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

Case no: 5676/2024

In the matter between:

THE GREEN CONNECTION NPC	First Applicant
NATURAL JUSTICE	Second Applicant
And	
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	First Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Second Respondent
DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	Third Respondent
TOTAL ENERGIES EP SOUTH AFRICA BLOCK 567 (PTY) LTD	Fourth Respondent
SHELL EXPLORATION & PRODUCTION SOUTH AFRICA B.V.	Fifth Respondent

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JUDGMENT DELIVERED ELECTRONICALLY ON 13 AUGUST 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] There are three applications before this Court: a review in terms of the Promotion of Administrative Justice Act 3 of 2000 (*"PAJA"*), which is the main application, a condonation application for the late institution of the review, and an application by the fourth respondent (*"Total"*) for joinder of Shell Exploration and Production South Africa BV (*"Shell"*) as the fifth respondent.

[2] The review application concerns the granting of an environmental authorization (*"the EA"*) to Total in terms of the National Environmental Management Act 107 of 1998 (*"NEMA"*), for the purpose of conducting exploration drilling to determine whether geological structures contain oil or gas - fossil fuels - in potentially extractable amounts.

[3] The application for an EA was lodged with the Department of Mineral Resources and Energy, and was granted by its Director-General, the third respondent (*"the DG"*) on 17 April 2023. On 24 September 2023 the first respondent (*"the Minister"*) dismissed the applicants' internal joint appeal against the DG's decision (*"the appeal decision"*). It is these two decisions that are the subject of the review application.

[4] The applicants are public interest organisations whose activities include protecting, preserving and conserving the environment. They bring this application in their own interest, in the public interest and in the interest of protecting the environment. They also participated in the process which led to the granting of the EA.

[5] The second respondent is the Minister of Mineral Resources and Energy, responsible for the administration of the Mineral and Petroleum Resources Development Act 28 of 2002 (*"MPRDA"*).

[6] It is common cause that Total and its co-venture partners, Shell and the Petroleum Oil and Gas Corporation of South Africa SOC Ltd (*"PetroSA"*), are the co-holders of an Exploration Right 12/3/224 ("ER 224"), which was 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 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.

[7] ER 224 allows for the undertaking of various exploration operations, including two-dimensional (2D) seismic, three-dimensional (3D) seismic and controlled source electromagnetic surveys, which have now been undertaken within Block 5/6/7. Based on the analysis of the acquired seismic data, Total intends to drill one exploration well and, success dependent, up to four additional wells within the area of interest in Block 5/6/7.

[8] The proposed exploration operations include activities listed in Listing Notices 1 and 2 of the Environmental Impact Assessment Regulations, 2014 (*"the EIA Regulations"*) and as a result, require application for an EA in terms of NEMA.

B. THE INTERLOCUTORY APPLICATIONS

The Condonation

[9] The applicants seek condonation because the review application was only properly served in terms of the Uniform Rules some 51 days late upon the Minister, 29 days late upon the second respondent and the DG, and 10 days late upon Total.

[10] Since the appeal decision was issued on 24 September 2023, and the applicants were notified thereof on 3 October 2024, the review application was due by 1 April 2024, which was the statutorily prescribed 180 days deadline in terms of section 7(1) of PAJA. Instead, the late timeframes mentioned above meant that service was effected on 10 April 2024 upon Total, 9 May 2024 upon the DG and the second respondent, and 21 May 2024 upon the Minister.

[11] The condonation application is not opposed. The applicants explain that, although they issued the review application on 20 March 2024 and served it electronically on 22 March 2024, within the prescribed 180 days, it only contained four of the many annexures attached to the founding affidavit, with some pages of the founding affidavit omitted. The founding papers were voluminous, running to some 1614 pages. And some of the attached annexures were not initialled by the deponents or the commissioner of oath. All of these omissions were rectified in the papers that were later physically served by the sheriff.

[12] They explain that there were logistical difficulties experienced in the printing of the documents, as well as some back and forth travelling to the residence of the commissioner of oaths after hours. In addition, it appears that the initial physical service upon Total, which was attempted on 9 April 2024, was served at an incorrect address. Total took issue with that as well as the electronic service to which it had not consented. For its part, the Pretoria State Attorney refused to accept service on 15 April 2024 because the papers had been issued out of the Western Cape High Court, and as a result the papers were served directly upon the first to third respondents on 9 and 21 May 2024.

[13] As I have stated, the condonation application is not opposed. The errors and omissions have now been rectified. All the affected parties have filed papers in response to the application and accordingly there is no prejudice caused to any of them. There is furthermore no dispute that the issues raised in the application are important matters of public interest, and that it is in the interests of justice that they should be fully ventilated. The explanation for delay is also not disputed. The condonation application is accordingly granted.

The Joinder

[14] Next for consideration is the joinder application, which is opposed only by the applicants. For its part, Shell delivered an affidavit recording its support for the joinder, making common cause with the contentions set out in Total's answering affidavit to the main application, and recording that it adopts those contentions and defences as its own. It was accordingly not necessary to adjourn or postpone the proceedings pursuant to the joinder application, and in fact, the parties agreed to argue the joinder, condonation and review applications compositely.

[15] The joint venture which holds the rights to ER 224 comprises Total, Shell and PetroSA who hold undivided participating interests of 40%, 40% and 20%, respectively. The ER 224 records that PetroSA ceded 80% of an undivided share to Total[1] which was endorsed on 20 May 2023, and Total ceded an undivided participating interest of 40% in favor of Shell which was officially endorsed on the ER 224 on 4 June 2021.

[1] At the time, the name of Total was Anadarko South Africa Pty (Ltd), which was subsequently changed and the name change endorsed on 3 May 2022.

[16] Total states that, subsequent to the granting of the EA by the DG on 18 April 2023 which is the subject of the review application, it has resigned from the joint venture of which it has been the Operator, and Shell has been appointed as the Successor Operator. It states that it has also commenced with the process of assigning its undivided participating interest in ER 224 to Shell and Petro SA in proportionate shares.

[17] In order to formalise its resignation, Total states that it will in due course apply in terms of s 11 of the MPRDA for the second respondent's prior written consent to transfer its undivided participating interest in ER 224 to Shell and PetroSA, and in terms of s 102 of the MPRDA for the amendment of the EA to reflect the transfer.

[18] On the basis of these developments, Total states that Shell has a direct and substantial in interest to be joined in these proceedings as the co-holder of the ER 224 which has applied for the EA, and is a prospective holder thereof on behalf of the joint venture, subject to the approval of the amendment of the EA. Further, as the Successive Operator of the joint venture it will undertake the proposed exploration activities on behalf of the joint venture, once the amendment of the EA to provide for Shell as the holder has been approved. An order granted in the review application, says Total, will be binding on all parties whose interests will be affected, including Shell.

[19] The applicants dispute that Shell has a direct and substantial interest in the review application. First, they state that the review relates to the EA, not the underlying exploration right ER 224. In any event, they state that since Total has yet to apply to amend the EA and to transfer it to Shell, the alleged interest in the proceedings amounts to and inchoate intention to the transfer of the EA, which does not establish a legal interest in the subject matter of the review. The only interest that Shell may have in the relief sought in the review is a contingent commercial interest or *spes* in obtaining the transfer of the EA, neither of which amount to a legal interest.

[20] Secondly, the applicants contend that ER 224 has in any event lapsed under the MPRPA, given the statutory maximum length of an exploration right renewal set out in sections 80(5) and 81 (4).

[21] Thirdly, the applicants state that the founding affidavit in the joinder application contradicts the content of the final environmental and social impact assessment report (*"the Final EIR"*) prepared on behalf of Total as well as Total's answering affidavit in the review application in relation to: (a) the identity of the party who will drill the exploration wells under the EA; and (b) the mitigation measures that will be in place for the project, and there can be no transfer of the EA without evidence that Shell has equivalent mitigation measures.

[22] It is most convenient to first deal with the second contention - the applicants' denial of the extant status of the ER 224. The ER 224 was registered in the minerals and petroleum titles registration office on 31 August 2012. On 29 October 2021, Total lodged an application on behalf of the joint venture for the third renewal of ER 224 in terms of section 81 of the MPRDA, and states that the application is still pending whilst the applicants dispute this.

[23] The application for renewal was lodged with the Petroleum Agency SA (*"PASA"*), which is the agency designated in terms of s 70 of the MPRDA[2], to perform the functions set out in Chapter 6 of the MPRDA, including accepting and processing exploration rights.

[24] The basis for the applicants' denial is firstly a letter dated 25 May 2022, in which PASA's then manager of licencing and regulation advised Total that the renewal of the exploration right had been granted. Given the two-year validity period of a renewed exploration right in terms of s 80, read with s 81, the applicants state that it had expired at the earliest by 24 May 2024. The second basis is the applicants' statutory construction of the provisions of the MPRDA, to the effect that an exploration right could not be valid in excess of 9 years.

[25] As regards the letter of 25 May 2022, Total denies receiving it, and explains that it first came to its attention on 7 April 2025 when the applicants forwarded it to it, after the institution of these proceedings. In reaction thereto, Total states it contacted its erstwhile Managing Director (Mr Fayemi) to whom the correspondence was purportedly addressed and who was in its employ at the date of the letter, and he denies receiving the letter or knowing about its existence.

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[2] The designated PASA by the second respondent was *gazetted* in GN R733 on 18 June 2004.

[26] In addition, Total contacted PASA for clarification, and they confirmed by means of a letter dated 15 April 2025 which is also attached to the replying affidavit in the joinder, that the renewal application was still pending and had not been finally determined. Neither Total nor PASA mentions the letter of 25 May 2022 in the correspondence of April 2025, and PASA gives no explanation for that correspondence.

[27] It appears that the applicants also sent correspondence to PASA on 16 April 2025 to clarify the status of the ER224 and received no answer. Save to complain about the lack of explanation regarding the letter of 25 May 2022, the applicants have not been able to refute the outcome of Total's investigations.

[28] PASA's confirmation that the process of the renewal application is still pending must mean that, contrary to the contents of the letter of 25 May 2022, the renewal right was not granted on 25 May 2022. There is nothing in the record to gainsay the contents of the latest letter of 15 April 2025.

[29] In fact, Total has also attached to its replying affidavit an email from PASA's Chief Executive Officer dated 7 July 2023, in which PASA advised Total that it intended to finalise the renewal application in respect of ER 224 only after all the challenges to the EA had been concluded. This is yet further confirmation that as at that date, which was after 25 May 2022, PASA considered the renewal application of ER 224 as still pending.

[30] Turning to the statutory construction argument, the applicants state that on a proper construction of the provisions of the MPRDA, the exploration right has lapsed. They refer in this regard to sections 80(4) and 80(5), which provide as follows:

> "(4) If the Minister refuses to grant an exploration right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons therefor.
>
> (5) An exploration right is subject to prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed three years.

[31] The applicants state that the effect of sections 80 (4) and (5) of the MPRPA is that the term of ER 224 could not have extended beyond 31 August 2021, which is nine years from the effective date of the exploration right.

[32] Total counters this argument by reference to the express wording of s 81(5), which provides as follows:

> "(4) An exploration right may be renewed for a maximum of three periods not exceeding two years each.
>
> (5) An exploration in respect of which an application for renewal has been lodged shall, notwithstanding its expiry date, remain in force until such time as such application has been granted or refused."

