuming that they have been proven) and in this regard, we submit, deference must be shown to the Minister's determination as set out above.

Abidjan Convention

146. Reliance is placed on article 13(2) which provides that 'each contracting party shall <u>endeavour to include an assessment</u> of the potential environmental effects in any planning activity entailing projects within its territory, particularly in the coastal areas, that may cause substantial pollution of, or significant and harmful changes to, the convention area'.[139] Four points are noted:

   146.1. The obligation is that the contracting party 'shall <u>endeavour</u>' to include an assessment of the potential environmental effects in any planning activity entailing projects within its territory. It does not oblige subjects of the South

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[136] TAA p 2955 par 52.2-52.3.
[137] FA p 57 par 130, p 58 par 132 and134.
[138] Record p 10300 (Appeal Decision).
[139] FA p 66 par 160-161.

African state to assess such impacts in terms of municipal law (for e.g. by conducting an assessment compliant with the EIR regulations) or the South African state to consider the transboundary impacts of the activities in terms of the EIR regulations.

146.2. It further appears from article 13(2) that such an assessment shall be included where the planning activity (i) may cause (ii) substantial pollution of or (iii) significant harmful changes to, the Convention area. It would not apply to a case such as the present one where the chance of a well blow out is 'extremely small' (a fact which this court must accept).

146.3. The convention is of course limited to the specific convention area and is not a general obligation extending to international waters.

Benguela Convention

147. The applicants in the second place rely on the Benguela Current Convention.[140] Article 4(2)(b) of the Benguela Convention provides that '<u>the parties</u> shall undertake an environmental impact assessment for proposed activities that are <u>likely</u> to cause adverse impacts on the marine and coastal environment'. Again, this is an obligation of the South African state and does not translate without more into an obligation resting on an applicant for an environmental authorisation to undertake such impact assessment in terms of the EIA regulations or the Minister to consider such assessment in terms thereof.

148. The threshold for this section is, again, that it must be 'likely to cause' adverse impacts on the marine and coastal environment.

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[140] Annexure 'FA12' pp 1608-1616.

United Nations Convention on the Law of the Sea

149. The applicants furthermore place reliance on article 206 of the UN Convention on the Law of the Sea. It provides that '[w]hen states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effect of such activities on the marine environment …'.

150. Again, there must be 'reasonable grounds' for believing that planned activities (i) 'may cause', (ii) 'substantial' pollution', or (iii) 'significant' changes, to the marine environment. It is submitted that this obligation is not triggered on the facts of the present matter, for the reasons set out in TEEPSA's answering affidavit.

The Principle of Prevention

151. We have addressed how the principle of prevention is already part of NEMA, and the Minister's determination reflects that the precautionary approach has been adopted. [141]

152. What the *Pulp Mills* case says is 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 <u>may have a significant adverse impact</u> in a transboundary context, in particular, on a shared resource'.[142]

153. On the facts, an environment impact assessment was undertaken. The remote possibility of a blow-out and spill bears on the required level of <u>detail</u> of the assessment that had to be undertaken, as the Minister confirmed

[141] Record p 10300 (Appeal Decision).
[142] At para 204, quoted in the Applicants' HOA at par 157.

154. To conclude on this ground of review, we submit that TEEPSA is not obliged by the empowering legislation to undertake the detailed assessment of the impacts of the proposed Project on Namibian waters, the Namibian shoreline, and international waters, contended for by the applicants. TEEPSA's obligations as well as the DG's and the Minister's powers are exhaustively set out in the applicable legislation, as properly interpreted. TEEPSA complied with these obligations.

155. For all these reasons, this ground of review must fail.

BLOW-OUT AND OIL SPILL CONTINGENCY PLANS

156. The fifth review ground is a challenge to the Environmental Management Programme (**EMPr**) for the Proposed Project on the basis that: [143]

 156.1. The Blow-Out Contingency Plan (**BOCP**) and Oil Spill Contingency Plan (**OSCP**) were not made available when the Final EIR was prepared and when the decisions under review were taken.

 156.2. The BOCP and the OSCP documents (or their content) were required to form part of the EMPr for the proposed project, because these are the documents which will describe how TEEPSA intends to modify, remedy, control or stop an oil spill resulting from a well blow out.

 156.3. The process through which the Final EIR and the EMPr for the proposed project were prepared and through which the EA was granted was not procedurally fair and did not comply with the public participation requirement in NEMA.

[143] FA pp 72-73 par 188-192, pp 74-75 par 194 RA pp 3157-3158 par 71.

