



forestry, fisheries & the environment

Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA

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APPEAL RESPONSE REPORT

PROJECT NAME/TITLE:

- 1) Environmental Authorisation (Reference No.: 12/3/343) was granted to Sezigyn Proprietary Limited on (30 November 2018) by the Department of Mineral Resources (now the Department of Mineral Resources and Energy)
- 2) The first renewal (30 September 2022) of the Exploration Right (Reference No.: 12/3/343) granted to the holders (TotalEnergies EP South Africa B.V. ("TEEPSA")(50% interest), Qatar Energy International E&P LLC (30%) with partner Sezigyn Proprietary Limited (20%)) of the Exploration Right , off the West Coast of South Africa

PROJECT LOCATION:

The block is located in Deep Water Orange Basin (DWOB) Area located off the West Coast of South Africa, between Saldanha in the South and Kleinsee in the North. The application area covers approximately 37 335 km in extent and in water depths ranging from 500m to 4500m.

PROJECT REFERENCE NUMBER: 1) PASA Ref 12/3/343, SRK Project Number 524262 ;2) Exploration Right 12/3/343

DATE PROJECT/ACTIVITY AUTHORISED: 1) 30 November 2018 ; 2) 30 September 2022

DATE NOTIFIED OF DECISION: 27 October 2023

DETAILS OF THE APPELLANT	DETAILS OF THE APPLICANT
Name of appellant: Oceans Not Oil coalition	Name of applicant: Sezigyn Proprietary Limited
Appellant's representative (if applicable): Janet Solomon	Applicant's representative (if applicable): Thabang Khomo
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GROUNDS OF APPEAL	RESPONDING STATEMENT BY THE APPLICANT	COMMENTS BY THE DEPARTMENT
<p>INTRODUCTION</p> <p>Oceans Not Oil's appeal, in terms of Section 43(2) of the National Environmental Management Act, 106 of 1998, is against two decisions:</p> <ol style="list-style-type: none"> 1) the Environmental Authorisation granted to Sezigyn Proprietary Limited ('Sezigyn') (PASA Ref 12/3/343, SRK Project Number 524262) off the West Coast of South Africa (30 November 2018) 2) The first renewal of the Exploration Right (Reference No.: 12/3/343) granted to the holders (TotalEnergies EP South Africa B.V. ("TEEPSA")(50% interest), Qatar Energy International E&P LLC (30%) with partner Sezigyn Proprietary Limited (20%)) of the Exploration Right, off the West Coast of South Africa (30 September 2022) <p>These projects are located in Deep Water Orange Basin (DWOB) Area located off the West Coast of South Africa,</p> <ol style="list-style-type: none"> 1) The EA covers an area between Saldanha in the South and Kleinsee in the North. The application area covers approximately 37 335 km in extent and in water depths ranging from 500m to 4500m. 2) The ER renewal covers an area of approximately 29 869 km² and is located approximately 150 km and 188 km offshore the West Coast of the Republic of South Africa, roughly between Saldanha Bay (33°S) and Kleinsee (30°S), with water depths ranging from 500 m to 3 900 m. <p>The appeal is brought on behalf of the Oceans Not Oil. Oceans Not Oil is a non-profit association comprised of 35 non-governmental organisations and persons whose ultimate objective is the cessation of</p>		