[33] The applicants state that, given the delays incurred during consideration of renewal applications by the relevant administrators, it could not have been the intention of the MPRDA to have near indefinite existence of an exploration right. Such an interpretation, they state, would be at odds with the scheme of Chapter 6 of the MPRDA, and the positive obligations imposed on exploration right-holders.

[34] They refer in this regard to the requirements placed upon an exploration right holder to commence exploration operations within 90 days of the effective date of the exploration right, and to continuously conduct exploration operations in accordance with the approved exploration work programme.[3] In addition, the applicants state that the MPRDA does not treat the renewal of an exploration right as the grant of a new right subject to a new effective date, and that a renewal constitutes continuation of the original right.

[35] It is trite that the interpretation of statute is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which it is directed and the material known to those responsible for its production[4].

[36] And absent absurdity, the terms of a statute should be interpreted according to their ordinary grammatical meaning, with the riders that[5]: (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must

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[3] Although the applicants refer in their heads of argument to s 79(2) (a) and (c) of the MPRDA in this regard, these requirements are contained in sections 82(2)(b) and (f).

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 4 SA 593 (SCA) para 18. *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29. See *C:SARS v United Manganese of Kalahari (Pty) Ltd* (264/2019) [2020] ZASCA 16 (25 March 2020) para 8.

[5] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

be properly contextualised; and (c) statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

[37] The most forceful point against the applicants' argument is the express wording of s 81(5) of the MPRDA, which is clear and not ambiguous. In terms thereof an exploration right in respect of which an application for renewal has been launched shall, notwithstanding its expiry date, remain in force until such time as the application has been granted or refused.

[38] It seems obvious from the express wording of the provision that the drafter was anticipating the very issue that the applicants rely upon in this case, namely a delay in the rendering of an outcome of the renewal application. That is the problem sought to be cured by the provision. To decide otherwise, in accordance with the argument of the applicants would achieve the very opposite of the policy decision taken in drafting the provision. I also observe that the Supreme Court of Appeal (SCA) in *Sustaining the Wild Coast*[6] adopted the express wording of the provision, without further ado.

[39] But even the facts do not favour the applicants' argument. In PASA's email of 7 July 2023, PASA took the view that the renewal application process should be stayed pending the outcome of firstly, the appeal launched by amongst other the applicants, and secondly a possible review application, which had not yet been launched at that stage, but which eventually transpired. The e-mail also stated that PASA had been nearing finalisation of its consideration of the renewal application when it reached that decision. None of this evidence is refuted by the applicants.

[40] Thus, any suggestion by the applicants of undue delays caused in this instance by that functionary, is in part undermined by the contents of the e-mail of 7 July 2023. Rather, the email suggests that it was the lodging of the appeal and the review, that has contributed to the extension of the period of the exploration right, at least since July 2023.

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[6] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (58/2023; 71/2023; 351/2023) [2024] ZASCA 84; 2024 (5) SA 38 (SCA) (3 June 2024) para [31].

[41] There is simply no support for the applicants' argument that the ER 224 has expired. Rather, the evidence is that it is still extant, and that the process of considering its renewal has been stayed pending, amongst others, these proceedings.

[42] Next is consideration of whether Shell has a direct and substantial interest in these proceedings. The main complaint by the applicants is that the review relates to the EA of which Shell is not a right-holder, and secondly, that no application has yet been made for amendment of the EA to reflect Shell as the holder of the EA.

[43] However, it is not disputed that Shell remains a co-holder of ER 224. The legal nature of the right held by Shell is set out in s 5 of the MPRDA, which provides, in relevant part, as follows:

> "(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.
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> (2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.
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> (3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may
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> …
>
> (e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

[44] Subsections (1) and (2) confirm that, as co-holder of ER224, Shell enjoys a limited real right in respect of the mineral or petroleum and the land to which the exploration right granted by ER 224, relates. Subsection (2) further confirms that its limited real rights include, not only those expressly specified in ss (3) but also such other rights as may be granted to, acquired by or conferred upon it under the MPRDA or any other law. Subsection (3)(e) confirms that Shell may carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of the MPRDA.

[45] Those activities, in this case, include the activities for which the EA application has been found to be necessary. The parties agree that the application for an EA is necessary in these circumstances because the exploration operations

proposed in its application will trigger activities listed in Listing Notices 1 and 2 of the EIA Regulations, including drilling in offshore wells. Had that not been a requirement, the exploration activities might well have been conducted in terms of the ER 224, of which Shell is already a co-holder.

[46] It is furthermore clear from the common cause facts that the proposed project to be undertaken in terms of the EA is to be the next phase following the exploration operations already conducted in terms of the ER 224. The activities arise from the analysis undertaken of the 2D and 3D seismic data surveys which were acquired in terms of the ER 224. The drilling area, Block 5/6/7, is to be the same as that in respect of which the ER 224 is held by, amongst others, Shell, even without being the operator of the joint venture, and even without amendment of the EA.

[47] All of these considerations confirm, in my view, that the EA is incidental to the ER 224, as envisaged in ss 5(3)(e). As a result, Shell has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the review proceedings.[7]

[48] As the Constitutional Court stated in *Snyders*[8],

> "A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard."

[49] It is also not in dispute that, although the application for the EA was made in the name of Total, it was in fact on behalf of the joint venture, of which Shell is a member. Whether or not Shell is the operator of the joint venture, it stands to be affected by the court's outcome regarding the EA. The same consideration applies

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[7] *Judicial Service Commission and Another v Cape Bar Council and Another* (818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012) para [12]. See also *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21.

[8] *Snyders and Others v De Jager (Joinder) (CCT186/15) [2016] ZACC 54; 2017 (5) BCLR 604 (CC) (21 December 2016) para [9].*

in respect of whether or not Total applies for the amendment of the EA to reflect Shell as the main holder.

[50] Moreover, it is not disputed that Total has resigned as the operator of the joint venture, and that Shell remains a part of the joint venture. Further, that as a consequence of Total's resignation and withdrawal from the joint venture, the arrangements to transfer the holder of the EA would have to be made, although the applicants complain about the delay with regard thereto.

[51] I therefore reach the conclusion that Shell has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the review proceedings.

[52] The next issue to consider is the applicants' argument that the contents of the joinder application contradict the contents of the Final EIR and of Total's answering affidavit, specifically in relation to: (a) the identity of the party who will drill the exploration wells under the EA; and (b) the mitigation measures that will be in place for the project; and there can be no transfer of the EA without evidence that Shell has equivalent mitigation measures.

[53] In this regard the applicants have pointed to instances where Total has referred interchangeably to itself and to the joint venture, stating that there are unexplained contradictions. This issue is related to the previous discussion regarding the joint venture. As I have already discussed, it is not disputed that the joint venture exists, and that it holds the exploration right ER 224. However, in terms of the statute, the ancillary EA rights can only be exercised by the right holder specified in the EA.

[54] Regulation 29(1) of the EIA Regulations provides for transfer of an EA as follows:

> "An environmental authorisation may be amended by following the process prescribed in this Part if the amendment
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> 1) will not change the scope of a valid environmental authorisation, nor increase the level or nature of the impact, which impact was initially assessed and considered when application was made for an environmental authorisation; or
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> 2) relates to the change of ownership or transfer of rights and obligations."

[55] Regulation 29(a) above, read with Regulation 30, provides that an amendment will not be granted if it seeks to change the scope of the environmental authorization or the level or nature of the impact already assessed when the application for the EA was made.

[56] Total points to the above provisions to demonstrate that, regardless of the applicants' arguments, a transfer to Shell may not change the scope of the EA or the level or nature of the impact already assessed when the application for the EA was made. As a result, whether the identity of the party who will drill the exploration wells is Total, or changes to Shell in the future, the party concerned will be required to comply with the environmental and social impact assessments that have already been made, which are part of the record. And that party will also be bound by the conditions set out in the EA. Furthermore, in any event, the competent authority must still approve the transfer of the EA, and according to Regulation 30, it will have to be satisfied that the conditions for the transfer are met.

[57] What appears from the papers and is not disputed is that the intention is for the joint venture to exercise the same rights granted in terms of the EA. There is no indication that, in seeking to transfer the rights of the EA to Shell, the scope of the EA will change. That is in any event prohibited by the statute. The provisions above make it clear that a transfer of an EA from one holder to another will not be granted if there is any contradiction of the nature complained about by the applicants. That determination stands to be made at the time that the transfer application is made and by the competent authority, not now and not by this Court. As a result, the argument raised does not rise to the level of denying the joinder of Shell to these proceedings.

[58] For all these reasons the joinder of Shell is granted. It has been shown to have a legal interest in the subject matter, which may be affected prejudicially by the judgment of this Court in the review proceedings. The heading of this judgment will accordingly reflect Shell as the fifth respondent in the review application.

C. THE REVIEW APPLICATION

[59] As already adverted to, the proposed exploration involves activities listed in Listing Notices 1 and 2 of the the EIA Regulations, and as a result required application for an EA in terms of s 24 of NEMA.

[60] Total's EA application involved an impact assessment phase, during which three technical studies and five specialist studies were commissioned to assess the key potential impacts of the exploration activities and identify mitigation measures. 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.

[61] Total's scientific studies for the proposed exploration project were submitted to PASA, who reviewed the studies and recommended approval of the EA, in terms of s 24 of NEMA. The DG granted the EA on 17 April 2023.

[62] The applicants lodged an appeal against the DG's decision to the Minister, in terms of s 43 of NEMA read with the 2014 EIA Appeal Regulations, and the Minister dismissed the internal appeal on 24 September 2023 and confirmed the DG's decision to grant the EA.

[63] The applicants' review challenges the Final EIR prepared on behalf of Total, and the review grounds may be summarised as follows:

(a) Firstly, the Final EIR failed to properly assess, and the state respondents failed to properly consider, the socio-economic impact of the proposed project because it did not assess the socio-economic impact which a well blowout and consequent oil spill may cause on the fishing industry and small scale fishers.

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

(c) Thirdly, the Final EIR failed to assess, and the state respondents failed properly to consider, the need and desirability of the proposed project because no consideration was given to the climate change impacts which will be caused by burning any gas discovered by the proposed project.

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

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

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

[64] Since the grounds of review target the sufficiency or otherwise of the Final EIR and the assessments conducted therein, it is apposite to begin with the overarching statutory context.

[65] NEMA was enacted in order to give effect to s 24 of Constitution of the Republic of South Africa 108 of 1996 (*"the Constitution"*),[9] which provides as follows:

> "Everyone has the right-
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[66] NEMA empowers the Minister to identify activities which may not commence without an environmental authorisation,[10] and, together with the EIA Regulations, it sets out the process through which such authorisations may be obtained.

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

[10] NEMA, section 24(2).

[67] Section 2 of NEMA sets out environmental management principles which apply to the actions of all organs of state that may significantly affect the environment and which guide the interpretation of NEMA and any other law concerned with the protection of the environment.

[68] Section 24(1) of NEMA provides as follows:

> "**24 Environmental authorisations**
> (1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister responsible for mineral resources, as the case may be, except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act."