157. This ground of review is without merit:

157.1. First, it is impossible to prepare such plans absent the information an applicant can only ascertain after obtaining the EA. The applicants do not dispute this.

157.2. Second, the Final EIR sufficiently detailed how TEEPSA intends to modify, remedy, control or stop an oil spill resulting from a well blow out.

157.3. Third, the applicants disregard the fact that the EA includes conditions requiring (a) the submission of the BOCP and OSCP within 60 days prior to the commencement of the proposed drilling operations (5.5.2); and (b) an enhanced OSCP if operations are planned to cover the Austral winter (5.5.4).

The applicants have not established a reviewable irregularity

158. The applicants argue that the manner in which the BOCP and OSCP have been handled has two flaws: (a) no public participation regarding the BOCP and OSCP; and (b) the BOCP and OSCP ought to have been part of the EMPr.[144]

159. But this is not what is required under NEMA. On the facts, interested and affected parties were 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.

160. TEEPSA has explained in detail: (a) the data inputs required for the BOCP and OSCP, and the stage at which such information becomes available; (b) the level of detail in TEEPSA's 'generic Oil Spill Contingency Plan'; and (c) the mechanics and logistics of

[144] Applicants' HOA par 187-199.

the mitigation measures that will be put in place, including the feasibility of such measures.[145]

161. The applicants do not dispute these allegations. They simply say that these allegations are vague, and that TEEPSA has not set out the time and costs of preparing and then amending the BOCP and OSCP.[146]

<u>The BOCP and OSCP could not be made available</u>

162. In s 1 of the MPRDA an 'exploration operation' is defined as the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery. In order to undertake an exploration operation, TEEPSA requires an EA.

163. The TEEPSA Appeal Response records that the OSCP and BOCP are unique and specific to each operation and contractor. As a result, the specific plans cannot be developed in detail at this stage.[147]

164. There is no vagueness in TEEPSA's explanation of the data inputs required for the BOCP and OSCP, and the stage at which such information becomes available. By way of example:

164.1. TEEPSA explains that the BOCP and OSCP are prepared specifically for each drilling campaign. The modelling inputs required include (a) location, (b) type of resource, (b) season, (c) contractor, and (d) response services. These

[145] TAA pp 2996-3006 par 159-183.
[146] RA p 3158-3159 par 73-74.
[147] Record p 9674.

tailored operational plans therefore cannot be prepared during the ESIA phase as the information required to determine the well locations and well designs is not yet available.[148]

164.2. Mr Groenewald explains in detail the preparation of the BOCP and OSCP, including that: [149]

164.2.1. The BOCP is a large document that is intended to define a detailed response plan specific to the rig and well location to address a possible subsea blow out, including measures to be put in place in case of a blowout incident to stop the release of oil (intervention on the well head, mobilisation of a capping device, drilling of a relief well, and the like) and to limit the amount of oil reaching the sea surface (for example deployment of a subsea dispersant injection system – SSDI, or other techniques).

164.2.2. The BOCP document is composed of several sub-documents each of which is dedicated to various aspects of an overall plan and is always specific to a particular well designed rig set up, environment, affiliate, logistics plans and resources identified to respond to an emergency. All these resources can only be identified and put in place as part of drilling project and cannot be identified or contracted years in advance. The BOCP can therefore only be finalised once well engineering has been completed, and rig and associated services are all selected and identified.

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[148] TAA p 2996 par 161.
[149] TAA pp 2996-2999 par 162.

164.2.3. The BOCP is also a live document that requires updates as necessary, and is an emergency response strategy that requires a level of detail sufficient to respond in adequate and timely manner;

164.2.4. The OSCP takes into account the outcomes of the BOCP and the analysis done by the oil spill modelling studies, which analyse the potential consequences of a release of oil following a blowout incident, taking into account all relevant parameters. This assists in determining the best-suited response strategy. Oil spill modelling must be associated with a specific well design and reservoir type, each having unique characteristics. This association enables the determination of what is known as the most credible blowout rate, which is specific to that particular well and location.

164.2.5. The location of the specific well and reservoir oil type are critical because oil spilled at sea moves under the influence of local winds and currents, and differences in metocean conditions, water depth, temperature, distance to shore, hydrodynamics, and the like, influence the behaviour of the oil as it flows to the surface.

164.2.6. The type of product spilled is also a critical input. The oil expected to be encountered as a result of the drilling is very different between blocks, with different basins and reservoirs being targeted. The potential type of oil expected is determined by geological and reservoir specialists' studies that are matured closer to the final well selection and also feeds into the well architecture and design.