<p>oil and gas operations and exploitation off South Africa's coastline. It is a conservation imperative that has public support and engages South African policymakers with the aim of building an economy beyond gas and oil, with its consequence to its marine life, subsistence and commercial fisheries, the tourism, recreation and hospitality industries, and to deal with climate change vulnerability that is the legacy of gas and oil.</p> <p>Vanishing Present Productions, is a film company of which Janet Solomon is director. It is a founding member of Oceans Not Oil. As such it predates Oceans Not Oil. It is as director of Vanishing Present Productions that Janet Solomon submitted comment on the Scoping Report (Appendix 4) for the Exploration Application 12/3/343, in 2018.</p> <p>This is a resubmission (of the separated ARR) which was initially submitted on 16 November 2023.</p> <p>[Oceans Not Oil's previous submission was an appeal in terms of the Section 43(2) of the National Environmental Management Act, 106 Of 1998 and in terms of section 96 of the Mineral and Petroleum Resources Development Act against the following decisions made pertaining to Block Deep Water Orange Basin off the West Coast of South Africa, (Reference: TEEPSA DWOB 12/3/343) and included:</p> <ul style="list-style-type: none"> a. the Environmental Authorisation granted to Sezigyn (Pty) Ltd on 30 November 2018 (Decision one); b. the exploration right granted to Sezigyn (Pty) Ltd on 27 March 2019 (Decision two); and c. the renewal of the exploration right granted on 30 September 2022 (Decision three) <p>That appeal was a submission against the aforesaid decisions made by the Department of Mineral Resources and Energy. The Appellant mentions parenthetically that, in its notification of</p>		
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<p>administrative decisions, TEEPSA advises that the exploration right granted on March 2019 is a decision which may be appealed against in terms of the provisions of the MPRDA, yet the decision to renew that right must be appealed against in terms of the provisions of NEMA and its regulations. The Appellant respectfully submitted that this makes no legal or practical sense. All of the decisions were granted in terms of MPRDA and the decision to renew the exploration right is dependent on the existence of the original exploration right. The Appellant believed the decisions should accordingly be regarded as one decision as the decision to renew is meaningless without the existence of the original exploration right.]</p> <p>This appeal is based on the following grounds:</p> <ol style="list-style-type: none"> 1) Inadequate consultation 2) Fatally flawed procedural irregularity 3) Failure to take into account relevant considerations. 4) Decision to authorise made in a critical policy vacuum <p>These grounds are more fully dealt with below.</p> <p>TEEPSA notified the Appellant by letter dated 27 October 2023 of the decision to grant an EA in favour of Sezigyn on 30 November 2018; the decision to grant an exploration right to Sezigyn on 27 March 2019 and an extension of the aforementioned right, notwithstanding the dates of the decisions, relevant to granting TEEPSA environmental authorisation for exploratory drilling activities:</p> <p>As is apparent from the notification, the following is indicated,</p>		
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<p><i>"TEEPSA is bringing to your attention the current and previous administrative decisions that have been issued in respect of offshore block Deep Water Orange Basin (DWOB Block)".</i></p> <p>In its notification to Oceans Not Oil, TEEPSA requests stakeholders to note the internal appeal process applicable to the EA, namely the "National Environmental Management Act, 106 of 1998: Environmental Impact Regulations, 2014" and, for the ER renewal, "Section 96 read with Regulation 74 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA)".</p> <p>The notification did not include copies of the exploration right nor its renewal, nor the documents which formed the applications. The notification did not advise Oceans Not Oil which entity or organisation authorised the exploration right or its renewal.</p> <p>A copy of the notification referred to here is attached marked (Appendix 1).</p> <p>The Appellant reserves their right to supplement this appeal should additional information be forthcoming during this appeal process, and in response to their request for information.</p>		
<p>GROUNDS OF APPEAL</p> <p>Ground 1. Inadequate consultation</p> <ol style="list-style-type: none"> 1. Apropos the unusual notification by TEEPSA of 27 October 2023, the reasonable extrapolation is that stakeholders were neither informed of the internal appeal process applicable to the decision of 27 March 2019 to grant the exploration right to Sezigyn, nor the decision to renew it on 30 September 2002. 2. The Deputy DG made clear in her <i>Decision on Environmental Authorisation</i> that the EA would only be effective in the event that an application for exploration right is granted in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 		