[69] The provision requires that the potential environmental impacts of a listed activity must be assessed. This is necessary to enable the decision-maker to decide whether or not to authorise the undertaking of such activities, and to select the best practicable environmental option.[11]

[70] The manner in which environmental impact assessments must be conducted is regulated by sections 24(4) and 24O of NEMA and the EIA Regulations. These assessments must be conducted by environmental assessment practitioners, who must be independent.[12]

[71] As regards the prescribed content of assessments, s 24(4)(a)(iv) of NEMA provides that the *"procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorization… investigation of the potential consequences for or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts"*.

[72] Section 24(4)(b) provides that procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the

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[11] NEMA, section 2(4)(b).
[12] EIA Regulations, Regulations 12 and 13 (1)(a).

environment must include, with respect to every application for an environmental authorisation and where applicable, the following:

> *"(i) investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity;*
>
> *(ii) investigation of mitigation measures to keep adverse consequences or impacts to a minimum;*
>
> *(iii) investigation, assessment and evaluation of the impact of any proposed listed or specified activity on any national estate referred to in section 3 (2) of the National Heritage Resources Act, 1999 (Act 25 of 1999), excluding the national estate contemplated in section 3 (2) (i) (vi) and (vii) of that Act;*
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> *(iv) reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;*
>
> *(v) investigation and formulation of arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation;*
>
> *(vi) consideration of environmental attributes identified in the compilation of information and maps contemplated in subsection (3); and*
>
> *(vii) provision for the adherence to requirements that are prescribed in a specific environmental management Act relevant to the listed or specified activity in question."*

[73] When considering applications for environmental authorisations, s 24O(1) requires decision-makers to take into account all relevant factors, which may include the following: environmental impacts or environmental degradation likely to be caused if the application is approved or refused; measures that may be taken to protect the environment from harm as a result of the activity which is the subject of the application; measures that may be taken to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; and if applicable, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment.

[74] In terms of items 2(d) of Appendix 3 of the EIA Regulations, the objective of the environmental impact assessment process include the determination of the following:

(a) the nature, significance, consequence, extent, duration and probability of the impacts occurring to inform identified preferred alternatives; and

(b) degree to which these impacts can be reversed, may cause irreplaceable loss of resources, and can be avoided, managed or mitigated.

[75] The scope of assessment and content of environmental impact assessment reports is regulated by Item 3(h) of Appendix 3, which states that an environmental impact assessment report must contain the information that is necessary for the competent authority to consider and come to a decision on the application, and must include the following:

"(h) a full description of the process followed to reach the proposed development footprint within the approved site as contemplated in the accepted scoping report, including:
(i) details of the development footprint alternatives considered;
(ii) details of the public participation process undertaken in terms of regulation 41 of the regulations, including copies of the supporting documents and inputs;
(iii) a summary of the issues raised by interested and affected parties, and an indication of the manner in which the issues were incorporated, or the reasons for not including them;
(iv) the environmental attributes associated with the development footprint alternatives focusing on the geographical, physical, biological, social, economic, heritage and cultural aspects;
(v) the impacts and risks identified including the nature, significance, consequence, extent, duration and probability of the impacts, including the degree to which these impacts-
(aa) can be reversed;
(bb) may cause irreplaceable loss of resources; and
(cc) can be avoided, managed or mitigated;
(vi) the methodology used in determining and ranking the nature, significance, consequences, extent, duration and probability of potential environmental impacts and risks;
(vii) positive and negative impacts that the proposed activity and alternatives will have on the environment and on the community that may be affected

focusing on the geographical, physical, biological, social, economic, heritage and cultural aspects;

(viii) the possible mitigation measures that could be applied and level of residual risk;

(ix) if no alternative development footprints for the activity were investigated, the motivation for not considering such; and

(x) a concluding statement indicating the location of the preferred alternative development footprint within the approved site as contemplated in the accepted scoping report."

[76] In terms of Item 3(j) an environmental impact assessment report must also include-

"an assessment of each identified potentially significant impact and risk, including-

(i) cumulative impacts;

(ii) the nature, significance and consequences of the impact and risk;

(iii) the extent and duration of the impact and risk;

(iv) the probability of the impact and risk occurring;

(v) the degree to which the impact and risk can be reversed;

(vi) the degree to which the impact and risk may cause irreplaceable loss of resources; and

(vii) the degree to which the impact and risk can be mitigated."

[77] Section 24(7)(b) of NEMA provides:

"Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure . . . investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact".

[78] Discussing the requirements in sections 2(4)(i) and 24(7)(b) of NEMA, the Constitutional Court in *Fuel Retailers*[13]emphasized that the impact assessment of proposed activities requires assessment of the socio-economic benefits and disadvantages of proposed activities. The Court continued as follows:

"[78] What must be stressed here is that the objective of considering the impact of a proposed development on existing ones is not to stamp out competition; it is to

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[13] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007) paras [79] – [81].

> ensure the economic, social and environmental sustainability of all developments, both proposed and existing ones. Environmental concerns do not commence and end once the proposed development is approved. It is a continuing concern. The environmental legislation imposes a continuing, and thus necessarily evolving, obligation to ensure the sustainability of the development and to protect the environment. As the International Court of Justice observed-
>
> > "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."
>
> ...
>
> "[79] Second, the objective of this exercise, as NEMA makes it plain, is both to identify and predict the actual or potential impact on socio-economic conditions and consider ways of minimising negative impact while maximising benefit. Were it to be otherwise, the earth would become a graveyard for commercially failed developments. And this in itself poses a potential threat to the environment. One of the environmental risks associated with filling stations is the impact of a proposed filling station on the feasibility of filling stations in close proximity. The assessment of such impact is necessary in order to minimise the harmful effect of the proliferation of filling stations on the environment. The requirement to consider the impact of a proposed development on socio-economic conditions, including the impact on existing developments addresses this concern."

[79] In *Fuel Retailers,* the Constitutional Court held that where an environmental decision-maker fails to consider an environmental impact it ought to have considered, its decisions stand to be reviewed and set aside in terms of section 6(2)(b) of PAJA, for failure to comply with a mandatory and material condition.[14]

[80] Similarly, in *Philippi Horticultural*[15] this Division held that where an environmental impact assessment omitted relevant information, this restricted the ability of the decision-maker to consider relevant information and resulted in their decision being subject to review in terms of section 6(2)(b)(iii) and 6(2)(f)(ii) of PAJA.

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

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

[81] Regarding the consideration of review applications, it is well to repeat what was stated by the SCA in *Clairison's CC*[16]:

> *"It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below ... was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted."*

[82] 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 (s)he acts in good faith (reasonably and rationally) a court of law cannot interfere. [17]

[83] The question in proceedings for judicial review is not whether the best, or most correct, decision has been made, but rather whether it is one that is lawful, reasonable and procedurally fair.[18] With that background, I now turn to consider the grounds of review.

D. FIRST GROUND: FAILURE TO CONSIDER SOCIO-ECONOMIC IMPACTS

[84] In the first review ground, the applicants state that the Final EIR failed to properly assess the potential socio-economic impacts of the proposed project despite identifying the risk of a blowout and oil spill as the greatest environment threat from offshore drilling, rating it as having a 'very high' impact on the fishing industry before mitigation, and 'high' after mitigation.

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[16] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) para 18; since cited with approval in this Court by Rogers J in *JH v Health Professions Council of South Africa* 2016 (2) SA 93 (WCC) para 23, by a unanimous Full Bench in *Cape Town City and Another v Da Cruz and Another* 2018 (3) SA 462 (WCC) para 70 footnote 91 (not disturbed on appeal), and by Sher J in *Philippi Horticultural Area Food and Farming Campaign and Another v MEC For Local Government, Western Cape And Others* 2020 (3) SA 486 (WCC) para 92.

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

[18] See *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA) paras 70-75 and the authorities cited there.

[85] They complain about the inadequate reference to these consequences in the Final EIR, read with the Socio-Economic Impact Report (SEI Report), which they state amounts to the following:

> "Reduction in recreational, small-scale, and commercial fishing in the impacted area, including near-shore and offshore fishing. This may result in undermining fishing by the public at large.
>
> Large scale effects on fishing operations would also be likely to include area closures and exclusion of fisheries from areas that may be polluted or closed to fishing due to contamination of surface waters by oil or the chemicals used for cleaning oil spills. Based on the possible extent of surface oiling (including major fish spawning and nursery areas), the intensity of the impact on most commercial fisheries would be high. As an indicator, assuming a 10% drop in value of fisheries, sustained over a full three years, the revenue lost would be about R600m a year. The percentage drop is however difficult to estimate.
>
> Reduction in income for secondary and tertiary sectors that support tourism, recreational, fishing and other coastal economies.
>
> Reduction in income and livelihoods impacts on those dependent on small scale fisheries."

[86] The applicants state that the above is an inadequate assessment of the socio-economic consequences of an oil spill as it fails to -

(a) assess the impact on local communities or small-scale fisheries despite the fact that they play a crucial role in sustaining communities and that any disruption of these fisheries could have devastating consequences for fishers and dependent communities; and

(b) quantify the consequences of the potential impacts. Rather, it simply postulates an assumed figure of a drop of 10% in the value of fisheries for three years. This is deficient in two respects, say the applicants. First, no basis is provided for this figure. Second, there is no assessment of the consequences which such a reduction would have on small scale fishers, fishing operators or local communities.

[87] Total and the Minister deny the applicants' charge in this regard, pointing out that the applicants have provided an incomplete and inaccurate summary of the Final EIR and SEI Report. They point, in addition to the Fisheries Impact Assessment Report (*"the FIA Report"*), which the applicants have omitted to mention in this regard. It is common ground, however, that the Final EIR accepted that, although

the risk of a blowout was small, the devasting nature of its impact required it to be assessed.

[88] The FIA Report sets out the impact that normal operations would have on the fishing industry including those persons who rely on the industry for their livelihoods. It specifically identified the impacts that would follow on fisheries during normal operations, and concludes that potential impacts arising from normal operations have limited impact on commercial fisheries, and no impact and small-scale fishers. It records that the impacts can be suitably mitigated by ensuring good communication and coordination with affected sectors allowing them to temporarily focus fishing effort in other areas.

[89] The FIA Report explains that there are limitations involved in the assessment of the impact of a blowout and oil spill on the fishing industry, and that any assumptions would depend on at least seven unknown factors, depending on the spread and concentration of the oil spill, namely: the oil type (hydrocarbon profile); characteristics of the reservoir; type of well blow-out; well architecture; spill duration; seasonality; and the well location. Nevertheless, in respect of each factor, the assessment is modelled on the worst-case scenario.

[90] The FIA Report also addresses the impacts of an oil spill on the marine environment, as well as the probability of contamination in different scenarios, adopting a worst-case scenario. The methods of modelling the oil spill studies are also set out.

[91] As for the quantification of drop in value, Total's answering affidavit has set out the various references made in the SEI report to the impact on fisheries, beyond the references mentioned by the applicants. In this regard, the SEI Report refers to a reduction in both recreational, small scale and commercial fishing in the region including all forms of nearshore and offshore fishing, noting that this may also result in the undermining of fishing by the public at large and commercially. It states that all coastal communities and activities along the South-West coastline, which is the key area to be affected, are considered to be of very high sensitivity to major oil spills, and that the worst-case scenario of a large oil spill would likely be focused along the coastline between southern Namibia and Gqeberha, depending on the location of the well.

