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

JUDGMENT

Case no: 24492/2024

In the matter between:

AUKOTOWA FISHERIES PRIMARY CO-OPERATIVE LIMITED	**First Applicant**
THE GREEN CONNECTION NPC	**Second Applicant**
NATURAL JUSTICE	**Third Applicant**

AND

DIRECTOR-GENERAL: DEPARTMENT OF MINERAL AND PETROLEUM RESOURCES	**First Respondent**
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**Second Respondent**
TGS GEOPHYSICAL COMPANY (UK) LIMITED	**Third Respondent**
MINISTER OF MINERAL AND PETROLEUM RESOURCES	**Fourth Respondent**

Coram: Justice J Cloete

Heard: 1 and 2 June 2026

Delivered electronically: 13 August 2026

ORDER

The application is dismissed. Each party shall pay their own costs.

JUDGMENT

Cloete J:

Introduction

[1] This is an opposed application for the review and setting aside of decisions by the first respondent, and second respondent as appellate authority, to grant an environmental authorisation (EA) to the third respondent in terms of the National Environmental Management Act (NEMA)[1] and the Environmental Impact Assessment Regulations (EIA Regs) [2] for a seismic reconnaissance survey off the West Coast of South Africa. Although the applicants also sought substitution relief, that was abandoned. They also do not seek remittal relief.

[2] The first applicant ('Aukotowa') is a co-operative of 64 small-scale fishers, established in 2018. All of its members are generational fishers residing in Port

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[1] National Environment Management Act 107 of 1998.

[2] Environmental Impact Assessment Regulations, 2014 published under GN R982 IN GG 38282 of 14 December 2014 as amended.

Nolloth, a coastal town in the Northern Cape. They say that they are extremely concerned about the degradation of the oceans and their local coastline, which is at the heart of so much of their history and culture and is now also the source of their livelihoods.

[3] The second applicant (Green Connection) is a non-profit company. The third applicant (Natural Justice) is a voluntary organisation. According to the applicants, both Green Connection and Natural Justice are organisations whose object is to promote sustainable development by empowering people to participate in decision-making about their environment. Given that all make common cause I will simply refer to them, unless otherwise indicated, as 'the applicants'.

[4] The first respondent is the Director-General, Department of Mineral and Petroleum Resources ('DG'). He is delegated as the competent authority[3], amongst other things, as the original decision-maker for the approval or refusal of an EA application, as well as the granting or refusal of a reconnaissance survey permit. Such a permit cannot be granted without an EA. A permit is valid for a period of one year and cannot be renewed. It is also limited to allowing the holder to undertake geological, geophysical or photographic surveys and other remote sensing techniques.

[5] The second respondent is the Minister of Forestry, Fisheries and the Environment ('Environment Minister'). An appeal against a decision of the DG in respect of an EA must be made to the Environment Minister in terms of s 43(1A) of NEMA. The Environment Minister at the time was Minister Creecy. Her successor, Minister Aucamp, deposed to an answering affidavit confirming under oath that he was familiar with, and had verified, all relevant records

[3] In terms of Chapter 5 of NEMA and the EIA Regs, read with s 103 of the Mineral and Petroleum Resources Development Act 28 of 2002.

pertaining to the EA and subsequent appeal. I will thus refer to the Environment Minister as if it were still Minister Creecy.

[6] The third respondent ('TGS'), to whom the EA was granted, is a company registered in the United Kingdom which also conducts business in South Africa. It says that it is a well-regarded international survey company.

[7] The fourth respondent ('Minerals Minister') is empowered, under s 70 thereof, to designate an organ of state to perform functions in terms of Chapter 6 of the Mineral and Petroleum Resources Development Act ('MPRDA').[4] Chapter 6 deals with petroleum exploration and production, more particularly the granting of exploration and production rights and the issuing of technical co-operation permits and reconnaissance permits. For present purposes the definition of 'petroleum' in the MPRDA includes "any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust…".

Relevant factual background

[8] It is undisputed that TGS has conducted seismic reconnaissance surveys in South Africa and across the world. It is part of a Norwegian group of companies that are world leaders in seismic surveys, with more than 40 years experience in geoscience data.

[9] Also undisputed is that neither TGS nor any other company in the group is involved in extracting or producing hydrocarbons; instead, they provide data. TGS' parent company complies with the European Union's corporate sustainability standards; publishes annual sustainability reports which demonstrate *inter alia* the group's commitment to mitigating and avoiding

[4] Mineral and Petroleum Resources Development Act 28 of 2002.

disruptions to marine ecosystems; and has ratified the United Nations Global Compact, which is the world's largest sustainability initiative.

[10] TGS wishes to undertake a seismic survey in the Orange Basin, off South Africa's West Coast ('project area'). The project area measures approximately 57 400 km; starts about 120 km offshore from St Helena Bay; and ends approximately 230 km offshore from Hondeklip Bay. It is further undisputed that the survey itself will entail low-frequency, low-energy sound pulses being generated just below the ocean surface and directed at the seabed; each pulse lasts between 5 and 30 milliseconds; and one pulse is discharged every 6 to 20 seconds as the survey moves through the project area. The sound levels are akin to commercial vessels' peak frequency bands but, for the limited duration of the seismic activity, are more intense. The entire survey will take place over 70 days (i.e. just under 2 ½ months), including downtime.