<p>of 2002). It is therefore reasonable that any interested and affected party to the EA would be informed of the granting of the exploration right and consequently its renewal.</p> <p>3. Subsequently, there was a substantial failure to notify the Appellant of the grant of the first renewal of Exploration Right 12/3/343 granted on 30 September 2022 by the Department of Mineral Resources timeously.</p> <p>a. The first time the holders of the right (TEEPSA) made any approach to the Appellant was on the 27th of October 2023, a year later.</p> <p>4. The Appellant contends the decision to renew the Exploration Right 12/3/343 is procedurally unfair because Sezigyn failed to adequately consult (or consult at all) with the Appellant, and it is uncertain whether this affects all interested and affected parties.</p> <p>5. The Appellant contends that the decision to renew the Exploration Right impinges on the Appellant's right to procedurally fair administrative action enshrined in section 33(1) of the Constitution, and PAJA as the law contemplated in section 33(3) of the Constitution, the provisions of MPRDA for consultations to be made with interested and affected parties and the Regulations made thereunder.</p> <p>The importance of a meaningful public participation process, applicable to an exploration right application, was stated as follows in the case of <i>Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy</i>, (Appendix 3)</p> <p>"In the first place, meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine, bona fide substantive two-way process aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import</p>		
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<p>thereof. Moreover and in any event, the Constitution, PAJA, MPRDA and the Regulations apply contemporaneously to the impugned consultation process. The prescripts of MPRDA and regulation 3 are subject to the Constitution and PAJA. Therefore, it is within the prism of the Constitution and PAJA that regulation 3 should be interpreted."ⁱ</p> <p>6. As a result of the inadequate consultation process, any factors that the Appellant, and possibly any intervening parties, would have placed before the minister to inform the decision-making process were not considered.</p> <p>7. The decision to grant the renewal of the exploration right falls to be reviewed on this ground alone, in terms of section 6(2)(c) of PAJA.</p> <p>8. The Appellant reserves its right to make further submissions on this issue.</p>		
<p>Ground 2. Fatally flawed procedural irregularity</p> <p>1. It is noted that the EAP (SKR Consulting) determined in the Scoping Report (Appendix 2) for the Exploration Application 12/3/343 that the proposed project warrants triggering a listed activity in terms of a Listing Notice 2 (LN2) of the EIA Regulations, 2014, requiring a S&EIR process, since its objective is exploring for offshore oil and gas. The aforesaid Scoping report contained the following statement:</p> <p style="padding-left: 40px;"><i>“LN2: Any activity including the operation of that activity which requires <u>an exploration right</u> as contemplated in section 79 of the MPRDA.</i></p> <p style="padding-left: 40px;"><i>The EIA Regulations, 2014, define the detailed approach to the S&EIR process, which usually consists of three phases,</i></p>		

<p><i>namely the Pre-Application Phase, Scoping Phase (the current phase) and an Impact Assessment Phase.”</i></p> <p>2. The EA granted to Sezigyn was based solely upon the Final Scoping Report, referred to below. The EA granted to Sezigyn in respect of the proposed <u>exploration activities</u> in offshore Mid Orange Basin, off the West Coast of South Africa, given by the Deputy Director-General: Mineral Regulation (Appendix 1) is based on the listed activity No.18:</p> <p><i><u>“Any activity including the operation of that activity which requires an exploration right as contemplated in section 97 of the Mineral and Petroleum Resources Development Act 202 (Act No. 82 of 202), including:</u></i></p> <p><i><u>(a) associated infrastructure, structures and earthworks; or</u></i></p> <p><i><u>(b) the primary processing of a petroleum resource including winning, extraction, classifying, concentrating or water removal; but excluding the secondary processing of a petroleum resource, including the beneficiating or refining of gas, oil or petroleum production in which case activity 5 in this Notice applies” (Appellant’s emphasis)</u></i></p> <p>3. The EA granted to Sezigyn was based solely upon the Final Scoping Report, short-circuiting the Impact Assessment Phase necessary for any activity including the operation of that activity which requires an exploration right. Therefore, the process of granting the Environmental Authorisation was procedurally irregular and fatally flawed, since it does not give effect to the regulations prescribed in Appendix 3 of the Environmental Impact Assessment Regulations (2014) and consequently, the Exploration Right, and its renewal, should not have been granted.</p> <p>4. Further, the Deputy DG (as the competent authority) is not empowered by the EIA Regulations to short-circuit the EIA process</p>		
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<p>by abandoning the Impact Assessment Phase of the EIA, which makes the granting of the EA procedurally flawed and unfair. If the EA is wrong in law, then the ER, and its renewal, are legally untenable.</p>		
<p>Ground 3. Failure to take into account relevant considerations.</p> <p>1. Section 6(2)(e)(iii) of PAJA provides for review where action was taken without taking into account relevant considerations.</p> <p>2. The fundamental considerations that are said to be absent from the issuance of the EA and the renewal of the Exploration Right 12/3/343 are -</p> <ul style="list-style-type: none"> a. the anticipated harm to the marine and bird life along the Western Cape coast; b. the communities' spiritual and cultural rights and their rights to livelihood; c. climate change considerations and requirements. <p>It is incumbent on the relevant authorities to give due weight to these considerations of harm. Furthermore, there is no evidence of the decision-maker having taken into account any remedial measures.</p> <p>3. It is noted that the Deputy DG found the exclusion of the Impact Assessment Phase relating to Exploration Application 12/3/343 was "found satisfactory considering the nature of the proposed desktop exploration activities" (Appendix 1), and that due to the desktop activities involved "no environmental and social impacts could be identified and/or assessed". The consequence of this was an effective exclusion of all environmental and social impacts relevant</p>		