[92] The SEI further refers to a 'reduction in income for secondary and tertiary sectors that support tourism, recreational, fishing and other coastal economies'. It then states: *"As an indicator, assuming a 10% drop in value of fisheries, sustained over a full three years, the revenue lost would be about R600m a year. The percentage drop is however difficult to estimate".* Since the applicants criticize this statement, one of the socio-economic specialists who originally compiled the SEI report for the Final EIR, Professor Tony Leiman, explains that there is no assumption that there will be a 10% drop in the value of fisheries for three years. Rather, it is an indicator intended to provide an idea of the relative magnitudes involved if there were a sustained drop in the output of the nation's fisheries. Professor Leiman indicates that the impact would be far lower, since the only major fisheries likely to experience serious impacts are the ones currently producing relatively little output most noticeably West Coast Rock Lobster and small pelagic fishery on the West Coast.

[93] It is in this relation to this issue that the Final EIR explains it would be challenging and of little assistance to conduct an assessment, due to many variables, assumptions and uncertainties involved, and that the outputs of an assessment were 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.

[94] In that regard, the SEI Report set out mitigating measures, including avoiding drilling in July and August as far as possible, to avoid the effects of the worst-case scenario presented by the winter months when the wind is more likely to be from the West and the South-West, which could blow a spill onshore against the prevailing currents. It states that in the event of an unplanned event such as a well blowout a process of determining the economic effects and related compensation would be initiated which would typically involve government, insurers, the organization responsible for the incident, industry organizations and applicable legal systems. It further states that Total would plan for and implement responses in terms of the IPIECA[19]-IOGP[20]guideline document (which provides a framework for effective oil spill preparedness, response and restoration) for the economic assessment and compensation for marine oil releases; and would ensure that damages and compensation to third parties were included in insurance cover to financially manage the consequences of any unplanned event.

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[19] International Petroleum Industry Environmental Conservation Association, though the name was changed in 2002 to the global oil and gas industry association for environmental and social issues.

[20] International Association of Oil and Gas Producers.

[95] Furthermore, the SEI Report outlines that small scale fishers between Saldana Bay and Cape Agulhas operate via 68 community cooperatives with 2031 fishers as members, and which have been registered for small scale fishing rights. This is the maximum number of small-scale fishers expected to be affected by a large-scale blowout. The actual effect, they state, would depend on variables such as the time of the year and duration.

[96] The FIA Report evaluated the impact on commercial and small-scale fisheries during the mobilisation, operational, and demobilisation phases of the proposed 3 to 4-month drilling project. It also evaluated the safety of the fishing sector during the drilling operation and recommended that Total should adopt certain specified measures. Similarly, after evaluating the safety of the fishing sector in relation to abandoned wells, it concluded that the likelihood of imposing danger or risk to the safety of the fishing sector is low, and made specific recommendations in that regard. It also made specific recommendations regarding any blowout and oil spill impacts on the fishing sector caused during the drilling operations, although it indicated an insignificant likelihood of such an occurrence.

[97] The record reveals that the assessment process leading to the granting of the EA involved consultation by Total with both the commercial and small-scale fishing sectors, represented by FishSA, SA Tuna Association; SA Tuna Longline Association, Fresh Tuna Exporters Association, South African Deepsea Trawling Industry Association ("SADSTIA") and South African Hake Longline Association ("SAHLLA") and they were informed that: the fishing zones lie beyond the drilling area; the aquaculture industry will not be affected and Total would offer insurance coverage to compensate the fishing sector in the event of a blowout and oil spill.

[98] The above summary indicates that Total undertook some assessment of the socio-economic impacts of an oil spill on fisheries and communities, and in this regard the summary provided by the applicants of the contents of the impact assessments, which they state is insufficient and cursory, is incomplete. The final EIR set out the method for assessing impact significance, the assessment of potential impacts and risks, where the nature, significance, consequence, extent, duration and probability were considered and presented for each potential impact.

[99] The assessments concluded that potential impacts arising from normal operations have limited impact on commercial fisheries, and no impact on small

scale fisheries. They further expected that impacts can be suitably mitigated. And although there were noted limitations involved in an impact assessment in this regard, which was summarized earlier into seven factors, it is not disputed that Final EIR selected the worst-case scenario in respect of each factor for its modelling, and provided the mitigation measures in relation to each of those.

[100] It is regarding the economic assessment of unplanned events that Total refers to limitations in quantifying the consequences of the potential impacts and the consequences of a drop in value on fishing operators or local communities. It is here that that it estimates a drop of 10% in the value of fisheries for three years, which the applicants complain lacks a basis. I have noted Total's explanation that there is no assumption that there will be a 10% drop in the value of fisheries for three years, but that it is rather an indicator intended to provide an idea of the relative magnitudes involved, and that in fact the impact would be far lower, since the only major fisheries likely to experience serious impacts are the ones that are currently producing relatively little output, most noticeably fisheries targeting West Coast Rock Lobster and the small pelagic fishery on the West Coast.

[101] Although the 10% estimate is not refuted by expert evidence from the applicants, it is clear that the Final EIR did not fully assess the economic impact of the unplanned events of a well blowout and an oil spill, due to the stated variables. In light of the admitted devasting nature of the impact of a blowout and an oil spill, even though of low risk, it was incumbent upon Total to assess it. Appendix 3 to the EIA Regulations[21] requires an environmental impact assessment to include assessment of "*each identified potentially significant impact and risk*" including the cumulative impact; the nature, significance, and consequence of the impact and risk; the extent and duration of the risk; the probability of the impact and risk occurring.

[102] In this regard, Total contends that an oil spill is a "*risk"* [22] rather than a probability or "*anticipated project impact which is more typically assessed in [a Final EIR]" ,* this distinction is facile and is not supported by the legislation. The Regulations clearly apply to both risks and impacts.

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[21] EIA Regulations Appendix 3 Item 3(1)(j).

[22] Total seeks to distinguish between a 'risk', which is described as "an unplanned event not being a normal part of project operations", and an 'impact', which is described as "a consequence of a predictable impact from the proposed activity". On this basis, it is stated that an oil spill is a risk rather than an impact of the proposed activity in the normal course.

[103] The spirit of the statutory requirements is transparency and accountability, and is designed to enable the decision-maker to make a decision after having taken into account all relevant factors. It is not for the entity applying, such as Total, to decide for itself, and weigh for itself, the degree to which those factors must be declared or are relevant.

[104] The distinction sought to be created by Total between a risk[23] and an impact or probability, one of which places are lower obligation to account or assess in this regard, is against the spirit and purport of these Regulations. Both are required to be assessed in terms of the legislation, in equal measure. There is no lower standard of assessment created for either an impact or a risk. Once the Final EIR identified the potential blow out and oil spill as potentially significant impact or risk, it was obliged to assess the consequences and the probability of the impact or risk, including those with a low degree of probability of a blow out or oil spill.

[105] To the extent that there were or are limitations in conducting such assessments, Total was compelled to adopt a cautious approach and take protective and preventive measures before the anticipated harm of a blowout and oil spill materialise.[24] That is in light of the risk-averse and cautious approach espoused by NEMA[25] and the MPRDA[26], in terms of which the limitation on present knowledge about the consequences of an environmental decision must be taken into account.[27] The precautionary approach entails that where there is a threat of serious or irreversible damage to a resource, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.[28] It means that, where there exists evidence of possible environmental harm, such as a possible blow-out or oil spill as the Final EIR accepts, a cautious approach should

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[23] Total seeks to distinguish between a 'risk', which is described as "an unplanned event not being a normal part of project operations", and an 'impact', which is described as "a consequence of a predictable impact from the proposed activity". On this basis, it is stated that an oil spill is a risk rather than an impact of the proposed activity in the normal course.

[24] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007) paras [81] and [98].

[25] In terms of s 4 (a)(vii) of NEMA, sustainable development requires the 'application of a risk averse and cautious approach' 'which takes into account the limits of current knowledge about the consequences of decisions and actions'.

[26] See *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* [2018] 4 All SA 889 (WCC); 2019 (2) SA 403 (WCC) paras 101-104.

[27] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007) para [81].

[28] See *WWF South Africa paras 100 - 101;* Jan Glazewski *Environmental Law in South Africa* 19-20; *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority & others* [2013] 4 All SA 624 (GSJ) paras 45-48.

be adopted, and if necessary decision-makers may compel the party to take protective and preventive measures before the anticipated harm materialises.[29]

[106] Since Total's case is effectively that, due to unavailable scientific knowledge there is uncertainty as to the future impact of the proposed development, I am of the view that this was an occasion for application of this principle in its assessment.

[107] As a result, insofar as the Final EIR failed to quantify the economic impact of unplanned event of a blowout and oil spill, it fell foul of the assessment requirements of NEMA and the EIA Regulations.

[108] In the circumstances, insofar as the Final EIR failed to quantify the economic impact of unplanned events, it contravened sections 24(4) and 24O of NEMA, and Appendix 3 of the EIA Regulations. As a result, the decisions of the DG and the Minister to grant the authorisation failed to take into account relevant considerations, they fall to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

E. SECOND GROUND OF REVIEW: ICMA CONSIDERATIONS

[109] The second review ground is that the Final EIR and the decision-makers failed to take into account the considerations prescribed by the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (*"ICMA"*), specifically:

(a) 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, in terms of s 63(1)(c).

(b) 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, as contemplated in s 63(1)(h)(i).

[29] See also *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* (934/2023) [2024] ZASCA 143; 2025 (2) SA 31 (SCA) (22 October 2024) para 11.

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

(d) The objects of ICMA, as set out in s 63(1)(k).

[110] In relation to coastal management, ICMA is to be read, interpreted and applied in conjunction with the NEMA[30], and must be regarded as a *"specific environmental management Act"* as defined in section 1 of the NEMA[31].

[111] Section 2 of ICMA provides that it was enacted to: (a) provide for the co-ordinated and integrated management of South Africa's coastal zone; (b) preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans including future generations; (c) secure equitable access to the opportunities and benefits of coastal public property; (d) provide for the establishment, use and management of the coastal protection zone; (e) to give effect to the Republic's obligations in terms international law regarding coastal management and the marine environment.

[112] Section 7(1)(a) provides that coastal public property includes South Africa's coastal waters, which is defined as including South Africa's territorial waters and South Africa's exclusive economic zone.[32]The proposed project is to take place within South Africa's exclusive economic zone, and therefore falls within coastal public property and is subject to ICMA.

[113] ICMA obliges the State to: (a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interest of the whole community;[33] take reasonable legislative and other measures necessary to protect coastal public property for the benefit of present and future generations; [34] control and manage activities in coastal waters in the interests of the whole community and in accordance with South Africa's obligations under international law.[35]

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[30] See s 5(1) of ICMA.
[31] Section 1 of NEMA 1 previously defined a "specific environmental management Act", but it has since been deleted.
[32] Section 1 of ICMA defines "coastal waters" to include "the internal waters, territorial waters, exclusive economic zone".
[33] ICMA section 12.
[34] ICMA section 12.
[35] ICMA section 21.