[11] Aside from the sound source, the survey vessel also tows hydrophones (waterproof microphones) 6 m to 10 m below the ocean's surface which pick up the acoustic signals reflected from the seabed and transmit them to be recorded. The hydrophones are grouped together in 'streamers' which are towed up to 10 000 m behind the survey vessel, 25 m apart from one another. The ends of the streamers are marked with buoys to warn of their presence. Because the survey vessel has restricted manoeuvrability (since it tows the survey gear), it is assisted by up to two escort vessels, which alert proximate vessels to the survey vessel and its limited manoeuvrability.

[12] The data gathered during the survey may be used to: (a) identify the extent of natural resources such as natural gas; (b) facilitate oil and gas exploration and production; (c) acquire information to be used for developing renewable energy solutions; and (d) provide general oceanic scientific information and research data in respect of fish.

[13] The EA granted to TGS includes conditions that the vessels will transport at least one Fisheries Liaison Officer ('FLO'), several Marine Mammal Observers ('MMOs') and a Passive Acoustic Monitoring System ('PAM'). The FLO will facilitate communication with fishers and proximate vessels, while the MMOs and PAM will monitor for marine fauna, and are to ensure that no seismic sound begins or continues if marine fauna are observed or detected within 500 m of the survey vessel.

[14] As already stated, in order to conduct the seismic survey, TGS requires the EA, for which it applied on 6 September 2022. An integral part of considering such an application is an environmental impact assessment ('EIA'), contained in a Basic Assessment Report ('BAR') as contemplated in regulation 19 of the EIA Regs. The BAR must set out the "environmental outcomes, impacts and residual risks of the proposed activity".[5]

[15] TGS commissioned Environmental Impact Management Services (Pty) Ltd as environmental assessment practitioner ('EAP') to compile the BAR. The EAP's expertise and independence are undisputed. The BAR runs to over 300 pages and was also informed by the following five specialist studies of other independent scientists: (a) an Acoustic Technical Report ('Acoustic Report'); (b) a Biodiversity and Ecosystem Services Assessment Report ('Biodiversity Report'); (c) a Specialist Fisheries Assessment ('Fisheries Report'); (d) a Social Impact Assessment ('SIA'); and (d) a Heritage Impact Assessment ('HIA').

[16] Before the draft BAR was completed there was an extensive preliminary public participation process. All inputs from this preliminary process were incorporated in the draft BAR. Thereafter the draft BAR was circulated for public

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[5] Regulation 19 (3) of the EIA Regs read with Appendix 1(1) thereto.

comment, and a further public participation process took place. The final BAR – reflecting the input from the public participation processes as well as more than 950 references, studies and academic articles – was completed on 6 December 2022. The applicants gave input during the public participation process(es).

[17] The final BAR contains detailed analyses in respect of environmental impacts, as well as a range of mitigation measures (in the main body of the BAR and in the Environmental Management Programme ('EMPr')). Most pertinent for present purposes are the following three conclusions reached.

[18] First, in respect of fish, from the sound source the survey will have: (a) a mortal – injury zone of approximately 30 m; (b) a non-fatal injury zone of between 90 m and 180 m; and (c) a zone of temporary loss of hearing to a range of about 2.9 km. This could cause behavioural disturbances up to 4 km away from source.

[19] Second, given the project area's location, it is expected that there will be no impact on the following fishing sectors: demersal trawl, midwater trawl, demersal longline, small pelagic purse-seine, linefish, West Coast rock lobster, netfish and small-scale fishing. While there could be some residual impacts for the large pelagic longline and tuna pole-line fishing sectors, the impacts can be mitigated (e.g. by not allowing survey activities during June and July, when those sectors would be most affected by the survey).

[20] Third, because the project area is located in the Orange Basin and offshore of the shelf break (i.e. the submerged offshore edge of the shallow continental shelf where the seafloor transitions to the continental slope), the survey will take place away from the important oceanic fishing areas and key spawning/nursery areas.

[21] On 17 April 2023, the DG granted the EA, subject to numerous conditions which included the obligation to implement all management and mitigation measures in the EMPr. After six parties (including the applicants) appealed against the DG's decision, the Environment Minister dismissed the appeals on 22 May 2024, and confirmed the EA, but with an additional condition requiring the appointment of a FLO.

Required approach to the evidence on the disputed issues

[22] These are motion proceedings for final relief and accordingly the *Plascon-Evans* test applies. This means that where disputes of fact arise, a final order may only be granted if the facts alleged in the respondents' affidavits, together with those alleged in the applicants' affidavits that have been admitted by the respondents, justify such an order. The only exception is where the respondents' allegations are so far-fetched or improbable that they fall to be rejected on the papers as they stand.

[23] Further, an applicant must make out its case in its founding papers and is not permitted to make out a new case, or raise a new ground, in its replying affidavit.

Required approach in review proceedings

[24] The first principle is that a judicial review is not a further appeal. Judicial review is concerned, not with the merits of the impugned decisions, but with the decision-making process itself. Unless that restriction on the court's power is observed, it will, under the guise of preventing the alleged abuse of power, be guilty itself of usurping the statutory powers conferred on the decision-maker in question in any given matter.