<p>to any activity including the operation of that activity which requires an exploration right, exclusion of an Environmental Impact Assessment report and any public comment upon these. This failure by the decision-maker to take into account relevant, fundamental considerations of all environmental and social impacts when making the relevant decision, renders that decision fatally flawed, and this decision falls to be set aside on Appeal.</p> <p>4. If the EA is irregular, it follows that the exploration right is, and so too is the renewal of the exploration right.</p>		
<p>Ground 4. Decision to authorise made in a critical policy vacuum</p> <p>1. The decision to renew ER 12/3/343 has occurred without assurance that activities involved in offshore exploration well drilling, sonar surveys and seabed coring for oil and gas are compatible with other ocean uses and objectives within the marine environment, since the necessary ocean governance framework, required to implement the Constitutional imperative flowing from Section 24 of the Constitution of the Republic of South Africa (1996), has yet to be implemented:</p> <ul style="list-style-type: none"> • the White Paper on the National Environmental Management of the Ocean (2014) has yet to be promulgated, and • The Marine Spatial Planning Act, 16 of 2018, (“MSPA”) still requires development of the Marine Area Plans (as defined in the MSPA). <p>i. This effectively renders the granting of the EA and ER renewal unlawful as they, inter alia, ignore alternate sectoral objectives as well as cumulative pressures to</p>		

<p>the marine ecosystem itself.</p> <p>ii. Pursuant to Section 3(2) of the MPSA, states that,</p> <p>“Any right, permit, permission, license or any other authorisation issued in terms of any other law must be consistent with the approved marine area plans.” (emphasis added)</p> <p>The Competent Authority was therefore never entitled, in law, to award the EA, nor renew ER 12/3/343 until such time as the Marine Area Plans are gazetted, come into law, and become binding. Because the Marine Area Plans have not yet been “approved” as envisaged by section 3(2) of the MSPA, no ‘right, permit, permission, license or any other authorisation’ (such as the environmental authorization) could be deemed to be ‘consistent’ with the said Marine Area Plans. Therefore, and considering the peremptory language used by the drafters of the MSPA viz the use of the word “must” – the Competent Authority was not authorised to grant EAs or ER renewals i.e., the decisions that are subject to this appeal.</p> <p>2. The decision to implement Section 6 of the National Energy Act (NEA) into operation with effect from 1 April 2024 has been announced by President Ramaphosa. The National Energy Act, Section 6 requires the Minister of Mineral Resources and Energy to develop an Integrated Energy Plan (IEP) in the context of the current climate crisis. Without the legislative framework, both administrative decisions to grant the EA and the ER renewal lack the appropriate guidelines prescribing the adoption and implementation of performance management systems relating to the global warming and international carbon commitments. Offshore exploration for fossil fuels lacks the legislative mandate to</p>		
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proceed whilst the IEP undergoes full public participation and consideration as per the Constitution.		
<p>CONCLUSION</p> <p>The Appellant reserves their right to supplement these grounds of appeal, as well as to add any new grounds of appeal, once the information relevant to the applications and decisions have been provided to them.</p> <p>For all the reasons stated above, it is our submission that the appeal should succeed and that the EA (ref 12/3/343) and the ER 12/3/343 renewal must not be permitted to proceed.</p>		

ARR comments by Case Officer

Name & Surname:

Date:

Signature:

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Approved by Supervisor

Name & Surname:

Date:

Signature:

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ⁱ Mbenenge, JP. S[95] of the Judgement, *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* (2022)