[114] Consideration of the *"interests of the whole community"* is a concept unique to ICMA.[36]It refers to the collective interests of the community as determined by: (a) prioritising the collective interests in coastal public property of all persons living in South Africa of the interests of any particular group; (b) adopting a long-term perspective the takes into account the interests of future generations in inheriting coastal public property characterised by healthy and productive ecosystems and economic activities that are ecologically and socially sustainable; and (c) taking into account the interests of other living organisms that are dependent on the coastal environment.

[115] Section 63 of ICMA prescribes the factors that must be taken into account when a competent authority considers granting an environmental authorisation for coastal activities. They include:

(a) whether coastal public property will be affected and, if so, the extent to which the proposed development is consistent with the purpose of protecting that property;[37]

(b) if an activity affects coastal public property then whether it is inconsistent with the objective of conserving coastal public property for the benefit of current and future generations;[38]

(c) whether the activity would be contrary to the interests of the whole community;[39] and

(d) the objects of ICMA.[40]

[116] In *Wild Coast* the Makhanda High Court held that a failure to consider ICMA renders the decisions at issue reviewable.[41]

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[36] ICMA section 1 "interests of the whole community".
[37] ICAM section 63(1)(c).
[38] ICMA section 63(1)(h)(i).
[39] ICMA section 63(1)(h)(vii).
[40] ICMA section 63(1)(k).
[41] *Sustaining the Wild Coast NPC v Minister of Mineral Resources* 2022 (6) SA 589 (ECMk), para. 130. This finding was not disturbed on appeal, see *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA), para 25.

[117] Turning to the DG's decision in this case, while it listed the information considered, it made no specific mention of ICMA. The applicants add that none of the key findings made in the DG's decision relate to ICMA or the ICMA factors.

[118] In response to this criticism, Total has tabulated a list of various references to the Final EIR which it contends amount to a consideration of the ICMA factors, though under a different rubric. In essence, the references mention effects that the proposed project will have on various components of the marine environment. Total concludes that, as a result, the DG "would have" considered ICMA factors. It does not deny the fact that no reference was specifically made to ICMA or its provisions.

[119] Whether or not ICMA factors were considered is a matter of fact. In this instance the references relied upon in the tabulated list contained in the answering affidavit are contained in the Final EIR, not in the DG's decision. I have also noted that Total goes no higher than to assume that the DG "would have" considered ICMA factors, and this because they are contained in the Final EIR.

[120] In any event, none of the documents cross-referenced by Total make any attempt to explain findings or indeed assessments relating to: whether coastal public property would be affected by the proposed project; whether the proposed project is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations; or whether the proposed project would be contrary to the interests of the whole community. All of these are the concern of ICMA factors.

[121] Even based on a generous reading of the record, I am unable to conclude that the Final EIR, and by extension, the DG, considered ICMA factors. To reach a conclusion that ICMA factors were considered incidentally, there must be some reasoning which relates to ICMA factors, and I have found none.

[122] As the applicants point out, ICMA introduces concepts which are not present in NEMA or other aspects of environmental law, by conferring a special legal status on coastal public property, which afforded the environment a particularly high level of protection.[42] It expressly provides that the State holds the coastal public property in trust for current and future generations. It creates the concept of the interests of

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

the whole community, which specifically recognises the need to take into account the interests of other living organisms which are dependent on the coastal environment. As such, ICMA's requirements cannot be satisfied by generic consideration of NEMA.

[123] The DG therefore failed to consider the ICMA factors, and his decision stands to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

[124] The Minister's decision responded to the appeal ground raised regarding the failure to consider ICMA as follows:

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

[125] In light of the criticism levelled against the DG's decision, I am in agreement with the applicants that the Minister's decision is woefully deficient. First, it does not identify any portions of the DG's decision which considered the ICMA factors. It could not do so because the DG's decision failed to consider the ICMA factors at all. Secondly, although the Minister purports to have considered the ICMA factors, she fails to set out any findings in respect thereof the ICMA factors.

[126] The first respondent's response on this issue is that the areas of interest or drilling do not overlap with any marine protected area; that the Final EIR reviewed the critical biodiversity areas and ecologically or biologically significant marine areas; and that the EA conditions mandate Total to conduct a pre-drilling survey to gather information on seabed habitats and if sensitive habitats are detected this will be addressed. However, none of these contentions amount to an allegation that the DG or the Minister considered the ICMA factors. Nor do they bear any relation to the ICMA factors.

[127] Accordingly, the Minister's decision also clearly failed to consider the ICMA factors. Therefore, the Minister's decision also stands to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

[128] The Minister's decision is unsatisfactory in another respect, namely that it does not go beyond proving mere conclusions, and fails to give specificity as to what exactly was taken into account as regards the requirements of ICMA.[43] In *Phambili Fisheries*[44] and *Sprigg Investment,*[45] the SCA stated that:

> *[…] the decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.*
>
> *This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact, on which conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matter will depend upon considerations such the nature and importance of the decision, its complexity and the time available to formulate the statement. Often these facts may suggest a brief statement of one or two pages only.*

[129] As a result, the Minister's decision does not provide adequate reasons and the Minister's Decision's stands to be reviewed and set aside in terms of sections 6(2)(e)(iv)[46] and 6(2)(f)(ii)(aa) to (cc)[47] of PAJA.

F. THIRD GROUND: FAILURE TO CONSIDER CLIMATE CHANGE

[130] The third ground of review is that the Final EIR's assessment of need and desirability failed to take into account the climate change impacts which will be caused by burning fossil fuels discovered by the proposed project, notably greenhouse gas emissions (GHG) and fugitive emissions.

[131] The applicants state that, whilst the Final EIR acknowledges that the need for the project stems from the objective of locating gas to be burnt to create electricity, it fails to consider the climate change impacts that combustion will cause. In other

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[43] See *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) para 69.

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

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

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

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

words, whilst the assessment of need and desirability relies on the positive impact of burning gas, it excludes the negative impacts which that would cause.

[132] Further, that the need and desirability inquiry undertaken by both the environmental assessment practitioners and the decision-makers treated the exploration activities as an end in and of themselves and an activity directed at the generation of information on possible indigenous resources. Adverse consequences related to the production stage were postponed to a future environmental impact assessment process.

[133] The result was that the decision-makers determined that the exploration activities authorised were 'needed and desirable' by reference to the benefits that would be realised at production phase, namely catering to the need for gas to generate electricity in South Africa. The applicants state that this was an incomplete and asymmetric assessment of need and desirability, which resulted in approval of the exploration activities - with all of the attendant environmental risks and impacts - without giving any consideration certain highly material considerations.

[134] Amongst those material considerations is an assertion by the applicants that any gas field developed on the project area would produce gas far in excess of what is needed to satisfy the gas requirements of South Africa's Integrated Resource Plan 2019 (*"the IRP 2019"*). The applicants rely in this regard on calculations projected by an engineer and energy systems expert, Mr. Hilton Trollip, whose opinion is that a gas field on the project area would need to be capable of producing 50 to 100 petajoules of gas per annum in order to be commercially feasible, whilst the new gas utilisation envisaged by the IRP 2019 represents demand of approximately 6 petajoules per annum from 2024 and thereafter 19 petajoules per annum from 2027. This means, according to Mr Trollip, the production phase would produce 5 to 10 times what is required for domestic electricity generation. The evidence of Mr Trollip in this regard was produced in reply.

[135] The evidence of Mr Trollip is denied as speculation by Total. Total states that it is not possible to accurately predict the volumes of gas that could in future be extracted from a field on the project area, and any such exercise would be informed by unknown variables relating to the scale of the development, the size of the discovery, the type of resource, the costs of extracting and processing the gas. There is also an application to strike out the evidence of Mr. Trollip as new matter which is impermissibly introduced only in reply, and which is in any event irrelevant.

[136] Another material consideration which the applicants state was not considered is that, once produced, the gas would inevitably be consumed in South Africa, and generate greenhouse gases, which would have significant implications for compliance with the country's emissions reduction targets and worsen the global climate crisis with ramifications for environmental conditions in South Africa. In this regard, the applicants have set out a number of domestic and international commitments by the South African government, in which it undertakes to contribute towards the reduction of climate change, including fossil fuel emissions.

[137] Total states that the exploration operation itself would not result in the production of oil and gas, but rather the generation of information on possible indigenous resources, thus giving 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. Total adds that the exploration 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.

[138] The response of Total on this ground of review relies considerably on the distinction between an exploration activity which is the activity for which the EA is granted, and production stage, which would be the next stage if sufficient gas and oil are discovered from the exploration activities. According to Total, the considerations raised by the applicants would only become relevant if and when it applies for environmental authorisation of the production phase, which might not eventuate, depending on the exploration activity results.

[139] Turning to the regulatory scheme, Item 2(b), Appendix 3 of the EIA Regulations includes amongst the objectives of the environmental impact assessment process: *"to describe the need and desirability of the proposed activity, including the need and desirability of the activity in the context of the development footprint on the approved site as contemplated in the accepted scoping report*".

[140] Item 3(1)(f) obliges an environmental impact assessment to provide *"a motivation for the need and desirability for the proposed development including the need and desirability of the activity in the context of the preferred location".*

[141] In terms of Item 3(1)(h)(v) an environmental impact assessment must contain *"the impacts and risks identified including the nature, significance, consequence, extent, duration and probability of the impacts, including the degree to which these impacts(aa) can be reversed; (bb) may cause irreplaceable loss of resources; and(cc) can be avoided, managed or mitigated."*[48] In terms of Item 3(1)(j) it must also contain an assessment of each identified potentially significant impact and risk, including:

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

[142] The Regulations also require that an environmental impact assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision including an assessment of each identified potentially significant impact.

[143] It has been held that the consideration of need and desirability is a key factor in a decision to grant an environmental authorisation.[49] In *Fuel Retailers*, the Constitutional Court held that a decision to grant an environmental authorisation would be reviewable where the decision makers did not consider the need and desirability of the proposed project.[50] According to *Fuel Retailers,* considerations that ought to inform the inquiry into need and desirability include the following features:

1) Environmental decisions which strike a balance environmental and socio-economic developmental considerations through the concept of sustainable development.[51]

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[48] This is similar to one of the objectives in Item 2(d).
[49] *Pine Glow Investments (Pty) Ltd v Brick-On Brick Property Investments 23 (Pty) Ltd* 2019 JDR 1681 (MN) para 49.
[50] 2007 (6) SA 4 (CC).
[51] *Fuel Retailers*, para 61.

2) The need for development must be determined by: its impact on the environment; sustainable development; and, social and economic interests.
3) Environmental authorities must integrate these factors into their decision-making.[52]
4) The objectives of integrated environmental management.[53] This includes that the effects of activities on the environment must be considered before actions are taken in connection with them.[54]Unsustainable developments are inherently detrimental to the environment especially if they entail potential threats to the environment.[55]

[144] Section 24O(1)(b) of NEMA requires the competent authority considering an application for an environmental authorisation to take into account all relevant factors including: i) any pollution, environmental impacts or environmental degradation likely to be caused; ii) measures that may be taken to protect the environment from harm as a result of the activity and to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; iv) any feasible and reasonable alternatives to the activity and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment; and v) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application. These requirements are peremptory.[56]

[145] In *Earthlife*[57], the court interpreted s 24O(1) of NEMA, and specifically the injunction to consider "any pollution, environmental impacts or environmental degradation" to logically include climate change impact assessment to be conducted and considered before the grant of an environmental authorisation. The court held that the absence of a climate change impact assessment rendered both the impugned decisions irrational and unreasonable,[58]and that granting an environmental

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[52] *Fuel Retailers*, para 79.
[53] *Fuel Retailers,* paras 63 to 69.
[54] NEMA, section 23(2)(c).
[55] *Fuel Retailers* para 74.
[56] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 12. See *Earthlife* para 13.
[57] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) see para [78].

