

IN THE MATTER OF:

OCEANS NOT OIL

APELLANT

**THE MINISTER OF THE DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

FIRST RESPONDENT

**/ or THE DIRECTOR-GENERAL IN THE DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

SEZIGYN (PTY) LTD

SECOND RESPONDENT

TOTALENERGIES EP SOUTH AFRICA BV.

THIRD RESPONDENT

QATAR ENERGY INTERNATIONAL E&P LLC

FOURTH RESPONDENT

NOTICE OF APPEAL IN TERMS OF SECTION 96 OF THE MINERAL AND PETROLEUM

RESOURCES DEVELOPMENT ACT, 96 OF 2002

KINDLY NOTE THAT Oceans Not Oil intends appealing against the following decisions of the First Respondent, and/or his delegate:

1. The Exploration Right (Reference No.: 12/3/343) was granted to Sezigyn Proprietary Limited on 27 March 2019 by the Department of Mineral Resources.

The appeal is based on the following grounds:

1. Inadequate consultation
2. Fatally flawed procedural irregularity
3. Failure to take into account relevant considerations.

These grounds are more fully dealt with below.

APPEAL IN TERMS OF SECTION 96 OF THE OF THE MINERAL AND PETROLEUM

RESOURCES DEVELOPMENT ACT, 96 OF 2002

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AFFADAVIT

I, the undersigned,

JANET SOLOMON

do hereby make the oath and say that,

1. I am an adult female, the spokesperson for the coalition Oceans Not Oil, the appellant in this matter. I have held this position for 5 years. I am duly authorised to file this appeal, and to depose this affidavit on behalf of the Appellant.
2. The facts set out below are true and correct and, unless the context indicates the contrary, fall within my personal knowledge.
3. The Appellant is 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 oil and gas operations and exploitation off South Africa's coastline.
 - a. Vanishing Present Productions, is a film company of which I am the 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 I submitted comment on the Scoping Report (Appendix 4) for the Exploration Application 12/3/343, in 2018.
4. This is a resubmission of an appeal against the following decisions:
 - a. The Exploration Right (Reference No.12/3/343) granted to Sezigyn Proprietary Limited ("Sezigyn") on 27 March 2019 by the then Department of Mineral Resources.

5. The Appellant'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:-
- 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 30 November 2018 (Decision two); and
 - c. the renewal of the exploration right granted on 30 September 2022 (Decision three)
- for proposed exploration well drilling, undertaking sonar surveys and seabed coring in Block Deep Water Orange Basin off the West Coast of South Africa, (Exploration Right 12/3/343)

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 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 they should accordingly be regarded as one decision as the decision to renew is meaningless without the existence of the original exploration right.

6. TotalEnergies EP South Africa B.V. ("TEEPSA") notified the Appellant by letter dated 27 October 2023 of the decision to grant an EA in favour of Syzigen on (30 November 2018), the decision to grant an exploration right to Syzigen 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:

As is apparent from the notification, the following is indicated,

"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)".

7. In its notification to the Appellant, TEEPSA requests stakeholders to note the internal appeal process applicable to the exploration right and its renewal, namely "Section 96 read with Regulation 74 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA)".
8. 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 the Appellant which entity or organisation authorised the exploration right or its renewal. Given this uncertainty the Appellant lodges this appeal with both the Director-General and the Minister.
A copy of the notification referred to here is attached marked (Appendix 1).
9. It is recorded that the Appellant was a registered Interested and Affected Party and submitted comments on the application for an Environmental Authorisation to conduct desktop analysis of existing data, on 12 Sept 2018. The Appellant received no notification that the Exploration Right (Reference No. 12/3/343) was purportedly granted to Sezigyn Proprietary Limited on 27 March 2019, nor did it receive notice of the first renewal of Exploration Right 12/3/343 granted on 30 September 2022 by the Department of Mineral Resources.
10. The first the Appellant was made aware of these decisions was on the 27th of October 2023 as referred to above in paragraph 5.
11. The Appellant understands that Sezigyn currently holds a 20% interest in the exploration right granted for the DWOB Block, together with its partners Qatar Energy International E&P LLC who hold a 30% interest and TEEPSA, with a controlling interest of 50%.

- a. Sezigyn, TEEPSA and Qatar Energy International are identified as persons affected by the outcome of appeal.

12. In accordance with the provisions of PAJA and the Constitution, the Second, Third and Fourth Respondents are requested to provide details of other affected persons.
13. The proposed application area is the Deep Water Orange Basin 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.
14. The Appellant brings this application in its own interest, in the interests of its members, in the public interest in terms of section 38(1)(d) of the Constitution (and section 32(d) of the National Environmental Management Act No. 107 of 1998 ("NEMA")) and in the interest of protecting the environment in terms of section 32(e) of NEMA, read with section 24 of the Bill of Rights.
15. This appeal is brought against the ER granted to Sezigyn by the DMRE on 20 March 2019, as well as the first renewal granted by the DMRE to Sezigyn on 30 September 2022. I mention parenthetically that the right upon which the renewal was granted, peculiarly, does not fall within this appeal even though the (latter) renewal depends on the initial right.
16. 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.

GROUND OFS OF APPEAL

Ground 1. Inadequate consultation

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 Decision on Environmental Authorisation 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 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.
3. There was a failure to notify the Appellant, as an interested and affected party to the EA process, of the granting of the Exploration Right (Reference No. 12/3/343) to Sezigyn by the Department of Mineral Resources, on 27 March 2019 at that stage.
 - a. The first time the Respondents made any approach to the Appellant was on the 27th of October 2023, some four and a half years later.
4. 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.
5. The Appellant contends the decision to grant 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.
6. The Appellant contends that the aforesaid decision 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.

The importance of a meaningful public participation process, applicable to an exploration right application, was stated as follows in the case of *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy*, (Appendix 3)

"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 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."

7. 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.
8. The decision to grant the exploration right falls to be reviewed on this ground alone, in terms of section 6(2)(c) of PAJA.
9. The Appellant reserves its right to make further submissions on this issue.

Ground 2. Fatally flawed procedural irregularity

1. It is noted that the EAP (SKR Consulting) determined in the Scoping Report (Appendix 2) for 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:

"LN2: Any activity including the operation of that activity which requires an exploration right as contemplated in section 79 of the MPRDA.

The EIA Regulations, 2014, define the detailed approach to the S&EIR process, which usually consists of three phases, namely the Pre-Application Phase, Scoping Phase (the current phase) and an Impact Assessment Phase."

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 exploration activities 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:

*"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:
 (a) associated infrastructure, structures and earthworks; or
 (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)*

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.
4. Further, the Deputy DG (as the competent authority) is not empowered by the EIA Regulations to short-circuit the EIA process 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.

Ground 3. Failure to take into account relevant considerations.

- 1 Section 6(2)(e)(iii) of PAJA provides for review where action was taken without taking into account relevant considerations.
- 2 The fundamental considerations that are said to be absent from the issuance of Exploration Right 12/3/343 are -
 - a. the anticipated harm to the marine and bird life along the Western Cape coast;
 - b. the communities' rights to livelihood;
 - c. climate change considerations and requirements.

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.

- 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 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.
- 4 If the EA is irregular, it follows that the exploration right is, and so too is the renewal of the exploration right.

CONCLUSION

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.

In the light of the above, the Minister is respectfully requested to exercise his powers in terms of section 96 of the MPRDA and set aside the ER and the ER renewal.

JANET SOLOMON

I hereby certify that the deponent has declared that she knows and understands the contents of this affidavit and that to the best of her knowledge and belief it is the truth, which affidavit has been signed and solemnly affirmed before me in _____ on this _____ day of November 2023.

COMMISSIONER OF OATHS

¹ Mbenenge, JP. S[95] of the Judgement, *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* (2022)