[25] The second principle, which follows from the first, is that in judicial review the exercise of judgment on facts by a decision-maker, including the weight that he or she gives to certain facts, is not reviewable, even if the court would have reached a different view had it been vested with original competence. The only times that a court may interfere is where the decision-maker gets the facts wrong, provided that those facts are material, are established, and meet a threshold of objective verifiability[6], or where it is demonstrated that the decision-maker has not acted in good faith or irrationally.[7]

[26] The third principle, given that this is a PAJA[8] review, is that the applicants are required to allege and prove the specific PAJA grounds relied upon. They are confined to those grounds. More particularly, subject to what follows, the grounds must be directed at the decision of the Environment Minister because her appeal power under s 43(6) of NEMA is a wide one.

[27] The wide appeal involves a determination of the merits *de novo*, i.e. a complete rehearing of, and fresh determination on, the merits of the EA application, with or without additional evidence or information, and with the Environment Minister exercising that power free to substitute her own decision for the decision under appeal.[9] As a general principle, the DG's decision is relevant only insofar as there may be irregularities that have not been overtaken or cured by the appeal decision[10] (I accept that this is not the case in all instances[11].)

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[6] *South Durban Community Environmental Alliance v MEC for Economic Development Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another* 2020 (4) SA 453 (SCA) paras 21-23 and the authorities referred to therein.
[7] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) paras 18 and 23; *Peermont Global (North West) (Pty) Ltd v Chairperson of the North West Gambling Review Tribunal and Others* [2022] ZASCA 80 para 70.
[8] Promotion of Administrative Justice Act 3 of 2000. Although the applicants alleged in the founding affidavits that it was brought under PAJA, alternatively the principle of legality, reliance on the latter was not persisted with.
[9] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) para 76.
[10] *Earthlife* also para 76.
[11] *Earthlife* para 14, referring to *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape, and Others* para 46.

[28] The fourth principle is that review grounds must be distinct from, and not merely repetitive of, those advanced in an internal appeal. A litigant cannot simply restate appeal grounds in the language of review.[12] Put differently, the grounds of review in s 6(2) of PAJA are specific and do not accommodate mere disagreement with the outcome of the appeal decision.

Overview of review grounds advanced by the applicants

[29] In their affidavits, the applicants advanced ten grounds of review. These affidavits, together with annexures, ran to thousands of pages. The respondents were thus compelled to answer to these. An 11th new ground of review was raised for the first time in the replying affidavit.

[30] In their heads of argument, the applicants reduced all of these to five grounds, jettisoning six of the initial ten grounds and persisting with the 11th, namely a challenge to the delegation of power by the Minerals Minister to the DG as competent authority. The 11th ground was also subsequently abandoned during oral argument, leaving 4 grounds, as follows.

[31] *First,* the alleged failure by the DG to have the statutorily prescribed documents before him when taking his decision. *Second*, the alleged unlawful reliance by the Environment Minister on the input of the Petroleum Agency of South Africa ('PASA') when making the appeal decision. *Third,* the alleged failure by both the DG and the Environment Minister to consider, alternatively appropriately consider, material information. *Fourth,* two plans, which were required to be submitted after the EA was granted, were thus not made subject to public participation.

[12] *South Durban Community* para 13.

[32] It is fair to say that both the respondents and this court had great difficulty in attempting to decipher how the formulation of the five grounds in the applicants' heads of argument related to those advanced in the applicants' affidavits. One of numerous examples is that the fourth ground in the heads of argument was originally pleaded in the founding affidavit as the first ground, and with a different description.

[33] It is also fair to say that the applicants adopted a 'scatter-shot' approach in their affidavits, in addition to which no particular subsection of s 6 of PAJA was squarely identified, with the respondents and the court left to try to discern this as well. Again, by way of example, the first ground in the founding affidavit was alleged to be "reviewable on one or more of the following PAJA review grounds" and then, trotted out as it were, appeared five potential PAJA grounds.

[34] This approach is unacceptable and must be frowned upon. That being said, I do not know who was responsible for drafting the applicants' affidavits, and I thus aim no criticism at counsel who argued the matter on their behalf.

First ground of review: whether the DG had the statutorily prescribed documents before him when taking the decision to grant the EA

[35] The applicants contend that the DG did not have the statutorily prescribed documents before him when taking his decision, and thus purported to grant the EA without considering the BAR, the specialist reports, the EMPr and comments from interested and affected parties (I&APs).[13]

[36] The applicants base this complaint on the following. The record of decision obtained under rule 53 reflects that the only document before the DG when he made his decision was the application submitted by TGS to PASA,

[13] The applicants allege that this was in breach of s 24O of NEMA read with regulation 18 of the EIA Regs.

together with the appendices thereto. These did not include the documents referred to in the immediately preceding paragraph.

[37] However, the DG's decision expressly records that he authorised TGS to undertake the seismic survey activities "as described in the BAR / EMPr submitted on 6 December 2022". In addition, in his answering affidavit the DG confirmed under oath that in order to avoid prolixity and duplication, he repeated and incorporated (by reference) the Environment Minister's answering affidavit and its correctness insofar as it referred to him and his decision.