[58] *Ibid* paras 78 and 83.

authorisation without having sight of a climate change impact assessment report was a reviewable irregularity in terms of section 6(2)(e)(iii) of PAJA.[59]

[146] Similarly, in *Wild Coast* the Makhanda High Court accepted that a need and desirability assessment for a fossil exploration project ought to consider the consequence of burning any fossil fuels discovered.[60]

[147] There is therefore no doubt that climate change impact assessment must form part of the assessment to be conducted and considered before the grant of an environmental authorisation.

[148] As regards the respondents' distinction between exploration and production phases, it is similar to an argument raised in *Wild Coast*[61], which was rejected by that court, on the authority of *Earthlife*.[62] In *Earthlife* the court appears to have endorsed the wide ambit of the climate change impact assessment invoked by the applicant, which was described as follows: *"A climate change impact assessment in relation to the construction of a coal fire power station ordinarily would comprise an assessment of (i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied*."[63]Thus, although the power station in that case was intended to be in operation until 2061, the assessment was to include the phases during construction, operation and decommissioning.

[149] The court in *Earthlife* as also stated as follows:

> "The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures

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[59] See para 87.
[60] *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk), paras. 120 to 125.
[61] See *Wild Coast* para 122.
[62] *Ibid* paras 124 -125.
[63] See para 6.

> protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences."[64]

[150] In *Wild Coast* the Makhanda Court also referred to *Save the Vaal*[65]*,* stating that the two processes of exploration and production are *"discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food"*[66].

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

[152] That this is so is confirmed by the definition of an "exploration operation" whose end-goal, according to the MPRDA, is to locate a discovery. It is defined as *"the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, of a well with the intention of locating a discovery"*.[67]

[153] Further confirmation of the interrelatedness of the two activities is found in the definition of a *"production operation"* [68], which includes an exploration. It is defined as *"any operation, activity or matter that relates to the exploration, appraisal, development and production of petroleum"*.

[154] That is the context in which the applicants' argument is to be viewed, that it is incongruous to rely on the long-term benefits of generating electricity and gas –

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[64] See para 82.
[65] *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9 (12 March 1999).
[66] *Wild Coast* para 123.
[67] See section 1 of the MPRDA.
[68] Ibid.

which is a result of production, whilst not considering the climate change effects of production. Climate change is relevant to both exploration and production activities. It makes no sense to rely on the positive consequences of production stage for purposes of considering an application at exploration stage, only to resist considering the negative consequences of the production stage when it comes to consideration of climate change.

[155] The approach of the decision-makers itself indicates the intertwined nature of the two processes. It proceeded from the assumption that any gas discovered will, in due course, be combusted to produce energy. This indicates the sense in which it is facile to distinguish the two processes when climate change impact assessment is considered.

[156] The asymmetric assessment of need and desirability is accordingly established by the applicants. In light of this finding, I do not consider it necessary to resolve the dispute of fact emanating from Mr Trollip's evidence. As I understand the context of that dispute, it is to demonstrate what should have been taken into account, had the needs and desirability assessment been conducted symmetrically. It does not concern what was placed before the decision-makers. Any information that still needs to be considered in this regard can therefore be placed before the decision-makers for their consideration. I do not consider it appropriate for this Court to make any determination based on it.

[157] The decisions of the DG and the Minister therefore stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

G. FOURTH GROUND: TRANSBOUNDARY IMPACTS

[158] 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.

[159] The fourth ground of review is that the Final EIR failed to consider the transboundary impacts of an oil spill caused by the proposed project. The respondents contend that there was no obligation to consider transboundary impacts. In the appeal decision, the Minister stated as follows:

> *"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.*
>
> *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."*

[160] Neither NEMA nor the EIA Regulations expressly address whether or not an environmental impact assessment must assess the transboundary impacts of a proposed project. The question arising is accordingly whether NEMA should be interpreted as to require the assessment of transboundary impacts.

[161] In this regard, the applicants appeal to the objectives[69] of integrated environmental management and the principles[70] set out in NEMA, which place emphasis on anticipating, considering, and preventing (or minimising) harmful effects on the environment. The only specific mention of international considerations is in s 2(4)(a)(n), which directs that "*global and international responsibilities to the environment must be discharged in the national interest"*.

[162] The applicants also state that NEMA's definition of the "environment" does not limit the environment protected by NEMA as the environment within the borders of South Africa. The definition reads as follows:

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

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[69] Sections 23(2)(b) and 23(2)(e) define the object of integrated environmental management to include the following: the identification, prediction, and evaluation of the actual and potential impact of an activity on the environment, socio-economic conditions, and cultural heritage; and ensuring that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them.

[70] Section 2(1) of NEMA provides that the NEMA principles apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. In terms of s 2(4)(a)(ii) pollution and degradation of the environment should be avoided or, where this cannot be avoided, minimised and remedied. In terms of s 2(4)(a)(vii) the negative impacts on the environment (and on people's environmental rights) should be anticipated and prevented or, where they cannot be prevented, minimised and remedied.

[163] The applicants therefore contend that read in context, the text of NEMA supports an interpretation which requires the assessment of transboundary impacts.

[164] In addition, the applicants refer to sections 232 and 233 of the Constitution, stating that NEMA should be interpreted in the light of applicable customary and international law. As regards customary international law, they refer to the case of *Trail Smelter Arbitration,*[71] a case involving a claim for damages for environmental harm caused in the United States by a zinc and lead smelter in Canada.[72] It was accepted in that case that international law provides that no state could use, or permit its territory to be used in a manner which causes injury in or to the territory of another state. They also refer to *Pulp Mills*[73], where the International Court of Justice (ICJ) accepted that international law requires an environmental impact assessment to be conducted where an activity poses a risk of transboundary harm.

[165] The applicants also refer to numerous international instruments, notably the *Rio Declaration on Environment and Development*[74]*,* and the Abidjan Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central Africa Region[75], to which South Africa is a party.

[166] On the basis of the above international authorities the applicants argue that both customary international law and international law recognise that states have a duty not to allow activities in their territory to cause transboundary harm, as well as a duty to ensure that where activities in their territory may cause transboundary harm, it is assessed as part of an environmental impact assessment.

[167] The Minister refers to *Zuma III*[76] where the applicant in that case sought to rely on the International Covenant on Civil and Political Rights (*"ICCPR"*), which is an unincorporated treaty, and the Constitutional Court stated 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*

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

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

[73] *Pulp Mills on the River Uruguay (Argentine v Uruguay) Judgment* I.C.J. Reports 2010 p. 14, at para 204.

[74] *Rio Declaration on Environment and Development* 12 August 1992, United Nations A.CONF/151.26 (Vol. 1).

[76] 2021 (11) BCLR 1263 (CC) (*"Zuma III"*).

signs them".[77] The Constitutional Court continued that an international treaty not incorporated into South African law has no place being invoked in a national court, 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.[78]

[168] The Minister also points out that there is no lacuna in NEMA, and that if there were any, the Minister would have taken the steps set out in Chapter 6 of NEMA where international obligations and agreements are dealt with; and recommended to Cabinet and Parliament accession to and ratification of international environmental instruments to which South Africa is not yet a party; and introduced legislation to give effect to an international environmental instrument to which the Republic is a party.[79]

[169] The Minister also complains that the applicants do not state which specific provision of NEMA must be interpreted so as to include extra-territorial assessment of impacts. He states that what the applicants seek to do is to import into NEMA a substantive provision based on some international instrument which has not become part of South African municipal law, which amounts to legislating as opposed to interpretation.

[170] The Minister also seeks to distinguish the facts of this case from *Trail Smelter Association* and *Pulp Mills*. He states that in *Trail Smelter*, the question arising was whether the company, Trail Smelter, should be required to refrain from causing damage in the State of Washington in the future and if so, to what extent. The tribunal in that case had to decide whether compensation should be paid. The question of whether a determination of the impact of the air pollution had to be made before commencing with smelter operations did not arise. Rather, the principle basis on which the decision was made is that no state may use or permit the use of its territory in such a manner as to cause injury by fumes in or to a territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

[171] As for *Pulp Mills*, the Minister seeks to distinguish it on the basis that it was decided on the basis of a treaty agreed between Uruguay and Argentina in 1975 ("1975 Statute"), in respect of a dispute concerning a breach of obligations under the treaty. The 1975 Statute provided for communication and co-ordination between the

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[77] *Zuma III*, para 108.
[78] See para 109.
[79] See section 25(1) to (4) of NEMA.

two states with respect to use of River Uruguay, especially in regard to industrial use. When two mills were erected by Uruguay, one of the questions was whether it had complied with its obligations. Although Uruguay conducted an environmental impact assessment, Argentina alleged it to be defective on the basis of non-consultation. It was within this context, says the Minister, that the ICJ made the remarks relied upon by the applicants in this case, and the ICJ was interpreting Article 41A of the 1975 Statute when it made reference to the practice emanating from general international law of conducting an environmental impact assessment to assess the transboundary risk and impact that a proposed industrial activity may have.

[172] For its part, Total contends that the applicants are precluded from relying on the fourth ground of review based on the principle of subsidiarity. To start with this argument, there is nothing in the applicants' case which triggers the principle of subsidiarity. The principle of constitutional subsidiarity provides that where legislation has been enacted to give effect to a constitutional right, then a litigant must rely on the legislation to enforce that right or challenge the constitutionality of the legislation.[80]The applicants here do not rely directly on section 24 of the Constitution, but seek an interpretation of NEMA which places an obligation to assess transboundary impacts of projects located in South Africa. They seek to do this through the interpretative tools of section 232 and 233 of the Constitution.

[173] Section 232 provides that *"[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"*. The provision clearly imports customary international law into South Africa, without more, provided it is consistent with the Constitution or an Act of Parliament.[81]

[174] In *Trail Smelter*, the court expressly referred to what *is "accepted in international law"*, and in *Pulp Mills* the court expressly referred to a *"requirement under general international law".* Although the Minister seeks to distinguish those

[80] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), para. 73. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd*) 2006 (2) SA 311 (CC), para. 437; *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 165.

[81] WA Joubert, *Law of South Africa* (LAWSA), Annual Cumulative Supplement 2024, Lexis Nexis.at 451.

cases on the basis of facts, it is not disputed that the principles the cases relied upon and applied were well-established rules of customary international law.[82]

[175] As the International Court of Justice (*"ICJ"*) stated in *Pulp Mills*:

> *[...] .. the obligation to protect and preserve, under article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environment impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, the duty of due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning work liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. [83]*

[176] The ICJ court continued as follows in *Pulp Mills*:[84]

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

[177] The respondents have not pointed to any aspect of these customary international principles which are inconsistent with the Constitution. Neither have they pointed to any inconsistencies with the provisions of NEMA, which are already outlined earlier, and in particular, the obligation to conduct an environmental impact assessment arising from the concept of integrated environmental management created in chapter 5 of NEMA.

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[82] See *S v Ephraim and Others* (SS70/2021) [2025] ZAGPJHC 410 (14 April 2025) para 30, where it was stated that "Customary international law is a source of international law developed through state custom or practice. In effect, it is the "common law" of the international legal system. A custom becomes a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation. In the matter of *Columbia v Peru*, the International Court of Justice ('ICJ'), stated that for a practice to become a rule of customary international law, the practice must be 'constant and uniform'." *(*Colombian-Peruvian asylum case I.C.J. Reports 1950, 266).

[83] *Pulp Mills on the River Uruguay (Argentine v Uruguay) Judgment* I.C.J. Reports 2010 p. 14, at para 204.

[84] *Pulp Mills on the River Uruguay (Argentine v Uruguay) Judgment* I.C.J. Reports 2010 p. 14, at para 101.

[178] As for s 233 of the Constitution, it provides that *"[w]hen 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"*. In *Law Society*[85], the Constitutional Court stated that the provision enjoins courts not only give a reasonable interpretation to legislation but also that the interpretation accords with international law. As stated in *Zuma*[86], international law is an interpretive tool to assist its interpretation. Its express wording clearly indicates that it is intended to be used to interpret South African legislation.

[179] This does not mean, as suggested by the Minister, creating new legislation or importing (a) new provision(s) into the already existing statutes. It is an interpretative tool provided by the Constitution to interpretate legislation. It is relevant in this regard that ICMA expressly requires the State to give effect to international law. One of the objects of ICMA is to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment. Sections 2(e) and 21 requires the State to control and manage activities within coastal waters in accordance with the Republic's obligations under international law.[87]

[180] Principle 2 of the Rio Declaration[88] reads as follows:

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

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[85] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) Sa 30 (CC) Para 5.

[86] *Ibid* paras 116 to 118. See also *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 35; and *Glenister Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at paras 96, 98.

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

[88] The United Nations Conference on Environment and Development was held in Rio de Janeiro, Brazil on 3-14 June 1992, http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm. This Conference adopted among other instruments, the Rio Declaration on Environment and Development (the Rio Declaration).

[181] As the Constitutional Court observed in *Fuel Retailers*[89], the Rio Declaration provides a benchmark for measuring future developments and a basis for defining sustainable development. It is also not disputed here that the Rio Declaration is the most generally accepted formulation of the main principles of international environmental law.[90] As a result, as the applicants point out, our courts[91]have frequently cited it, including the Constitutional Court in *Fuel Retailers* which commended it as a reflection of a *"real consensus in the international community on some core principles of environmental protection and sustainable development"*[92].

[182] There are other principles of the Rio Declaration which are relevant to the need to be cognisant of, and pro-active regarding, transboundary impacts. Some of the goals of the Rio Declaration include the following:

> "With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,
>
> Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,
>
> Recognizing the integral and interdependent nature of the Earth, our home…"

[183] Principle 6 provides as follows:

> "International actions in the field of environment and development should also address the interests and needs of all countries".

[184] Principles 18 and 19 provide:

> "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

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[89] See footnote 55.

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

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

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

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."

[185] If there is still any doubt regarding South Africa's international obligations to require assessment of transboundary impacts, there remains to consider the Abidjan Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central Africa Region[93], of which South Africa is a party. Article 13(2) obliges South Africa to endeavour to include an assessment of the potential environmental effects of an activity within South Africa on the 'Convention Area', which is defined to include the marine environment off the coast of Namibia.

[186] There is accordingly an obligation arising from customary international law and international law upon South Africa to not allow its territory to be used in a manner which causes transboundary harm. The duty includes a requirement for an environmental impact assessment to be conducted where an activity such as the present exploration activity, which poses a risk of transboundary harm, is to be conducted. At the very least, it has been established that there is a risk of oil spill and a blowout occurring, and a risk of the oil reaching Namibian waters and the Namibian shoreline.

[187] The approach adopted by the respondents, to the effect that NEMA and the EIA Regulations do not to require environmental impact assessment to assess and predict transboundary harm is inconsistent with the customary international law and international law obligations discussed above. It is also contrary to the NEMA principles and ICMA which recognise the need to discharge global and international responsibilities.

[188] I am also in agreement with the applicants that, Namibia has no jurisdiction to exercise control over the proposed project, and is not in a position to force Total to assess the impacts that the proposed project would have on its territory. To hold otherwise would create a dangerous, and easily exploitable, lacuna. Not only is this common sense, but it echoes the sentiments expressed in the principles of the Rio Declaration, set out earlier.

[189] For all these reasons, I conclude that NEMA, read in light of sections 232 and 233 of the Constitution, placed an obligation for the Final EIR to assess the environment impact of the transboundary impacts it predicted may be caused by the proposed project. And since the Final EIR failed to assess those transboundary impacts, and the decisions of the DG and the Minister failed to take those impacts into account, they stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

H. FIFTH GROUND: BLOW-OUT AND OIL SPILL CONTINGENCY PLANS

[190] The fifth review ground is a challenge to the Environmental Management Programme (EMPr) for the proposed project on the following bases: Firstly, 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. Secondly, the BOCP and the OSCP documents were required to form part of the EMPr for the proposed project, because these are the documents which will describe how Total intends to modify, remedy, control or stop an oil spill resulting from a well blow-out. Thirdly, the process through which the Final EIR and the EMPr were prepared and through which the EA was granted, was not procedurally fair and did not comply with the public participation requirements in NEMA.

[191] Total's main response to this ground is that it is impossible to prepare such plans absent information which can only be ascertained after obtaining the EA. It states that the Final EIR sufficiently detailed how it intends to modify, remedy, control or stop an oil spill resulting from a well blow out. Finally, it points to the fact that EA includes conditions requiring (a) the submission of the BOCP and OSCP within 60 days prior to the commencement of the proposed drilling operations[94]; and (b) an enhanced OSCP if operations are planned to cover the Austral winter[95].

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[94] Condition 5.5.2 of the EA reads: The holder must, within 60 days prior to the commencement of the proposed drilling operations, submit all specific management plans identified in the [Final EIR] i.e Shipboard Oil Pollution Emergency Plan; Emergency Response Plan Blow Out Contingency Plan; Oil Spill Contingency Plan; Stakeholder Engagement Plan; Waste, Emissions, Discharge Management Plan; Hazardous Substance Management Plan; Preventative Maintenance Plan; Ballast Water Management Plan; Biodiversity Management Plan And Corrective Action Plan.

[95] Condition 5.5.4 states: if the operations are planned to cover the austral winter period, the oil spill response plan must be enhanced to cover the risks associated with shoreline oiling from blow-out.

[192] In substantiation of why it would be impossible for the BOCP/OSCP, in a complete form, to be included in the ESIA and/or EMPr, and why in the circumstances, it is rational and reasonable that an BOCP/OSCP must be submitted within 60 days prior to the commencement of the proposed drilling operations, Total explains as follows:

1) BOCP's and OSCP's are internal operating documents that set out the way Total prepares for, and responds to, an oil pollution incident and are specific for each project. While the impact of an oil pollution incident is assessed in the Final EIR together with overall measures that Total will implement in response to an oil pollution incident, the BOCP&OSCP's do not assess the impacts of spills. They are operational plans that Total follows to respond to incidents.

2) The OSCP and BOCP are unique and specific to each operation, contractor, drilling campaign and well site. As a result, the specific plans cannot be developed in detail at this stage. The modelling inputs required for a OSCP and BOCP are tailored operational plans which include (a) location, (b) type of resource, (b) season, (c) contractor, and (d) response services, and therefore cannot be prepared during the ESIA phase as the information required to determine the well locations and well designs is not yet available.

[193] In further substantiation that a BOCP is intended to define a detailed response plan specific to the rig, well location, type of product spilled, and probable blow out rate, Total has explained the detailed the process of preparing a BOCP and OSCP, through its expert, Mr Groenewald. He explains that the two documents are inter-related in that the OSCP takes into account the outcomes of the BOCP.

[194] Total also states that, from a practical perspective, if tailored BOCPs/OSCPs were submitted and approved as part of the Final 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, Total would need to apply to amend its EA/EMPr to cater for these revised BOCPs / OSCPs. This would be impractical and overly burdensome.

[195] There is much more detail provided in Total's answering affidavit regarding the response strategy and associated plans to be included in the BOCP and OSCP.

They include consideration of the project specific conditions, well locations, metal ocean conditions, equipment, resources, local oceanographic and meteorological seasonal conditions, local environmental receptors and local spill response resources. None of this evidence is disputed by the applicants.

[196] Total also relies on the level of detail contained in its generic oil spill contingency plan which was submitted with the Final EIR, stating that it is sufficient for that stage. The DG and the Minister agree and were satisfied. Its content covers the generic response methodology and capability for the region (based on recent wells drilled in neighbouring Block 11B/12B), and as a result, regional Metocean conditions of the drilling campaign for Block 5/6/7.

[197] However, Total emphasises that 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. No comments were received on the generic OSCP during the public participation process.

[198] Contrary to the applicants' argument, I have not found that Total's response is vague in its explanation of the data inputs required for the BOCP and OSCP, and the stage at which such information becomes available. In fact, the applicants do not dispute Total's evidence regarding the impossibility of making the BOCP and OSCP available at the stage of applying for an EA. The applicants complain that there is a lack of detail regarding the time and costs it would take to prepare and then amend the OSC P& BOCP. However, as the evidence shows, the issue is not merely about costs but impossibility, which is not refuted.

[199] Nevertheless, given that there is yet to be more focused and detailed information to be provided, in the form of the OSCP and BOCP, which will define Total's plans to manage and mitigate a well blowout and oil spill, in another round of submissions, pursuant to the 60-day conditions inserted in the EA, it is difficult to conclude that there has been a full assessment and description of the manner in which Total intends to modify, remedy, control or stop any action, activity or process

which causes pollution or environmental degradation, as contemplated in section 24N(2)(g) and Appendix 4 of the EIR Regulations[96].

[200] Even more problematic is the lack of public participation in connection with the process that is yet to ensue. It appears that the OSCP and the BOCP will not be part of a public participation process. There is also no procedure specified regarding the consideration of those documents by the DG and the Minister.

[201] It is one of the foundational principles of NEMA that the participation of all interested and affected parties must be promoted,[97] and they must be provided reasonable opportunity to influence the outcome of the decision at hand.[98] Section 24(4)(a)(v) of NEMA provides that interested and affected parties must be given a reasonable opportunity to participate in the environmental impact assessment process.

[202] The fact that there was public participation in respect of the generic plan is not sufficient because, according to Total's own evidence, the specific detailed and relevant plans are the ones to be contained in the OSCP and BOCP, in respect of which there will not be public participation.

[203] As a result, the Final EIR and EMPr fell foul of section 24N (2)(g) of NEMA and Item 1(1)(f) of Appendix 4 to the EIA Regulations, for failing to include a description of the proposed impact management actions. And the decisions of the DG and Minister were procedurally unfair and did not comply with sections 24(4)(a)(v) and 24N(2)(g) of NEMA and the relevant provisions of the EIA Regulations. They therefore stand to be reviewed and set aside in terms of sections 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

I. THE SIXTH GROUND: THE INVOLVEMENT OF PASA

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[96] Paragraph 1(1)(f) of Appendix 4, which sets out the required content of environmental management programme (EMPr), provides that an EMPr "must comply with section 24N of [NEMA] and include a description of proposed impact management actions, identifying the manner in which the impact management outcomes … will be achieved, and must, where applicable, include actions to:

(i) avoid, modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;
(ii) comply with any prescribed environmental management standards or practices; and
(iii) comply with any applicable provisions of the Act regarding closure, in the case of a closure activity."

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

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

[204] The applicants' sixth ground of review is that the appeal response considered by the Minister was prepared and signed by officials of PASA and that, in submitting the appeal response, PASA purported to do so as the competent authority, the DG, and the appeal response was treated as such by the Minister. They state that the Minister's reliance on PASA's responding statement as if it was that of the DG means there was no proper compliance with Regulation 5, and that, to the extent that the Minister took account of PASA's responses in formulating his decision, she took account of irrelevant considerations.

[205] In this regard, the applicants rely, in the first instance, on an e-mail dated 16 May 2023 addressed to PASA's Sinazo Mnyaka, enclosing the appeal response of Total. It informed the competent authority that it could apply for condonation for the late filing of their responding statement, which at that stage had not been submitted and was out of time. Secondly, they rely on a decision by the Director: Appeals and Legal Review of the Department of Forestry, Fisheries and the Environment ("DFFE") dated 15 September 2023, in which the applicant for condonation of the late filing of PASA's appeal response is referred to alternately as 'PASA' and 'DMRE' which indicates, according to the applicants, that the author regarded the two entities as interchangeable. Thirdly, the applicants state that the appeal response is drafted in such a manner that the author considers him or herself to be responding in the capacity of the authority responsible for the decision.

[206] The respondents deny these allegations. They state that the DG, in fact, did not deliver an appeal response, which he was entitled not to do. And to the extent that there were interchangeable cross-references in the correspondence to PASA and the DMRE, those were clearly errors which are evident from the context of the documents referred to by the applicants.

[207] The e-mail of 16 May 2023 was addressed by Ms Fiona Grimmett of Total to PASA, and was copied to officials of the DMRE. Total has explained that the reference to the 'competent authority' instead of 'PASA', to whom the notification was clearly addressed, was a clear mistake arising from a 'copy and paste job'.

[208] Similarly, the reference to the 'DMRE' in the decision on condonation was also a clear mistake according to Total, because, as appears from that decision, the application for condonation was brought by the Chief Operating Officer of PASA, who was entitled to bring the application, not DMRE. Neither of these explanations

are refuted by the applicants and, to the extent that there is any factual dispute, it must be decided in Total's favour according to the *Plascon Evans* rule[99].

[209] Moreover, it is notable even from the supplementary affidavit where this ground of review is raised, that the ground is based on a supposition or inference, that in submitting an appeal response, PASA did so purporting to be the DG, which as I have indicated is explained by Total. To the extent that the applicants continue to allege that the Minister's appeal decision reveals that there was purported input from the DG whose source was, in fact, PASA, that is not supported by any evidence. Rather, the established evidence is that PASA filed a response to the applicants' appeal, and the DG did not.

[210] The appeal to the Minister was governed by the National Appeal Regulations published under NEMA (GNR.993 of 8 December 2014) ("the Appeal Regulations"). Regulation 5 of the Appeal Regulations provides as follows:

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

[211] It is clear from the use of 'if any' in Regulation 5, that the submission of an appeal responding statement is not compulsory. The fact that the DG, as the decision-maker, did not submit a responding statement is not a contravention of Regulation 5. The applicants have not pointed to any contrary statutory indication. And, since the DG had set out his reasons in his decision, it cannot be contended that the Minister did not have insight into his reasons.

[212] The corollary is that PASA as an 'organ of state' contemplated in Regulation 5, was entitled to submit an appeal response. The definition of an organ of state set out in section 1[100] of NEMA, read with s 239[101]of the Constitution, includes a functionary or institution exercising a public power or performing a public function in terms of any legislation.

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[99] *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.

[100] An 'organ of state' is defined in s 1 of NEMA to refer to 'an organ of state as defined in the Constitution.'.

[101] Section 239 of the Constitution 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.'

[213] PASA is such an institution by virtue of its designation by the Minister in terms of s 70 of the MPRDA[102], to perform the functions set out in Chapter 6 of the MPRDA and any other function determined by the Minister from time to time. Those functions include its mandate in terms of s 71(a) of the MPRDA to promote offshore oil and gas exploration and is the national custodian of petroleum data under the DMR.[103] In the furtherance of its duties in this case, it accepted and processed the EA application, reviewed it and made recommendations to the DG in terms of s 71(i) of the MPRDA [104], read with Regulation 6 (5) (b) of the 2014 EIA Regulations [105].

[214] Finally, in terms of Regulation 4 (2) of the 2014 EIA Regulations, Total was required to inform PASA, as an *interested and affected party* regarding the DG's grant of the EA and the timeframe for appealing the decision to the Minister.[106]It was in the performance of its public functions in terms of the MPRDA, and Regulation 5 of the Appeal Regulations that PASA submitted the responding statement, which the Minister considered before taking the appeal decision.

[215] As the Minister points out s 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.

[216] For all these reasons, the sixth ground of review is dismissed.

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[102] The first respondent designated PASA as such a functionary or institution occurred in GN R733 of 18 June 2004.

[103] s 71 (a) states that: the designated agency must (a) promote onshore and offshore exploration for and production of petroleum.

[104] s 71 (i) states that the designated agency must (i) review and make recommendations to the Minister with regard to the acceptance of environmental reports and the conditions of the environmental authorisations and amendments thereto.

[105] Regulation 6 (5) (b) of the 2014 EIA Regulations states that if the Minister responsible for mineral resources is the competent authority in respect of an application, the application must be submitted to the relevant office of the Department responsible for mineral resources as identified by that Department.

[106] Regulation 4 (2) states that: The applicant must, in writing, within fourteen days of the date of the decision on the application ensure that –

(a) all registered interested and affected parties are provided with access to the decision and the reasons for such decision and

(b) the attention of all registered interested and affected parties is drawn to the fact that an appeal may be lodged against the decision in terms of the National Appeals Regulations, if such appeal is available in the circumstances of the decision.

J. REMEDY

[217] I have found in favour of the applicants in respect of the first to fifth grounds of review. Once a ground of review under PAJA has been established, s 172(1)(a)[107]of the Constitution requires the decision to be declared unlawful.[108] In the circumstances, the decisions of the DG and the Minister are declared unlawful.

[218] In considering a just and equitable remedy under s 172(1)(b) in terms of which this Court has a wide discretion,[109]the Constitutional Court has emphasised the need for courts to be pragmatic.[110]For example, that court has found that it is disproportionate to set aside an entire project as a consequence of an imperfect process.[111] In addition, as emphasised by the SCA in *Sustaining the Wild Coast*[112], a just and equitable remedy must be proportionate, which means fair and just in the context of the particular dispute,[113] flexible, and should place substance above form.[114]

[219] In considering the appropriate remedy in this matter, I take into account the fact that a substantial amount of time has elapsed since Total applied for the EA, namely three years. This is a substantial delay when regard is had to the two-year duration of an exploration right in terms of the MPRDA.

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[107] Section 172 of the Constitution provides:
"When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[108] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013) para 25.

[109] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 132.

[110] *Electoral Commission v Mhlope & others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) para 132.

[111] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) para 134.

[112] *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (58/2023; 71/2023; 351/2023) [2024] ZASCA 84; 2024 (5) SA 38 (SCA) (3 June 2024) para [27].

[113] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 96.

[114] *Ibid* para 97.

[220] It has also been brought to the Court's attention that, in terms of Government Gazette No. 41743, dated 28 June 2018, a moratorium has been placed on the granting of new exploration rights over the entire South African coast.

[221] There is also to consider that, similar to the facts in *Sustaining the Wild Coast*, Total awaits the outcome of its application for a third renewal of its ER 224, and, as discussed elsewhere, it only has one more opportunity to renew the exploration right ER 224.

[222] In the fifth ground of review this Court has identified a failure to invite public participation regarding the BOCP and the OSCP. As in *Sustaining the Wild Coast*, this Cout is empowered to direct that, as part of a proper consideration of the third renewal application, a further public participation process be conducted to cure the identified defects in the process already undertaken. Similar to that matter, the matters warranting consideration have been fully canvassed in these proceedings.

[223] I am accordingly of the view that the just and equitable remedy would be remittal of the matter to the decision-maker for reconsideration based on the successful grounds of review.

K. COSTS

[224] There is no reason why costs should not follow the result. Save in the case of the joinder application and the sixth ground of the review, the applicants have been successful.

[225] In respect of the joinder, the applicants invoke the *Biowatch* principle[115] in terms of which there is a general rule in constitutional litigation that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs.[116] There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious, or there is conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs.[117]

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[115] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).
[116] *Biowatch* para 23.
[117] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 138.

[226] The respondents argued that the *Biowatch* principle ought not to apply because the main application and the opposition to the joinder application were frivolous and unmeritorious, and, in any event, a joinder application is not strictly speaking a constitutional matter.

[227] The latter argument is not supported by the prevailing case law. In *Phillips*[118] the SCA held the *Biowatch* principle is indeed applicable not only to orders on the merits in constitutional cases but also to what may be described as ancillary points. As the SCA stated in *Phillips*, "*that that must be so follows, inter alia, from the fact that a litigant wishing to vindicate a constitutional right might well be discouraged from going to court by the fear that some technical or procedural slip on the part of his legal representatives might result in a costs order with financially ruinous consequences for him or her"*[119].

[228] Although the opposition to the joinder application did not prevail, I did not find it frivolous. It is furthermore not disputed that the applicants act not only in their own interest but also in the public interest. I am accordingly of the view that the *Biowatch* principle should apply in respect of the joinder application, and that the applicants should not be ordered to pay costs in regard thereto.

[229] As regards the main application, all the parties employed more than one counsel - three each in the case of the applicants and Total, and two in the case of the Minister - an indication of the complexity and volume and importance of the matter. I am accordingly of the view that the applicants are entitled to the costs of three counsel.

L. ORDER

[230] In the circumstances, the following order is made:

1) Shell Exploration and Production South Africa BV is joined as the fifth respondent to these proceedings. There are no costs in relation to the joinder application.

2) The applicants' late service of the review application is condoned.

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[118] *Phillips v South African Reserve Bank and Others* (221/2011) [2012] ZASCA 38; [2012] 2 All SA 518 (SCA); 2012 (7) BCLR 732 (SCA); 2013 (6) SA 450 (SCA) (29 March 2012) paras [57] – [59].

[119] See para [58].

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

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

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

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

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

6) The first to third respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on a scale C, including the costs of three counsel.

MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

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Instructed by	:	Cullinan & Associates L Seema
Counsel for the first, second and third respondents	:	Adv G.L. Grobler SC Adv L. Gumbi
Instructed by	:	State Attorney Cape Town S. Mathebula
Counsel for the fourth respondent	:	Adv C. Loxton SC Adv J.L. Gildenhuys SC Adv T. Sarkas
Instructed by	:	Norton Rose Fulbright A. Vos
Counsel for sixth respondent (joinder)	:	Adv C. Loxton SC Adv J.L. Gildenhuys SC