164.2.7. The probable blow out rate is only calculated once the well architecture is finalised as the well final diameters and design have an impact on the flow rates. This means that the volume of oil reaching the sea surface and drifting on the surface of the sea are different from well to well. This in turn means that the types and quantities of resources to be mobilised and used to respond to an oil spill incident will vary accordingly.

164.3. TEEPSA further explains that from a practical perspective, if tailored BOCPs / OSCPs were submitted and approved as part of the EIR / EMPr, they would be based on an assumed well locations and designs. Once the pre-drilling activities (well studies, design, contractual arrangements) were completed, the well locations identified and the BOCPs / OSCPs approved by SAMSA, TEEPSA would need to apply to amend its EA / EMPr to cater for these revised BOCPs / OSCPs. This would be impractical and overly burdensome. [150]

165. For these reasons:

165.1. It would be impossible for the BOCP / OSCP, in a complete form, to be included in the ESIA and / or EMPR.

165.2. The requirement that an BOCP / OSCP must be submitted within 60 days prior to the commencement of the proposed drilling operations, is rational and reasonable in the circumstances.[151]

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[150] TAA p 2999 par 164.

[151] Initial Decision; specific condition 5.5.2.

The mitigation measures and public participation

166. TEEPSA has detailed the mechanics and logistics of the mitigation measures that will be put in place, including the feasibility of such measures.[152]

167. The Final EIR also sufficiently describes how TEEPSA intends to modify, remedy, control or stop an oil spill resulting from a well blow out.[153]

168. Regulation 40 of the EIA Regulations deals with the purpose of the public participation process. It provides:

> '(1) …
> (2) The public participation process contemplated in this regulation must provide access to all information that reasonably has or may have the potential to influence any decision with regard to an application unless access to that information is protected by law and must include consultation with … all potential, or, where relevant, registered interested and affected parties'.

169. The material information contained in the generic OSCP was made available on the SLR website as additional information, and interested and affected parties were notified of this

170. It is also recorded in the Final EIR that additional information provided to interested and affected parties during the comment period on the draft ESIA Report included a copy of TEEPSA's generic Oil Spill Contingency Plan (OSCP) which was uploaded to the SLR website and data free website for review and comment. Interested and affected parties and the regulator were duly notified of this, including the regulator by means of a notification letter to the final Scoping Report. [154]

[152] TAA pp 3003-3006 par 178-183.
[153] TAA pp 3002-3004 par 174-179.
[154] TAA p 3002 par 175, p 3003-3004 par 179.

171. TEEPSA has explained that the contents of TEEPSA's generic OSCP covers the generic response methodology and capability for the region (based on recent wells drilled in neighbouring Block 11B/12B) and therefore considers regional Metocean conditions of the drilling campaign for Block 5/6/7. However, the final specifics of the OSCP and detailed response strategies can only be finalised closer to the time of drilling and will require the approval of the relevant authorities closer to the time of drilling. The sections that will need to be updated in the final OSCP include logistics support, final well location, the oil spill modelling results, and the outcomes of the BOCP. [155] No comments were received on the generic OSCP during the public participation process. [156]

172. In the circumstances, the Minister, with respect correctly, determined that:

> '2.61. In summary, there is nothing before me to suggest that the applicant did not conduct an adequate PPP or that the appellants were denied an opportunity to participate in the application process, Moreover, those people with grievances made them in their appeal submissions which were responded to and I considered those.
>
> 2.62. I am accordingly satisfied that the PPP carried out in respect of the proposed project met and complied with the requirements for PPP, as outlined in the 2014 EIA Regulations'. [157]

173. We therefore submit that the fifth ground of review is without merit.

PETROLEUM AGENCY OF SOUTH AFRICA APPEAL RESPONSE REPORT

174. The sixth review ground is that the Appeal Response report (**ARR**) submitted by the competent authority in terms of regulation 5 of the National Appeal Regulations under NEMA (**the Appeal Regulations**) was prepared and signed by officials in the employ of

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[155] TAA pp 3002-3303 par 176.
[156] Record p 9674 (TEEPSA Appeal Response).
[157] Record p 10296 (Appeal Decision). 'PPP' means public participation process.

the Petroleum Agency of South Africa (**PASA**) and that this amounts to material non-compliance with the Appeal Regulations.[158]

175. But the competent authority did not submit an ARR, and PASA did not purport to submit an ARR as the competent authority, but submitted the ARR in its capacity as PASA, which it was entitled to do in terms of regulation 5 of the Appeal Regulations.