[38] The answering affidavit of the Environment Minister dealt with the EA at both DG and appeal decision stages. It was confirmed in paragraph 10.1 of that affidavit that the EA by the DG contained "clear and express findings demonstrating that the environmental assessments forming part of the BAR and EMPr were adequate...". This was not denied in the applicants' replying affidavit.

[39] It was also stated in paragraph 67.12 thereof that the DG "did not only consider the [TGS] application form, but all the information submitted in support of the EA application". The applicants' response in the replying affidavit was that this was the Environment Minister's inference from a reading of the EA, but the DG's confirmation under oath of the correctness of the Environment Minister's evidence on this score was also not disputed.

[40] In their heads of argument, the applicants asserted that on the evidence, PASA drafted the EA and recommended to the DG to sign it, which he did, without the DG himself having *considered* the documents submitted in support of the EA. But that was not the complaint that the DG was called upon to answer. It was instead that he did not have the required documents before him *at all.*

[41] As pointed out by counsel for TGS, sections 3 and 4 of the DG's decision set out content taken from the BAR, being a technical description of both the survey activities and project area; section 5.4.1 of the decision expressly approves the 'BAR/EMPr'; and the rest of sections 5.4 and 5.5 reflect the content of the BAR and EMPr.

[42] These include the "recommendations and management measures stipulated in the EMPr"; the appointment of MMOs and PAM operators; the prohibition on operating "during peak periods of fishing efforts and migratory season of cetaceans and their aggregates on the summer feeding grounds between St Helena Bay and Dassen Island"; the 5 km buffer zone around Marine Protected Areas; the "pre-acquisition watch of sixty (60) minutes"; the "500m mitigation zone"; and the development of "a community engagement protocol that is based on the San Code of Research Ethics".

[43] Section 8 of the decision records that the "authorisation is *accordingly* granted" (my emphasis) and that "the information presented in the environmental authorisation application and BAR" has been taken into consideration. In turn, Appendix 1 to the DG's decision records that "[a]ll information presented to the Department was considered in making this decision" which includes TGS' application as well as the information contained in the final BAR, EMPr, Biodiversity Report, Fisheries Report, HIA, SIA, Acoustics Report and the results of the public participation process.

[44] I accept that, having regard to the rule 53 record provided by the respondents, the applicants at that stage may have had legitimate concerns about what information served before the DG. However, the respondents subsequently answered those concerns satisfactorily, and their version certainly cannot be regarded as so far-fetched or untenable that it must be rejected. In any event the applicants do not suggest that the Environment Minister did not consider all the

required information in the exercise of her wide appeal power, which would have cured any irregularity which might otherwise have existed on the part of the DG. This notwithstanding, the applicants persisted with this review ground which was demonstrated to be without merit.

Second ground of review: whether the Environment Minister unlawfully relied on input from PASA when making appeal decision

[45] The applicants' initial complaints in their papers were wider on this score. In their heads of argument, the only one persisted with was that the Environment Minister unlawfully relied on input from PASA, because it purported to comment on the appeals as *competent authority* in respect of the EA when in fact it was only permitted to do so as an interested agency (or party). This morphed into a complaint that the Environment Minister purported to rely on PASA's input in the capacity of independent expert.

[46] PASA is the agency delegated by the Minerals Minister to perform functions in terms of Chapter 6 of the MPRDA. Section 71 of the MPRDA falls under Chapter 6 and lists the functions of PASA. They are to: (a) promote onshore and offshore exploration for, and production of, petroleum; (b) receive applications for reconnaissance permits, technical co-operation permits, exploration rights and production rights in the 'prescribed manner'; (c) evaluate such applications and make recommendations to the Minerals Minister; (d) monitor and report regularly to the Minerals Minister in respect of compliance with such permits and rights; (e) receive, maintain, interpret, evaluate, add value to, disseminate or deal in all geological or geophysical information relating to petroleum submitted in terms of s 88 (which in essence involves receiving information from a permit or right holder and submitting regular progress reports to the Council for Geoscience); (f) bring to the attention of the Minerals Minister any information in relation to the exploration and production of petroleum which is likely to be of use or benefit to the state; (g) advise on, and recommend to, the Minerals Minister the need to carry out reconnaissance operations in connection

with petroleum: (h) collect permit and rights fees; (i) review and make recommendations to the Minerals Minister regarding the acceptance of environmental reports and conditions of EAs and amendments thereto; and (j) perform any other function, in respect of petroleum, which the Minerals Minister "may determine from time to time".

[47] Under s 74 of the MPRDA an application for a reconnaissance permit must be lodged with PASA. The latter, the MPRDA and NEMA are thus intertwined in regulating petroleum activities, particularly in terms of EIAs and compliance. This is referred to as the One Environmental System. PASA's mandate includes regulating exploration and production, while NEMA aims to ensure environmental protection and sustainable development. Accordingly, under the legislative scheme, although the DG is the competent authority for issuing an EA, PASA is responsible for the processing, evaluation, and recommending to him the acceptability of an EA; and as will appear from what follows, PASA also plays an integral role in the appeal process. In this capacity, PASA acts as an organ of state and/or interested party.

[48] The Environment Minister has explained that the appeals were decided under the Appeal Regulations which prevailed at the time.[14] Regulation 5 thereof read: "[t]he applicant, the decision-maker, interested and affected parties and organ [sic] 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". Regulation 6(1) read in relevant part that: "[i]f the appeal authority reasonably believes that expert advice must be sought…the appeal administrator must source an independent expert…".

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[14] These appeal regulations were the National Appeal Regulations, 2014, published under GN R 993 in GG 38303 of 8 December 2014, as amended. They have since been repealed and replaced by the National Appeal Regulations, 2025, published under GN R 5985 in GG 52269 of 13 March 2025.

[49] The applicants say the Environment Minister's reliance on input from PASA was unlawful because in furnishing that input it did not act as an independent expert, and in any event could not have done so, given that it was by no means independent, having assisted with the EA. The applicants assert that herein lies the irregularity.

[50] However, as pointed out by the Environment Minister, she was entitled to consider the input of PASA, not as an independent expert under Appeal Regulation 6(1), but as an organ of state or interested party under Appeal Regulation 5. To this I would add that there would seemingly be no point in an organ of state and/or interested party such as PASA being permitted under Appeal Regulation 5 to submit a responding statement, if the Environment Minister could not have regard to it when making her appeal decision. I also agree with counsel for the Environment Minister that the technical submissions made by PASA as organ of state and/or interested party were entirely in accordance with its statutory mandate under the MPRDA framework.

[51] In terms of Appeal Regulation 6(1), it is in the discretion of the Environment Minister to determine whether expert advice must be sought, and she is required to act reasonably in so doing. The applicants do not suggest that the Environment Minister acted unreasonably in dispensing with obtaining independent expert advice.

[52] Further, at no stage did PASA become the 'competent authority' as the applicants assert. That was the function of the Environment Minister. It is also clear that PASA did not take the appeal(s) decision. The Environment Minister did so. In my view therefore, the applicants have conflated the furnishing by PASA of technical input on the one hand, and PASA exercising the decision-making power on the other. To the extent that it is suggested by the applicants that PASA was the competent authority in respect of the DG's decision, there is

similarly no merit in this for the reasons already given under the first review ground. There was accordingly no irregularity on the part of the Environment Minister, and the second ground of review also fails.

Third ground of review: whether there was a failure by the DG and Environment Minister to consider, alternatively appropriately consider, material information

[53] The applicants maintain that material information was not considered, or not appropriately considered, by the DG and the Environment Minister. As I understand it, the information pertains to the factors required to be taken into account in terms of s 63(1) of the National Environmental Management: Integrated Coastal Management Act (ICMA)[15], which is triggered if an environmental authorisation is required for coastal activities. Related complaints are alleged to be an unbalanced need and desirability assessment; a defective EMPr; and insufficient information on marine and cumulative impacts.

ICMA complaint

[54] For present purposes section 63(1) lists the factors to be considered as including the following: (a) representations made by the applicant for the EA and by interested and affected parties; (b) the extent to which the applicant has in the past complied with similar authorisations (the applicants in this case make no complaint about TGS in that regard); (c) whether coastal public property will be affected, and if so, the extent to which the proposed activity is consistent with the purpose establishing and protecting that area; (d) coastal management programmes and objectives applicable in the area; (e) the socio-economic impact if the activity is authorised or not ; (e) the likely impact of coastal environmental processes on the proposed activity; and (f) essentially, the impact on the environment viewed against its conservation purpose and the availability of adequate mitigation measures.

[15] National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[55] ICMA confers special legal status and a high level of protection on coastal public property. The project area falls within this category. The complaint is that despite the importance of ICMA, the BAR made a single reference to s 63 and contained no details of its provisions or analysis of its implications; the EA made no reference whatsoever to ICMA; and the appeal decision simply stated in general terms that its provisions and s 63 were considered.

[56] The applicants themselves say that a proper consideration and application of the requirements of ICMA, particularly s 63(1), would require both the DG and the Environment Minister, at a minimum, to consider whether the proposed project: (a) would affect coastal public property; (b) is consistent with the objective of conserving, protecting and enhancing coastal public property for the benefit of current and future generations; (c) would substantially prejudice any coastal management objective; (d) is socially and economically justifiable, ecologically sustainable and consistent with s 24 of the Constitution[16]; and (e) is in the interests of other living organisms dependent on the coastal environment. As I will attempt to demonstrate, the applicants have taken an overly simplistic and at times nitpicking approach in an attempt to sustain their complaint.

[57] One of the reasons why the BAR is alleged to be deficient is because it does not mention that the state is the 'public trustee' of coastal public property. But there was no need for the BAR to say so, since s 3(a) and s 12 of ICMA make this clear. Under the EIA Regs, the BAR had to identify the applicable legislation and describe "how the proposed activity complies with and responds to the legislation".[17] The BAR expressly identifies ICMA. It was entirely reasonable for the authors of the BAR to expect that the DG and Minister understood that,

[16] Section 24 of the Constitution is the overarching provision in relation to environmental authorisations.
[17] EIA Regs Appendix 1 s 3(1)(e).

under ICMA, the state is the public trustee of all coastal property. There is no suggestion by the applicants that they did not.

[58] The applicants contend that since each factor in s 63(1) is not specifically (and separately) identified in the BAR, it must be so that there was a failure on the part of both decision-makers to consider them. They rely for comparative purposes on a decision in this Division, namely *Green Connection*[18] in which, they say, the court found such a failure on the facts before it where the "information" was even less sparse. That may be so, but it is inappropriate for me to rely on whatever factual material was before that court – and which is not before me – as some sort of precedent.

[59] On the other hand, the respondents say that although the BAR did not expressly address each factor separately, it substantively addressed all relevant considerations. Both the DG and the Environment Minister confirmed under oath that the requirements of ICMA were taken into account.

[60] A proper consideration of the BAR reveals the following. Sections 7 and 8 thereof deal with the required public participation process and the environmental baseline assessment. Sections 8 and 9 engage in a comprehensive assessment of the proposed seismic survey activities, their impacts on the coastal environment and the suggested mitigation measures. The DG and Environment Minister stated under oath that they were thus provided with information necessary to ensure that any potentially affected coastal public property be managed in the public interest, pursuant to the state's role as 'public trustee'.

[61] More particularly, as explained in the answering affidavits, the BAR reflects, in substance, how the proposed survey activities will meet the provisions

[18] *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* 2025 JDR 3559 (WCC).

of s 63(1). The BAR describes: where the survey will be conducted (with reference also to maps and coordinates); the nature of the survey activities (the technicalities and logistics of how the survey will be conducted); the features of the project area, including its bathymetry (i.e. topography of the sea floor), geology and geomorphology, wind patterns, currents, waves and tides, water, plankton production, organic inputs, turbidity (i.e. clarity or cloudiness), faunal communities, cultural and heritage resources; the project area's socio-economic activities (including fisheries and conservation uses); scientific assessments of the survey activities' impacts, including on marine ecology, fisheries and heritage resources as well as noise and social impacts; and proposed mitigation measures.

[62] It is thus fair to accept that the DG was indeed provided with all relevant, material information to enable him to reach his decision. The EA itself contains the following: "[t]he findings of the specialist studies conclude that there are no environmental fatal flaws that should prevent the project from proceeding, provided that the recommended mitigation and management measures are implemented. Based on the nature and extent of the proposed project, the level of disturbance predicted as a result of the survey activities, the findings of the specialist studies, and the understanding of the significance level of potential environmental impacts, it is the opinion of the EIA project team and the EAP that the significance levels of the majority of identified negative impacts can generally be reduced to an acceptable level by implementing the recommended mitigation measures and the project should be authorised".

[63] As pointed out by counsel for TGS, it is telling that despite their complaint in relation to ICMA, the applicants did not identify a single impact, threat to conservation, adverse effect or prejudice that should have been addressed in, but was omitted from, the BAR. Moreover, the BAR explains that its needs and desirability analysis "includes, but is not limited to, describing the linkages and dependencies between human well-being, livelihoods and ecosystem services applicable to the area in question, and how the proposed development's ecological impacts will result in socio-economic impacts (e.g. on livelihoods, opportunity costs, etc)".

[64] The BAR (as confirmed by the EAP) also set out the relevant information pertaining to: the general collective interests in obtaining data on South Africa's offshore reserves of natural resources, including hydrocarbons; the diverse range of interests communicated during the public participation processes, as well as the responses of TGS and the EAP thereto; various social, economic, heritage and cultural impacts as identified by both experts and I&APs, including in respect of the fisheries sector; short and long term impacts; and impacts on human and non-human communities.

[65] In light of the aforegoing, it is difficult to fathom what other information relevant to s 63(1) the BAR should have contained.

Need and desirability assessment complaint

[66] The applicants argue that, in assessing need and desirability, the BAR only considered the benefits of the production of natural gas, and not the environmental impacts and risks associated with oil and gas exploration that could *potentially* take place, and that this was inconsistent and thus irrational. The reason given in the BAR for not doing so is that the specific details of these potential future activities are not known, and would need to be assessed in detail during subsequent scoping and EIA processes, should exploration drilling or production later be proposed.

[67] The applicants accept that in terms of the EIA Regs, a separate application(s) would need to be made for an EA in respect of an offshore exploration right and/or a production right in the project area, and at those stages more specific details of the respective intended projects and their impacts would be assessed. They maintain however that it nonetheless remains necessary to put forward a balanced need and desirability assessment at this first stage.

[68] They rely on *Green Connection* where the court upheld the 'asymmetric' assessment of need and desirability as a ground for review. It is important to note that *Green Connection* concerned, not an application for a seismic reconnaissance survey, but one for an exploration permit, which is an altogether different scenario. The court found that, on the facts before it, the decision-makers had relied on long-term benefits of generating electricity and gas, which is a *result of production,* whilst not considering the climate change effects of production.

[69] The applicants' argument cannot be sustained. Production does not come into play here. It is not yet even known what results, if any, the seismic survey which TGS wishes to undertake may yield. The applicants' argument becomes even more strained when it submits, in the alternative, that if TGS was not required to address impacts and risks, then consistency requires that benefits should also not have been considered. This alternative argument is self-defeating because need and desirability is, by necessary implication, one of the factors in s 63(1). It is also an integral part of the EIA process required by regulation 18 of the EIA Regs.

[70] The applicants ignore that these provisions must, as a matter of common sense, be applied to the facts underpinning the particular EA for which application is made. As pointed out by counsel for the DG and the Environment Minister, s 24(4)(b)(i) of NEMA requires assessment procedures to investigate the potential consequences or impacts of the alternatives to "the listed activities or specified activities" – in other words, in the present instance, to the seismic survey, and not to unrelated future activities that are not planned as yet.

[71] The same applies when regard is had to s 24O(1)(b)(i) of NEMA, which requires the competent authority to have regard to any pollution, environmental impacts or environmental degradation likely to be caused if *the application* is approved or refused. Importantly, s 2(4)(a)(vii) of NEMA codifies the

precautionary principle that a "risk-averse and cautious approach" must be adopted, which takes into account the limits of *current knowledge* about the consequences of decisions and actions.

[72] The applicants also appear to take issue with the alleged failure of the BAR to address impacts and risks of the proposed seismic activity. I will not repeat the extensive nature of the BAR as set out above. It is clear that the BAR indeed addressed those impacts and risks. It would hardly have recommended mitigation measures had it not done so.

[73] As argued by counsel for TGS, if the applicants' complaint were to be sustained, TGS would be subject to a loop of impossible knowledge requirements: it will not be able to obtain an EA for its intended reconnaissance until it conducts an impact assessment in respect of extracting hydrocarbons; it will never be able to conduct such an impact assessment until it has completed its reconnaissance; and it will therefore never be able to get the authorisation for the reconnaissance activities. This is plainly absurd. It is inconsistent with the regulatory framework. It is also pointless because any activity beyond seismic surveying will require its own authorisation and therefore its own updated and separate impact assessment.

EMPr complaint

[74] The applicants say that the EMPr is materially deficient and in contravention of items 1(1)(f), (g) and (k) of Appendix 4 to the EIA Regs, because it is alleged to have failed to record all the risks and recommendations in the SIA ('Social Impact Assessment'). They develop their complaint by contending that recommended mitigation measures were imposed by the SIA as a precondition for the seismic survey, yet the specific wording in the SIA requiring direct engagement by TGS with the fishing communities, in mitigation of the lack of a social licence to operate, was omitted from the EMPr. This, they argue, enables

TGS to avoid engaging directly with the fishing communities when implementing the mitigation measures.

[75] The applicants prepared a comparison between the SIA and EMPr ('the schedule')[19]. They point to two examples of alleged omissions in the schedule. The first is easily dispensed with since, contrary to what the applicants claim, the following wording in the SIA was carried over verbatim into the EMPr: "[p]articipatory processes and workshops where communities can engage in experiential learning should be considered. If the seismic survey fails to address the community's need for education and cooperation it will result in significant delays and increase the risk for social unrest". [20]

[76] The second is that the SIA recorded a specific request from community members for consultation, over and above consultation with traditional leadership of affected communities, which was not carried over into the EMPr. However, section 13.7D of the EMPr records, under the heading "Socio-Economic Considerations", that "[g]iven the socio-political environment, opposition to the project, and associated non-technical risks, further meaningful engagement with the leadership *and communities* are critical from a social perspective"[21] (my emphasis).

Marine and cumulative impacts complaint

[77] The nub of the applicants' complaint is that the Acoustics Report, Biodiversity Report and BAR were fatally flawed and omitted relevant information and considerations in relation to marine and cumulative impacts, with the result that the impugned decisions ultimately fell foul of NEMA and the precautionary principle.

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[19] Annexure RA 14 to their replying affidavit.
[20] EMPr section 13.7D , second bullet point, second and third sentences.
[21] EMPr section 13.7D, first bullet point, last sentence.

[78] In advancing this complaint the applicants rely on a report of Dr Michelle Fournet, an acoustic ecologist at the University of New Hampshire. The short answer is that the report of Dr Fournet did not serve before the DG or the Environment Minister. It was also only prepared in 2024, just before Dr Fournet signed her confirmatory affidavit on 13 November 2024, which was conveyed to the court during argument. This was nearly 6 months after the Environment Minister signed the record of her decision on the appeals against the DG's granting of the EA.

[79] These are judicial review proceedings. The decision-makers cannot be criticised for failing to consider information that either did not exist or was not put before them when they made their decisions. This court is limited to determining whether the DG and the Environment Minister acted as required by NEMA. It is not my function to consider different evidence in order to determine whether a different outcome could have been reached.

[80] In any event, as demonstrated by counsel for the DG and the Environment Minister, the applicants' grounds of review in respect of marine and cumulative impacts are replete with merit-based critiques of the BAR, the specialist studies, the correctness of the DG and Environment Minister's conclusions, the adequacy of mitigation measures and the sufficiency of scientific data. These complaints thus go to the merits, not to whether the processes were lawful.

[81] In summary, none of the complaints by the applicants in relation to the failure to consider, alternatively adequately consider, material information pass muster when applying the correct approaches to the evidence on the disputed issues and to judicial review.

Fifth ground of review: whether submission of two plans post-EA authorisation justifies setting aside the EA

[82] The conditions of approval found in paragraphs 5.5.6 and 5.5.7 of the EA require TGS to submit two further plans for approval, namely a Shipboard Oil Pollution Emergency Plan (SOPEP) and an Emergency Response and Medical Evacuation Plan (ERMEP). The applicants' complaint is that since these plans are to be submitted after the granting of the EA, they will not be subject to public participation, and that the BAR and EMPr also did not include descriptions of these risks.

[83] The applicants again rely on *Green Connection,* where the court found that a Blow-Out Contingency Plan and Oil Spill Contingency Plan could not lawfully be submitted after the award of that EA because they would then not be subject to public participation. This was held to be in breach of s 24N (2)(g) of NEMA and Item 1(1)(f) of Appendix 4 to the EIA Regs. However, what is also clear from the judgment is that the court found the plans to be 'generic' and that no procedure was specified regarding the consideration of those plans by the DG and Environment Minister.

[84] Here the position is different. As pointed out by counsel for TGS, the applicants are mistaken in relation to the BAR, where the risks of emergency incidents were identified and assessed in sections 9.3.1.2.4 and 9.3.1.3.3 thereof. They are also mistaken in respect of the EMPr.

[85] Section 9.3.1.2.4 refers to "oils, detergents, lubricants and grease…being introduced into the marine environment". The BAR assessed the impact to be of 'very LOW significance pre-mitigation'. It nevertheless recommended two mitigation measures: the implementation of leak-detection and repair programmes, and the use of low-toxicity biodegradable detergents for cleaning deck spillages.

[86] Section 9.3.1.3. deals with "unplanned events" generally, including vessel strikes. Section 9.3.1.3.3 specifically addresses the "release of diesel", noting that "marine diesel spilled in the marine environment would have an immediate detrimental effect on water quality, with the toxic effects potentially resulting in mortality…[i]f the spill reaches the coast, it can result in the smothering of sensitive coastal habitats".

[87] The BAR assessed that 'the potential impact on the marine fauna is in reality considered to range from LOW significance (offshore) to MEDIUM significance (nearshore) without mitigation'. It proposed numerous mitigation measures: using low-toxicity dispersants only cautiously and with approval; attempting to control any spill with suitable recovery techniques; providing resources to collect and transport oiled birds to a cleaning station; and limiting the situations in which offshore bunkering is allowed.

[88] Section 11.4.1.1 of the BAR then requires TGS to comply with "good international industry practice" in respect of the discharge of wastes. This includes prohibitions on waste disposals in certain locations and a SOPEP in accordance with the international treaty on ship pollution, namely MARPOL 73/78 Annex 1. The requirements for an approved SOPEP are regulated under the Marine Pollution (Prevention of Pollution from Ships Act)[22] by the South African Maritime Safety Authority. In addition, s 13 of the EMPr stipulates the same requirements, including in respect of a SOPEP.

[89] The applicants are also mistaken in relation to the ERMEP. Section 12 of the EMPr expressly addresses the ERMEP and requires TGS to develop and implement such a plan, which must include fire prevention, fire emergency response, spill prevention, spill response, accidents to employees and the use of

[22] Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986.

hazardous substances and materials. It goes on to detail the procedures and measures required.

[90] In other words, although the two plans themselves were not put out to public participation, because they did not yet exist, the risks and mitigation measures underpinning them were discussed and addressed in detail in both the BAR and EMPr; what was required to be included in the plans was spelt out; the applicants were part of the public participation process in that regard as well; and what is required for the approval of the plans is clear and unambiguous. For these reasons there is no merit in this complaint, but to the extent that the court in *Green Connection* may have reached the opposite conclusion on the same, or substantially similar, facts, I am in respectful disagreement therewith.

Costs

[91] There is considerable merit in the respondents' contention that, given the manner in which the applicants have litigated, a costs order against them is warranted. Moreover, the taxpayer will ultimately have to foot the state respondents' bill. Irrespective of how contentious and emotive the subject matter of litigation may be, activists like the applicants do not enjoy some special privilege to litigate at whim and without applying their minds to the cases they choose to bring to court. The record alone runs to 4701 pages as a result of the approach adopted by the applicants. I have also already referred to the haphazard, scatter-shot formulation and pursuit of their case.

[92] That being said, I will not make a costs order against the applicants, in the hope that my comments will rather send out a strong caution to them should they again choose to litigate in this way. There comes a point at which courts must discourage such conduct in the strongest terms, and the next time they may not be quite so fortunate.

Order

[93] I make the following order:

The application is dismissed. Each party shall pay their own costs.

J I CLOETE

JUDGE OF THE HIGH COURT

Appearances

For applicant:	N Rajab-Budlender SC P Kantor N Soekoe
Instructed by:	Chennells Albertyn, Cape Town
For the first and second respondents:	D B du Preez SC N Fourie
Instructed by:	State Attorney, Cape Town
For third respondent:	A M Breitenbach SC A P Pillay
Instructed by:	Bowmans, Johannesburg