176. The competent authority, interested and affected parties, and an organ of state (such as PASA) are all entitled but not obliged to lodge a responding statement. PASA is an interested and affected organ of state which would have provided recommendations in respect of the decisions which form the subject of the review application, and which was fully entitled to submit a responding statement in the internal appeal.

The applicants have not established a reviewable irregularity

177. Regulation 5 provides as follows:

> 'the applicant, the decision-maker and affected parties and organs 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.'

178. The applicants argue that the purpose of regulation 5 was to place the DG's comments on the Applicants' appeal before the Minister.[159] However, it is clear from regulation 5 that the submission of an appeal responding statement is not compulsory. The fact that the decision maker or competent authority did not submit a responding statement is not a contravention of regulation 5.

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[158] SFA p 1621 par 7.1, pp 1622-1625 par 8-15. This is contradicted in paragraph 18 of the supplementary founding affidavit, where it is stated that the Minister was provided with no information supporting the DG's decision because the only input received and considered was from PASA and not from the competent authority.
[159] Applicants' HOA par 220.

179. The DG has set out his reasons in the Initial Decision, and so it cannot be contended that the Minister did not have insight into the reasons for the Initial Decision.

180. An ‘organ of state’ is defined in s 1 of NEMA to refer to ‘an organ of state as defined in the Constitution.’ Section 239 of the Constitution of the Republic of South Africa, 1996 defines an ‘organ of state’ as [b(ii] ‘any other functionary or institution exercising a public power or performing a public function in terms of any legislation.’

181. PASA is a functionary or institution exercising a public power or performing a public function in terms of s 70 of the MPRDA. The designation of PASA as such a functionary or institution occurred in GN R733 of 18 June 2004, whereby the Minerals Minister, acting in terms of s 70, designated PASA to perform the functions set out in Chapter 6 of the MPRDA and to perform any other function in respect of petroleum, which the Minister may determine from time to time. PASA is thus an institution performing public functions in terms of the MPRDA, and it exercised its powers as an organ of state in terms of regulation 5 of the Appeal Regulations to submit a responding statement.

182. In this instance, TEEPSA and PASA as an organ of state submitted responding statements which the Minister considered together with the appeals before took the Appeal Decision.

183. The Minister explains that:

> ‘Section 43 of NEMA, read with Regulation 5 of the 2014 National Appeal Regulations, neither restricts nor precludes PASA, the custodian of petroleum data, from responding to the internal appeal filed against the DG's decision to grant the EA for the offshore listed activities or clarifying its recommendation to grant the EA.’[160]

[160] MAA p 2484 par 110.5.

184. The Minister was obliged to take PASA's responding statement into account, and any conflation of PASA's responses with the position of the DG does not rise to the level of a material misdirection, particularly given that the appeal before the Minister is a wide appeal.

185. We submit that for these reasons, this review ground is without merit.

STRIKE OUT OR DISREGARD NEW MATTER

186. The applicants seek to introduce new matter in the replying affidavit deposed to by Mr Hilton Trollip on 14 February 2025.[161] It is trite that new matter falls under the rubric of irrelevant matter and is susceptible to be struck out.[162]

187. In *Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others* , the Court stated that '*the general principle against making out a new case in reply has indeed hardened in recent times'*, with reference to various authorities, including *Pilane and Another* 2013 (4) BCLR 431 (CC), where the majority of the Constitutional Court held, without any qualification, that it is impermissible for an applicant in motion proceedings to make out a new case in reply. An applicant must stand or fall by what is contained in their founding affidavit. [163]

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[161] Trollip Replying Affidavit pp 3182-3183 par 13.
[162] *Van Zyl and others v Government of RSA and others* [2005] 4 All SA 96 (T) at para 119.
[163] *Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others* [2018] 1 All SA 46 (WCC) at para 167. In this regard, the Constitutional Court said the following in a footnote 40 of *Pilane and Another* 2013 (4) BCLR 431 (CC):

'In Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H-636B, the Appellate Division held: "When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustees v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases: *'… an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to*

188. It is also not in our law permitted to simply make general allegations, and when those allegations are dealt with in answer, to come forward with replying affidavits giving details supporting the general allegations originally set out in the founding affidavit.[164]

189. In the circumstances, paragraph 13 of Mr Trollip's replying affidavit should be struck out, alternatively disregarded.

CONCLUSION

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

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T SARKAS

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Chambers, Sandton and Cape Town

7 April 2025

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supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'. Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit' (per Van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260)." In *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 114, this Court held as follows: "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."'.

[164] *Bergkelder v Delheim Wines (Pty) Ltd* 1980 (3) SA 1171 (C) at 1176H, which was affirmed in *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC).