



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

Case No.: 3454/22

In the matter between:

ERF 1050 PATERNOSTER (PTY) LTD

Applicant

and

**THE MINISTER OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

First

Respondent

**CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL
AUTHORISATIONS, DEPARTMENT OF FORESTRY,
FISHERIES AND THE ENVIRONMENT**

Second Respondent

VREDENBURG WINDFARM (PTY) LTD

Third Respondent

Neutral citation: *Erf 1050 Paternoster (Pty) Ltd v The Minister of Forestry, Fisheries and the Environment and Others* (Case no 3454/22) [2025] ZAWCHC...(09 September 2025)

Coram: LEKHULENI J and NJOKWENI AJ

Heard: 19 May 2025

Delivered: Electronically on 09 September 2025

Summary: Administrative law – review under the Promotion of Administrative Justice Act 3 of 2000 - decision by the Chief Director to approve Environmental Authorisations under s 24 of National Environmental Management (NEMA) and decision of Minister to uphold decision of Chief Director in terms of section 43(6) of NEMA- Interpretation of Regulation 11(3) and 11(4) of the 2014 EIA Regulations, read with section 47A(1) of NEMA - substantial compliance sufficient – No merits in review grounds – Application dismissed.

ORDER

1. The applicant's application is hereby dismissed.
2. Each party is ordered to pay its own costs.

JUDGMENT

LEKHULENI J: (NJOKWENI AJ Concurring)

Introduction

[1] This is an application in which the applicant seeks an order reviewing and setting aside the decision made by the first respondent ('the Minister') on 12 October 2021 in terms of section 43(6) of the National Environmental Management Act 107 of 1998 ('NEMA') in which the Minister confirmed the granting of an environmental authorisation ('EA') by the second respondent ('the Chief Director') on 17 May 2021 in favour of the third respondent ('Vredenburg') for activities associated with a wind energy facility in terms of section 24 of NEMA.

[2] The applicant further seeks an order reviewing and setting aside the Minister's decision made on 30 August 2020 in which the Minister dismissed several appeals, including an appeal by the applicant in terms of section 43(1) of NEMA against the

granting on 14 January 2020 by the Chief Director of an EA in terms of section 24 of NEMA to Vredenburg for activities associated with the wind energy facility ('WEF').

[3] Crisply, this application concerns a review of the confirmation on appeal of an EA granted by the Chief Director to Vredenburg for activities associated with a proposed wind energy facility ('the proposed Boulders WEF') approximately 5km away from the small West Coast town of Paternoster in the Western Cape Province. The authorisation was granted in terms of section 24 of NEMA. It was confirmed on appeal by the Minister in terms of section 43(6) of NEMA. The proposed Boulder WEF would be situated directly adjacent to an existing wind energy facility, which comprises 47 turbines.

Background Facts

[4] On 28 February 2018, Vredenburg applied with the Department of Forestry, Fisheries and Environment for an environmental authorisation for the development of a 140MW wind energy facility, approximately 12 kilometres northeast of the commercial centre of Vredenburg and 7 kilometres east of Paternoster, within the Saldanha Bay Municipality, Western Cape Province. The proposed Boulders WEF was intended to comprise up to 45 wind turbines, with turbine hub heights of 120m, and blade lengths of 45m. The proposed WEF also comprised certain associated infrastructure, including a substation and medium voltage cables linking the wind turbines to each other ('the internal cables'), which would be placed mostly underground. The proposed Boulders WEF is intended to assist in addressing South Africa's unreliable supply of electricity.

[5] It is envisioned that the proposed Boulders WEF will be linked by a high voltage 132kV overhead transmission line to the Fransvlei-Aurora 132kV line on the ESKOM grid ('the overhead transmission line' or 'grid connection'). The proposed Boulders WEF will be located adjacent to an existing operating wind energy facility, the West Coast 1 Wind Energy Facility ('the WC 1 WEF'). The WC 1 WEF commenced commercial operation in June 2015 and generates approximately 94 MW of wind energy and consists of about 47 wind turbines. It is common cause that the existing WC 1 WEF is visible from Paternoster.

[6] An EA, as contemplated by NEMA, was required before the development of the proposed Boulders WEF. Vredenburg duly applied for an EA for the proposed Boulders WEF on 28 February 2018. Subsequent thereto, and in compliance with the requirements of NEMA, Vredenburg commissioned an independent consultancy to conduct an Environmental Impact Assessment ('EIA') for its EA application. The scoping phase of the application for EA took place between December 2017 and February 2018. The plan of study for the EIA was accepted by the Department of Environmental Affairs ('the Department') in June 2018. The initial EIA was undertaken by about 13 experts and included the preparation of 11 expert reports and a comprehensive public participation process. During this process, the location of the turbines was adjusted to mitigate their visual impact on at least two occasions.

[7] In April 2021, an extensive final Environmental Impact Assessment Report was submitted to the Chief Director. The Department received the Final Environmental Impact Assessment Report ('EIAR') and the Environmental Management Programme ('EMPr') on 16 September 2019. The Chief Director decided to grant the EA to Vredenburg after considering the final EIAR and the EMPr on 14 January 2020. ('the Chief Director's 2020 decision'). The Department subsequently received 16 appeals against the granting of the EA. The applicant in the present matter was one of the appellants who appealed against the granting of the EA in favour of Vredenburg. The first appeal by the applicant was based on certain legal technical grounds, including that the Chief Director had failed to approve a layout plan and an EMPr at the time that he granted the first EA, despite such approvals being required in terms of NEMA.

[8] The appeals were subsequently considered by the Minister in terms of section 43(6) of NEMA. On 30 August 2020, the Minister (then Barbara Creecy) dismissed several appeals against the first EA, including the one by the applicant. The Minister, however, upheld an appeal by Aurora Wind Power (RF) (Pty) Ltd ('Aurora') based on the absence of a Wake Effects Impact Assessment. The Minister set aside the first EA after a consideration of all the issues raised on appeal, directed Vredenburg to commission an independent expert to conduct a Wake Impact Assessment in respect of the proposed project, and thereafter subject the report thereof to a public

participation process in accordance with the EA Regulations and to submit the results to the Department for reconsideration of the application for an EA. The Minister further directed that comments received from interested and affected parties, as well as Vredenburg's responses thereto, be incorporated into the final EIAr for submission to the Department for reconsideration of the EA.

[9] I pause to mention that Vredenburg also proposed to develop a 132 kV above-ground electricity sub-transmission line to support the proposed Boulders farm. The sub-transmission line would ensure that the electrical energy generated by the Boulders Wind Farm can be transmitted to the existing Eskom, Fransvlei-Aurora for distribution via the national electrical grid network. The sub-transmission line is required to support the Boulders WEF by ensuring that the WEF is equipped with the fundamental infrastructure needed for the supply and transmission of electricity to the national grid. The Chief Director granted the EA for sub-transmission on 8 June 2020.

[10] Pursuant to the Minister's 2020 decision, as instructed by the Minister, there was a further limited investigation and assessment of the wake effects of the proposed Boulders WEF, including two specialist reports. Following further public participation, including distribution of the revised draft of the EIA and the EMPr for public review in April 2021, a final environmental impact assessment ('FEIA') was submitted to the Chief Director. Following consideration of the FEIA, the EA was ultimately granted by the Chief Director on 17 May 2021.

[11] Following the Chief Director's decision of 17 May 2021, the Appeals Directorate of the Department received 16 appeals against that decision. The appeals were received between 18 June 2021 and 25 June 2021. Upon review of the grounds of appeal, the Minister asserted that the same issues which were previously considered in her decision of 30 August 2020 were raised again on appeal in the May 2021 decision. The Minister noted in her second appeal decision that she had already deliberated on the grounds of appeal and is therefore *functus officio* in respect of those issues.

[12] In the second appeal decision, the Minister addressed the grounds of appeal raised by Aurora and considered the Wake Impact Assessment submitted by Vredenburg, following the August 2020 decision and found that: the Wake Impact Study was conducted and submitted for Public Participation. The Minister found that interested and affected parties had an opportunity to comment on the said study, in which comments were submitted in the Comments and Response Report and were incorporated into the final EIAr for consideration.

[13] Based on the information that was placed before the Minister, she was satisfied that Vredenburg had complied with the directives. The Minister was also satisfied that there would be a far greater gain than loss for the local community as a result of the construction and operation of the Boulders WEF, taking into consideration the energy constraint of the country. On 12 October 2021, the Minister dismissed the appeal of Aurora and confirmed the decision of the Chief Director to grant the EA to Vredenburg. Subsequent thereto, the applicant lodged the current review proceedings.

[14] In these proceedings, the applicant seeks to review, set aside and substitute the Chief Director's EA decision and the two decisions of the Minister upholding the Chief Director's decision to grant the EA to Vredenburg. The applicant takes issue with the two appeal decisions taken by the Minister namely, the decision dated 30 August 2020, wherein the Minister decided to set aside the EA granted to Vredenburg on the basis that a Wake Impact Assessment had to be conducted, as well the decision dated 12 October 2021 in respect of the second EA wherein she decided to uphold the decision of the Chief Director to grant the final EA.

Grounds of Review

[15] The applicant initially raised fifteen review grounds impugning the Chief Director and the Minister's decision to grant the EA to Vredenburg. However, the applicant has narrowed its initial fifteen grounds of review to five grounds addressed in its heads of argument. In the first ground of review, the applicant contends that the Chief Director granted the second EA on the strength of, among other specialist reports, the specialist Tourism Report. The applicant contends that the Tourism

Report was based on a deficient Visual Impact Assessment. According to the applicant, the specialists who prepared a report assessing, *inter alia*, the impact of the proposed Boulders WEF on tourism, failed to have regard to one of the two visual impact assessments prepared for EIA.

[16] In the second ground of review, the applicant impugns the WEF on tourism. The applicant submits that the assessment of the impact of the proposed Boulders WEF on tourism was so flawed that, by considering the report concerned, the decision makers contravened NEMA and took into account irrelevant considerations. The applicant asserts that the Chief Director and the Minister could not, and did not, appreciate the true impact of the proposed WEF on Paternoster because the same specialist tourism report failed to assess the impact of the proposed WEF on tourism with any degree of reliability. The applicant contends further that the Tourism Report relied upon by the Chief Director and the Minister was based on inaccurate and incomplete information.

[17] The third ground of review relied on by the applicant is that the Chief Director's EA decision and the Minister's EA decision should be set aside because Vredenburg was obliged by Regulation 11 of the NEMA Regulations to submit one application in respect of both the proposed Boulders WEF and the sub-transmission line which will be constructed for the purposes of transmitting electricity generated by the proposed Boulders WEF to the Eskom grid.

[18] The applicant's fourth ground of review is that the Minister acted unlawfully by failing to consider the 'new grounds' of appeal in the Minister's second EA decision. The Minister found that to the extent that she has made a final decision on the grounds of appeals, she is *functus officio* in respect thereof and therefore may not revisit the matter. The applicant contends that new grounds were raised in the latest appeal and that the Minister committed an irregularity in failing to consider these new grounds.

[19] The fifth and final ground of review advanced by the applicant is that relevant information regarding Black Harriers was not considered. To this end, the applicant contended that the Chief Director granted the second EA, and the Minister confirmed

the second EA in the second appeal decision in ignorance of information which has recently come to light as regards the importance of the WEF site for Black Harrier. According to the applicant, this rendered their decisions reviewable on the grounds of a material mistake of fact.

[20] I will address each of these grounds for review in a sequential manner later in this judgment. However, before doing so, I find it important to first outline the relevant constitutional and legislative provisions pertinent to cases of this nature. Additionally, I will provide a concise explanation of the environmental authorisation process for listed activities as stipulated in NEMA.

The applicable legal principles

[21] Environmental management is fundamentally anchored in the Constitution, particularly in section 24. This section establishes the principles necessary for effective environmental stewardship. The Constitution recognises the interrelationship between the environment and development. The Constitution recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development.¹ It contemplates the integration of environmental protection and socio-economic development. For completeness, section 24 of the Constitution provides:

‘Environment

24. Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; 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.’

¹ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) para 45.

[22] Section 24(b) of the Constitution obliges reasonable legislative measures for the protection of the environment. NEMA is the legislation that is contemplated in section 24(b) of the Constitution. NEMA was enacted to give effect to section 24 of the Constitution. Section 24(b)(iii) of the Constitution provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. In greater context, the purpose of NEMA and the EIA Regulations is to protect the environment and to ensure that only authorised activities can be undertaken.

[23] One of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. Section 2 of NEMA prescribes a set of principles which guide the interpretation, administration and implementation of NEMA and which also serve as guidelines for the purposes of decisions taken in terms of NEMA.² The principles require that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably. Section 2(3) envisages that development must be socially, environmentally and economically sustainable. Section 2(4) provides that sustainable development requires the consideration of 'all relevant factors', including those listed in the sub-section.

[24] The principles set out in section 2 of NEMA further require that the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.³ Furthermore, there must be harmonisation of policies, legislation and actions relating to the environment.⁴ That Global and international responsibilities relating to the environment must be discharged in the national interest.⁵ The principles also require that the beneficial use of environmental resources must serve the public interest.⁶

² Section 2 of NEMA.

³ Section 2(4)(i) of NEMA

⁴ Section 2(4)(l) of NEMA.

⁵ Section 2(4)(n).

⁶ Section 2(4)(o).

[25] The process applicable to decisions regarding environmental authorisations and the requirements applicable to whether or not to grant an EA are set out in NEMA and its regulations. Significantly, section 24(2) of NEMA authorises the Minister to identify activities which may not commence without environmental authorisation from the competent authority. The Minister has done this in the form of listing notices which are published in the Government Gazette. The relevant listing notices for present purposes are Listing Notices 1, 2 and 3 of 2014.⁷ Not all activities require a scoping report and/or an EIA. It is only those activities that implicate a 'listed activity', that require authorisation.

[26] The provisions of section 24 of NEMA deals with environmental authorisations and the requirements for the granting of an EA. Section 24 provides that in order to give effect to the general objectives of integrated environmental management, 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 EA.⁸

[27] NEMA provides the regulatory framework for environmental management and establishes principles for good governmental decision-making on matters that affect the environment. The EIA tool is one of the most critical tools in the integrated environmental system for which NEMA makes provision. The EIA process is designed to ensure that environmental considerations are properly considered during the decision-making process on whether an activity that may be harmful to the environment ought to be authorised.

[28] NEMA thus requires that, where an activity is likely to have an adverse impact on the environment, an EIA process be followed. This means that the impact of the proposed activity must be carefully considered by an environmental assessment

⁷ GN R983 in GG 38282 of 4 December 2014; GN R984 in GG 38282 of 4 December 2014; GN R985 in GG 38282 of 4 December 2014.

⁸ Section 24(1) of NEMA.

practitioner (EAP) who must prepare a report, supported by specialist studies, to motivate the relevant authority why the activity should be authorised, notwithstanding the potential harm to the environment.

[29] The Environmental Impact Assessment Regulations, 2014⁹ ('the 2014 EIA Regulations'), which are the relevant regulations for present purposes, contain detailed provisions pertaining to the environmental impact assessment process which must be followed after an application has been made. The purpose of the 2014 EIA Regulations is to regulate the procedure and criteria as contemplated in Chapter 5 of the Act relating to the preparation, evaluation, submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities, subjected to environmental impact assessment, in order to avoid or mitigate detrimental impacts on the environment, and to optimise positive environmental impacts, and for matters pertaining thereto.¹⁰

[30] In terms of Regulation 12(1), an applicant for an environmental authorisation must appoint an independent environmental assessment practitioner (an 'EAP') who, at the applicant's costs, is responsible for the planning, management, coordination or review of environmental impact assessments. The general requirement of EAP's and specialists is set out in Regulation 13(1) which provides that the EAP and specialist appointed in terms of Regulation 12(1) or 12(2) must be independent, must have expertise in conducting environmental impact assessments or undertaking specialist work as required, including knowledge of NEMA, the Regulations, and any guidelines that have relevance to the proposed activity, must ensure compliance with the Regulations and perform their work in an objective manner, even if this results in views and findings that are not favourable to the application.

[31] The first step in applications for environmental authorisations for the commencement of activities is the preparation and submission of a scoping report as contemplated by Regulations 21. If the scoping report is accepted, the competent authority must advise the applicant to proceed or continue with the plan of study for

⁹ Published in GN R.982 of 4 December 2014, as amended by GN 326 in GG 40772 of 7 April 2017 and GN 706 in GG 41766 of 13 July 2018 in terms of NEMA.

¹⁰ Regulation 2.

environmental impact assessment.¹¹ Appendix 2 of the EIA Regulations 2014 provides that the objective of the 'Scoping Process' is to, *inter alia*, identify the key issues to be addressed in the assessment phase and agree on the level of assessment to be undertaken, including the methodology to be applied, the expertise required as well as the extent of further consultation to be undertaken to determine the impacts and risks the activity will impose.¹²

[32] The plan of study, on the other hand, must include a description of the proposed method of assessing the environmental aspects to be assessed by specialists and an indication of the stages at which the competent authority will be consulted.¹³ The plan of study, informed by the scoping process, provides the basis for the environmental impact assessment itself. The guiding principle is that an environmental impact assessment must contain the information that is necessary for the competent authority to consider and come to a decision on the application.¹⁴

[33] Regulation 18 provides for criteria to be taken into account by competent authorities when considering applications and provides that when considering an application the competent authority must have regard to section 24O and 24(4) of the Act, the need for and desirability of the undertaking of the proposed activity, the requirements of these Regulations, any protocol or minimum information requirements relevant to the application as identified and *gazetted* by the Minister in a government notice or any relevant guideline published in terms of section 24J of the Act.

[34] Evidently, from the discussion above, it is apparent that the process for applying for an environmental authorisation is a reiterative process. The environmental impact assessment undertaken is informed by the scoping report and the plan of study for EIA, which is prepared during that process. Having set out the legislative framework, and mindful of the provisions of NEMA, its Regulations and the Constitution, I now turn to deal with the applicant's five grounds of review. I will deal with these grounds of review sequentially.

¹¹ Regulation 22(a).

¹² Appendix 2(1)(f).

¹³ Appendix 2(1)(h).

¹⁴ Appendix 3(3)(1)(a) to (w).

Was the tourism report based on a deficient visual impact assessment report?

[35] The applicant contends that the Chief Director granted the second EA on the strength of, among other specialist reports, the specialist tourism report. Mr Rosenberg SC, counsel for the applicant, submitted that the Minister dismissed the first appeal on 30 August 2020. The reasons that the Minister gave for dismissing the first appeal were the finding in the specialist tourism report that the impacts on tourism would be marginal, and on the summary of the specialist tourism report in the EIAR that the impacts on tourism are likely to be low or absent. Counsel submitted that both the Chief Director and the Minister relied on the specialist tourism report to dismiss the risk posed to Paternoster by the visual impact of the WEF. The applicant's counsel opined that the specialist tourism report had not been based on the specialist visual impact assessment prepared in accordance with the plan of study, namely the Logis VIA.

[40] Mr Rosenberg asserted that the specialist tourism relied upon by the Chief Director and the Minister had been based instead on the visual impact assessment report prepared in-house by the environmental assessment practitioner - CES VIA. Counsel submitted that the reliance on the specialist tourism report was flawed because it was not based on the specialist impact assessment prepared in accordance with the plan of study, the Logis VIA. In counsel's view, the specialist tourism report was accordingly prepared without a proper appreciation of the true visual impact. Mr Rosenberg submitted that although it is correct, as Vredenburg alleges that the Chief Director and the Minister had both the CES VIA and the Logis VIA before them when they took their decisions, the problem is that the specialist who had been appointed to assess one of the most significant impacts, namely the impact of the WEF on the tourism economy of Paternoster, did so without a proper appreciation of the true visual impact.

[41] In the circumstances, so the argument proceeded, a material procedure of conditions prescribed by an empowering provision was not complied with as sections 24(1), 24(4)(iii) and (iv) of NEMA and Regulation 3(1)(j) of the 2014 EIA Regulations were not complied with, as contemplated by section 6(2)(b) of the Promotion of

Administrative Justice Act 3 of 2000 ('PAJA'). Furthermore, relevant considerations were not considered as contemplated by section 6(2)(e)(iii) of PAJA, and the decisions were not rationally connected to the purpose for which they were taken and the purpose of the empowering provision (section 6(2)(f)(ii)(aa) and section 6(2)(f)(ii)(bb).

[42] In considering this review ground, I must mention that the visual intrusion of Paternoster pursuant to the proposed wind farm is unavoidable. A project of this nature demands a balancing exercise by the competent authority, considering all the material placed before it. It is common cause that the potential consequences for impacts on the environment of listed activities were considered, investigated, assessed and reported on to the competent authority. It is also common cause that there were two reports assessing the visual impact, as well as the tourism and impact assessment. It is also common cause that there were two visual impact reports, both of which were before the Chief Director and the Minister when they took their respective decisions.

[43] Importantly, the visual impacts were assessed and dealt with at length during the public participation process. The applicant's argument that the specialist tourism report had relied on the findings of a draft in-house visual impact assessment by the EAP rather than the formal visual impact assessment conducted by the visual impact specialist, Logis VIA, cannot be correct. It is evident from the report itself that this assessment also had regard to the Logis VIA. Furthermore, it is the findings and recommendations on visual impact from the Logis VIA, and not those of the CES VIA, which are reflected in the FEIA.

[44] As correctly pointed out by Ms Rajab-Bundleder SC, counsel for the third respondent, the visual impact assessment conducted by CES did not contradict the findings that were made in the Logis VIA. Specifically, the conclusions relating to the nature and extent of the assessed visual impact did not deviate or differ from those made by Logis. On the contrary, the CES VIA confirmed the findings that were made in the Logis VIA, thereby providing greater certainty in the overall environmental impact assessment undertaken, specifically regarding the visual impact issue. The

CES VIA confirmed the findings made in the Logis VIA and the conclusions relating to the nature and extent of the assessed visual impact.

[45] In deciding to grant the EA, the Chief Director took into consideration, among other things, the information contained in the FEIA, the comments received from various authorities¹⁵ and interested and affected parties, mitigation measures as proposed in the EIAr and EMPr and the information contained in the multiple specialist reports. Having carefully considered all these reports, the Chief Director found that the identification and assessment of impacts was detailed in the FEIA, that there was sufficient assessment of the key identified issues and impacts, that the procedures followed for impact assessment was adequate, that the information contained in the FEIA was deemed to be accurate and credible, and that the proposed mitigation of impacts was adequate to curtail the impacts.

[46] It is worth noting that the applicant's ground of review, which concerns the tourism report's reliance on a deficient visual impact assessment report, was addressed in the Minister's first appeal decision. One of the appellants in the first appeal contended that the visual impact assessment (VIA) produced in-house by the EAP is an unprecedented departure from the procedure and was compiled by unqualified VIA specialists. The appellant before the Minister also contended that the visual impact of the project will be unacceptably high for the communities in its proximity, and will have a dominating and intrusive presence, and will materially and detrimentally affect the sense of place of its residence.

[47] The Minister noted in her decision on appeal that the visual impact of the proposed Boulders Wind Farm was identified as a significant environmental issue during both the scoping phase of the EIA processes and from the VIA conducted by Logis. The Minister also noted that an additional VIA was conducted by the EAP, CES, to verify the findings of the Logis VIA. It was found that the study was consistent with the Logis study and that both VIAs can be found as appendices to the EIAr specialist report. The Minister alluded to the fact that the VIA indicates that

¹⁵ The Department of Water and Sanitation, Heritage Western Cape, Birdlife South Africa, Cape Nature, Western Cape District Municipality, Saldanha Bay Local Municipality, the Department of Rural Development and Land Reform, West Coast Bird Club, the Department of Environmental Affairs and Development.

the mitigation of this impact is possible and entails the relocation of the wind turbines (13 in total) to the east of the road or the outright removal of the wind turbines in the event that they cannot be accommodated to the east of the road.

[48] The Minister found that the visual impact of the proposed boulders wind farm remain high after the implementation of the mitigation measures, but that based on the assessment of significance, the potential losses of scenic resources are not sufficiently significant to present a fatal flaw to the proposed project given that, among other things, the superstructures are technically removable on decommissioning; and an understanding that although there are local losses there are also other local, regional and national environmental, social and economic gains. To this end, the Minister found that while the visual intrusion is unavoidable, the visual impact associated with the proposed project does not constitute a fatal flaw in the EIA process or the issuance of the EA. The Minister concluded that the fact that the visual impact is treated as high does not entail that the proposed project should be refused.

[49] From the discussion foreshadowed above, it is my firm view that there are no merits in the applicant's first ground of review. The decision makers considered all relevant considerations. The Chief Director was satisfied that the prescripts of NEMA had been met. The Chief Director found that, pursuant to the information provided and considered, the Department was satisfied that, subject to compliance with the conditions contained in the environmental authorisation, the authorised activities would not conflict with the general objectives of integrated environmental management and that any potentially detrimental environmental impacts resulting from the authorised activities could be mitigated to acceptable levels. In addition, the conclusions in the tourist impact assessment were ultimately based, not on the visual impact assessment, but on a variety of sources including, particularly, the fact that there was no evidence to suggest any adverse impact on tourism from the existing WC 1 WEF.

[50] In my opinion, the decisions of the Minister and the Chief Director are underpinned by sound reasoning. Both meticulously considered all the reports that were placed before them. Significantly, the CES VIA confirmed the findings made in

the Logis VIA and the conclusions relating to the nature and extent of the assessed visual impact. Even if each visual impact assessment report had not been considered, it would have had no material impact because ultimately both visual impact assessments had the same findings. It bears emphasis that the applicant's disagreement with the opinion expressed by the independent specialist does not, in itself, mean that relevant considerations were not considered.

[51] Similarly, it does not necessarily follow that the applicant's disagreement with the opinion expressed by the independent specialist indicates that the decisions were not rationally connected to their intended purpose. The Supreme Court of Appeal and the Constitutional Court have repeatedly emphasised in numerous judgments that courts should exercise caution, if not utmost deference, in usurping the decision-making function of a functionary, simply because they are in a position comparable to that of the functionary to make the decision, especially if motivated by expediency rather than principle.¹⁶ In my view, the applicant's first review ground has no merit and falls to be dismissed.

Was the Tourism Report based on inaccurate and incomplete information?

[52] The second ground of review is that the Chief Director and the Minister could not, and did not, appreciate the true impact of the proposed WEF on Paternoster because the same specialist tourism report failed to assess the impact of the proposed WEF on tourism with any degree of reliability. The applicant contends that the specialist study on property values, tourism, and economic impacts ('the specialist tourism report') had failed to conduct an accurate data gathering process to identify the important and relevant issues in the tourism industry in Paternoster.

[53] The applicant asserts further that in dismissing the first appeal, the Minister relied on the finding in the specialist tourism report that the impacts on tourism would be marginal, and on the summary of the specialist tourism report in the EIAR that the tourism impacts are likely to be low or absent. According to the applicant, the

¹⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (40) SA 490 (CC) para 46-49; *Cooper NO v First National Bank of SA Ltd* [2000] 4 All SA 597 (A) para 39; *Freedom Under Law v Judicial Service Commission and Another* [2023] 3 All SA 631 (SCA) para 114.

specialist tourism report's (Tourism and Economic Issues Assessment) finding as regards the likelihood of an impact on tourism was unreliable because it was based squarely on an assumption that the WC 1 WEF has not led to any loss of tourists, and that assumption itself is founded on the flimsiest of evidence, namely interviews with 12 tourism product owners, only 7 of which were from Paternoster and that it did not take into account that the WC 1 WEF is further away from Paternoster, has smaller turbines, and has a more minor visual impact on Paternoster than the proposed WEF would have.

[54] Crisply, the applicant asserts that the report was so materially deficient that the decisions of the Chief Director and Minister are unlawful.

[55] I must mention that in the EIA for the proposed Boulders Wind Farm, the Property Values, Tourism and Economic Issues Assessment Report prepared by Elena Broughton, a specialist of Urban-Econ Development Economists notes that the purpose of the Tourism and Economic Issues Assessment was to determine the key economic parameters applicable to the study area, identify potential benefits and possible negative impacts of the proposed project in property values, tourism activities, and the local economy during the various stages of the project's life cycle.¹⁷

[56] The structure and method for the purposes of the report included creating a profile and identifying the trends of the local economy, the tourism industry and property dynamics in the zone of influence using secondary data, reviewing concerns raised by interested and affected parties during public engagement including those received during the scoping phase and those obtained during the comment period following publication of the draft EIA report, augmenting the information concerned to gather further insights and concerns through a structured interview approach and making use of case studies to gather insight on probable effects of wind farms.¹⁸

¹⁷ Para 1.2 of the Report.

¹⁸ Para 1.2 of the Report.

[57] The terms of reference for the Tourism and Economic Issues Assessment and the extent and nature of what was to be investigated as part of this assessment were determined in consultation with the authorities as part of the entire EIA process, which entailed identifying what impacts ought to be assessed and the nature and extent of investigations required. The study relied on both secondary and primary sources of data to inform its assessment of potential impacts and their significance.

[58] The Tourism and Economic Issues Assessment ultimately found that there would be a nominal decline in tourism in Paternoster. However, it was found regarding the extent of that decline and in light of the other relevant considerations that the low impact on tourism did not provide a basis to preclude the development. The Tourism and Economic Issues Assessment found that the proposed Boulder WEF is expected to have a positive impact on the local and provincial economies, particularly during the construction phase. It noted that a total of R1 049 million of business scale was envisaged to be stimulated by the project during the two-year construction period, leading to the creation of about 931 jobs throughout the principal economy, which will be sustained for two years. In addition, the report noted that the Boulders Wind Farm will invest around R9 million on an annual basis into socio-economic development.

[59] Significantly, the Minister in her appeal decision, considered the Property Values Tourism and Economic Issues Assessment report that was placed before her by the third respondent which noted that the impact on tourism will be marginal while the effect on property prices will dissolve once the wind farm is dissolved. The Minister specifically states that in evaluating the grounds of appeal and responses thereto regarding tourism, she had regard to the Tourism and Economic Issues Assessment, which found that while the possibility of negative impacts on property prices and tourism cannot be ruled out completely, research shows that if any, the impact on tourism will be marginal while the effect on property prices will dissolve - based on the experience of WC1 WEF and wind farms in the Cape St Francis and Jeffrey's Bay area, and other research, there is no clear correlation between property price dynamics (positive or negative) and the development of wind farms.

[60] The Minister also noted, following from the Property Values Tourism and Economic Issues Assessment Report, that the experience of nine estate agents interviewed asserted that wind farm developments have not had a notable effect on the demand and value of surrounding properties. They stated that prospective buyers have mostly been indifferent to the presence of wind farms. The Minister also noted that the review of property transfer in Britannica Heights in the past few years does not give any indication that the demand or property prices have been negatively impacted by the development of the West Coast 1 Wind farm, with the closest wind turbines located some 6 kilometres away from the properties on the Vasco da Gama Crescent.

[61] From the above, it is abundantly clear that a thorough investigation was conducted on the impact of the proposed WEF on Paternoster and other property owners in the area. As correctly pointed out by Ms Rajab-Bundlender, on the applicant's version, the impact on tourism was a relevant consideration. It does not follow that because the applicant disagrees with the opinion expressed by the independent specialist that relevant considerations were not considered. From the methodology that was adopted for the purposes of the Tourism and Economic Issues Assessment as set out above, in my opinion, it cannot be concluded that the methodology followed was flawed and objectively unreliable. The applicant has not identified the specific respect in which the Tourism and Economic Issues Assessment has contravened NEMA and its Regulations.

[62] As discussed above, for the purposes of considering whether the Chief Director and the Minister complied with section 24(1), it is necessary to determine whether potential consequences for or impacts on the environment of the listed activities for which authorisation was sought were considered, investigated, assessed and reported on to the competent authority. It is apparent from the above discussion that the consequences and impact were considered, investigated, assessed and reported on as required by NEMA. It is also evident that there was a description of the environment, and an investigation of the potential consequences for or impacts on the environment as required by section 24(a)(iii) and (iv) of NEMA.

[63] It is worth noting that the applicant, for purposes of the review proceedings, has commissioned a tourism report which did not serve before the Minister at the time when the Minister considered the appeal or at the time when the Chief Director decided to grant the EA. The tourism report that the applicant bases his argument on was prepared on 9 September 2022, which was two years after the Minister decided on appeal. The decision of the Chief Director and the Minister was made based on an assessment of the situation at the time. In my view, it is not permissible for the applicant to contend that the Court should find that the Minister or the Chief Director's decision is reviewable because it failed to consider information that was never placed before them when they made their decisions.

[64] It must be stressed that grounds for review cannot be formulated for the first time in the heads of argument.¹⁹ A ground for review raised for the first time in argument cannot be sustained. Therefore, it is impermissible for the applicant to produce evidence or facts that were not before the decision-makers. This Court's role as a review court is to assess whether the decision was reasonable, lawful and procedurally fair, based on the information that served before the original decision-maker and not to retry the case with new evidence. The applicant's second ground of review must fail. I turn to consider the third ground.

Separate applications for WEF and transmission line (interpretation of Regulation 11(3) and 11(4) of the 2014 EIA Regulations)

[66] The applicant's third ground of review is that the making of separate applications for environmental authorisation in respect of the two components of the development, namely, the WEF on the one hand, and the overhead transmission line on the other, was non-compliant with regulation 11(3) of the 2014 EIA Regulations. The applicant contends that the concerns identified in the Avifaunal impacts arose because the applications for environmental authorisation for the two main components of the development, namely, the WEF (wind turbines) on the one hand, and the transmission line on the other, were separated. The applicant relies on Regulation 11(3) of the 2014 EIA Regulations which provides:

¹⁹ *Mtyala v Motor Industry Bargaining Council and Others* (JR 2426/2021) [2023] ZALCJHB 352 (8 March 2023).

'If a proponent or applicant intends undertaking *more than one activity as part of the same development* within the area of jurisdiction of a competent authority, a *single application must be submitted* for such development and *the assessment of impacts, including cumulative impacts*, where applicable, *and consideration of the application*, undertaken in terms of these Regulations, *will include an assessment of all such activities forming part of the development*' (emphasis added).

[67] Mr Rosenberg submitted that the purpose of the regulation is to ensure that all the impacts of a development are assessed and considered as part of a single integrated process before environmental authorisation is granted. If any single component of a proposed development has unacceptably high impacts, so the argument proceeded, then the development as a whole should not be authorised. Counsel argued that Regulation 11(3) is framed in mandatory terms and is a material requirement, with the consequence that non-compliance with it would render any ensuing environmental authorisation reviewable.

[68] Counsel asserted that on 8 June 2020, six months after the first EA was granted on 14 January 2020, and about a year before the second EA was granted on 17 May 2021, the Chief Director granted Vredenburg an EA for the construction of the overhead transmission line pursuant to a separate application for environmental authorisation (the transmission line EA). The granting of the transmission line EA followed a separate impact assessment process, and the impacts associated with the overhead transmission line were assessed separately from those associated with the WEF.

[69] To this end, Mr Rosenberg relied on the unreported case of *Badenhorst N.O. and others v Minister of Forestry, Fisheries and the Environment and Others*,²⁰ (the *Badenhorst N.O. matter*) handed down on 18 July 2023, in the Eastern Cape Division – Makhandla, in which the court considered the question of whether the separation of applications for a WEF on the one hand and its associated overhead transmission

²⁰ *Badenhorst N.O. & 5 Others vs Minister of Forestry, Fisheries and the Environment & 4 Others* (Case no 2229/2020) (18 July 2023).

line or grid connection on the other, is non-compliant with Regulation 11(3) of the 2014 EIA Regulations. In that matter, as here, the State argued that the applicable regulation was Regulation 11(4) as opposed to Regulation 11(3). Bloem J found, however, that each component would be useless without the other and that they constituted a single development. Having found that Regulation 11(3) was applicable, he held that the separation of the applications for each component had been unlawful and that the resultant decisions were reviewable in terms of section 6(2)(b) and 6(2)(f)(i) of PAJA.²¹

[70] I must highlight the fact that at the time the current application was heard in this Court, an appeal was pending before the Supreme Court of Appeal concerning the *Badenhorst N.O.* matter. The Supreme Court of Appeal subsequently issued its judgment on 29 May 2025, thereby overturning the decision of the High Court.²² The Court found that the EA in that matter encompassed a conditional authorisation. As such, it can be said that the EAs would only be finally granted once all the conditions had been met and the companies were entitled to commence the proposed activities.²³

[71] Mr Jacobs SC, the counsel for the first and second respondents, submitted that there is no merit in the applicant's contention that the regulations prohibit the splitting of applications for grid connections from wind energy facilities. The process and procedure are that EAs be obtained for both the construction of the Boulders WEF and the associated sub-transmission line. Mr Jacobs asserted that Regulation 11(3) relates to 'more than one activity' as a part of the same development. In this case, two developments were contemplated: firstly, the development relating to the generation facility, that is, the Boulders WEF and secondly, the development relating to the transmission line. The two developments have distinct activities. According to Mr Jacobs, the contention has been derived by defining the grid connection and the wind energy facilities solely with reference to Regulation 11(3) of the EIA Regulations, when in fact it should more properly be construed as 'interrelated activities' as contemplated in Regulation 11(4).

²¹ Paras 50-58.

²² *Minister of Forestry, Fisheries and the Environment & Others v Badenhorst N.O. & Others* (1004/2023) [2025] ZASCA 68 (28 May 2025).

²³ At para 71.

[72] In this regard, Regulation 11(4) stipulates as follows:

‘11(4) If one or more proponents intend undertaking interrelated activities at the same or different locations within the area of jurisdiction of a competent authority, the competent authority may, in writing, agree that the proponent or proponents submit a single application in respect of all of those activities and to conduct a consolidated assessment process but the potential environmental impacts of each activity, including its cumulative impacts, must be considered in terms of the location where the activity is to be undertaken.’

[73] Mr Jacobs further submitted that from the ordinary meaning of the words in Regulation 11(4), it is clear that it envisages a separate application process unless the Department agrees in writing for a single application. Ms Rajab-Budlender, the counsel for the third respondent, shared the views expressed by Mr Jacobs regarding the interpretation of this regulation. In addition, Ms Rajab-Budlender submitted that the proposed Boulders WEF and the development of the sub-transmission line are related in the sense that the sub-transmission line is necessary to convey the electricity generated by the proposed Boulders WEF into the grid.

[74] As this ground of review involves interpretation issues under NEMA and the EIA Regulations, understanding the current state of our law regarding interpretation is necessary.²⁴ The approach to interpreting legislative provisions, whether Acts or regulations made pursuant to an Act, is well settled and unnecessary to repeat in light of the most recent judgment of the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*,²⁵ citing with approval the judgment in *Natal Joint Municipality Pension Fund v Endumeni Municipality*.²⁶

²⁴ *Minister of Forestry, Fisheries and the Environment & Others v Badenhorst N.O. & Others* (1004/2023) [2025] ZASCA 68 (28 May 2025) para 32.

²⁵ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 64.

²⁶ *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[75] Suffice it to emphasise that the interpretation of documents is a unitary exercise, which means that the interpretation is to be approached holistically: simultaneously considering the text, context and purpose of the document in question.²⁷ One must start with the words, affording them their ordinary meaning, bearing in mind that statutory provisions should always be interpreted purposively, be properly contextualised and must be construed consistently with the Constitution.²⁸

[76] It is essential for this court to underscore that the objective of Regulation 11 is to ensure that all activities associated with a development or taking place within the same area are evaluated in a holistic manner. This approach guarantees that all pertinent facts are considered in their entirety. Regulation 11(3) is framed in mandatory terms. In my view, Regulation 11 must be interpreted purposively and as a whole and not compartmentalised. From the wording of Regulation 11(3), it is apparent that this regulation envisages a situation where the applicant intends to undertake more than one activity as part of the same development. In such a situation, a single application must be submitted for such development. However, the assessment of impacts, including cumulative impacts, where applicable, and consideration of the application, will include an assessment of all such activities forming part of that development.

[77] Simply put, I agree with the respondents' argument that Regulation 11(3) requires a single application only where an applicant for an EA intends to undertake more than one activity as part of the same development. It is not applicable where there are two developments, each with its distinct activities. In the present matter, the applicant would have been required to submit a single application for the proposed Boulders WEF and for the sub-transmission line only if the development of the proposed Boulders WEF and the development of the sub-transmission line are part of the same development as envisaged in Regulation 11(3). It bears emphasis that the transmission of electricity, which is a linear activity, is self-evidently distinct from the generation of electricity.

²⁷ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 65.

²⁸ *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC) para 36.

[78] As Ms Rajab-Budlender points out, the separation of the EIA processes for the development of WEFs and for the development of the associated electrical infrastructure has become standard and accepted practice for renewable energy projects. Generation and transmission are distinct. The development of the proposed Boulders WEF and the development of the sub-transmission line are not activities forming part of the same development. The construction of the proposed Boulders WEF and the construction of the sub-transmission line are not subject to the same activities as defined, nor do they form part of the same development.

[79] As correctly propounded by the respondents, the purpose of regulation 11(3) is to prevent multiple applications relating to the same thing where a development triggers more than one activity, such as, for example, an application for environmental authorisation for the development of facilities to generate a renewable resource where the electricity output is 20 megawatts or more (that is in respect of wind turbines) which will also require other identified activities such as the clearance of indigenous vegetation on which the wind turbines will be placed. Although 'the applicant intends undertaking more than one activity as part of the same development' Regulation 11(3) avoids unnecessary multiple application by requiring that a single application must be submitted for such development.

[80] Regulation 11(4), by contrast, deals with interrelated activities. Where an applicant for an EA intends to undertake interrelated activities, it may submit a single application in respect of both interrelated activities – but only with the prior consent of the competent authority. From the ordinary meaning of the words in Regulation 11(4), it is evident that it envisages a separate application process unless the Department agrees in writing to a single application. Therefore, the default position is that separate applications are required to be submitted for interrelated activities. In other words, Regulation 11(4) places an obligation on an applicant to obtain written consent to allow it to submit a single application for all interrelated activities should it wish to submit a single application. As stated, even where activities are interrelated, absent written permission in terms of Regulation 11(4), an applicant must submit a separate application in respect of each such activity unless they form part of the same development. Therefore, the separate application of the EAs by the third

respondent, in relation to the grid connection and wind energy, is indeed justified, as these activities are interrelated.

[81] Mr Rosenberg argued that even if the Court were to find that the WEF and overhead transmission line are more accurately described as ‘interrelated activities’ and that Regulation 11(3) did not apply, the Minister in any event took the second appeal decision on 12 October 2021, after the transmission line EA had been granted on 8 June 2020, without taking into account what the impact of the overhead transmission line would be. Neither the Arcus avifaunal assessment nor the FBAR served before her. The findings contained in those reports were, however, relevant considerations since the WEF would only ever be constructed together with its overhead transmission line. To this end, counsel argued that the second EA and the Minister’s confirmation of the second EA are therefore reviewable in terms of section 6 of PAJA.

[82] This argument, in my view, fundamentally misses the point and cannot be correct. The applicant has not challenged the sub-transmission line EA. The sub-transmission line EA was the subject of a judicial review by Aurora, the owner and operator of the WC1 WEF, in which Aurora sought to protect its own economic interests. The applicant has not challenged the decision granting the sub-transmission line EA and is not a party to that review. The review relating to the sub-transmission line EA has been withdrawn.²⁹ Accordingly, the sub-transmission line EA is unchallenged and will remain extant regardless of the outcome of these proceedings. As there is no challenge to the sub-transmission line EA, it should be accepted that the application for authorisation and the EA concerned complied with NEMA and its regulations. The Minister dismissed an appeal brought by Aurora Wind Farm (Pty) Limited and confirmed the sub-transmission line EA on 29 September 2020. There was no appeal against the sub-transmission line EA lodged by the Applicant.

²⁹ The notice of withdrawal in terms of rule 41(1) in Case Number 5447/2021 in which Aurora Wind Power (RF) (Pty) Limited was the sole applicant was withdrawn by the applicant in that application on 10 September 2024.

[83] Therefore, the impacts and cumulative impacts relevant to that development have been investigated, considered and assessed and were ultimately found to be acceptable and consistent with the requirements of NEMA. Furthermore, as the respondents posit, since there is already an EA for the sub-transmission line, it is not possible for Vredenburg to now, as the applicant requests, submit an application for the development of the sub-transmission line, together with an application for the development of the proposed Boulders WEF.

[84] In any event, the cumulative impacts that the powerline will have on the animal and plant species were assessed with reference to developments that are similar in nature. These developments are the Boulders Wind Energy Facility, the WC 1 WEF and associated infrastructure, and the Isivunguvungu WEF. The assessment found that there are numerous potential negative impacts associated with the proposed sub-transmission line; however, all of these can be reduced to an acceptable level by implementing appropriate mitigation measures. CES noted that there are no fatal flaws that are currently associated with the proposed 132KV sub-transmission line development, as all identified impacts can be adequately mitigated to reduce the risk or significance of impacts to an acceptable level.

[85] In the first appeal decision in relation to the proposed Boulders, the Minister noted that there are important and vulnerable bird communities located within the project area. The Minister noted that impacts could not be completely eliminated. However, they could be minimised to the maximum extent possible through the avoidance of no-go areas and the implementation of the recommended mitigation measures. It was noted that the EIAR suggests that with the implementation of the proposed mitigation measures, the project will not cause irreplaceable loss of avifauna biodiversity, and no fatal flaws were identified in the project.

[86] It is abundantly clear from the above that the cumulative impact of the Boulders WEF and the sub-transmission lines on the birds in the area was assessed. Importantly, NEMA does not require complete and absolute knowledge of all potential consequences of a development proposal before environmental authorisation may be granted. An applicant for environmental authorisation must indicate the possible mitigation measures that could be applied and the level of

residual risk and describe any assumptions, uncertainties, and gaps in knowledge which relate to the assessment and mitigation measures proposed. Consequently, this ground of review must also fail.

Did the Minister fail to consider the applicant's new grounds of appeal?

[87] Mr Rosenberg argued on behalf of the applicant that when the Minister took the second appeal decision, she considered herself *functus officio* as regards grounds of appeal which had already been raised in the first round of decision-making and failed to appreciate that there were several new grounds of appeal arising directly from the second EA, with the result that she failed to consider them at all. According to Mr Rosenberg, the Minister assumed wrongly that there were no new grounds of appeal contained in the other fifteen appeals (being the appeals which were unrelated to wake effects). Having made that incorrect assumption, so the contention proceeded, the Minister failed to consider the new appeal grounds which had been raised by the applicant, and which pertained directly to the amended layout plan and the amended EMPr.

[88] The new appeal grounds allegedly not considered by the Minister identified and relied on by the applicant are that the amended layout plan lacked the information which the first EA had required should be included in the layout plan before it could be approved and that the amended EMPr did not contain the information which the first EA had required should be included in the EMPr before it could be approved.

[89] In evaluating this ground of review, it is important to consider the decision of the Minister in the first appeal (2020 Appeal decision) to determine if indeed the Minister erred in her finding that the appeal grounds raised by the applicant were dealt with in the first appeal. In the Minister's 2020 appeal decision dated 30 August 2020, the Minister considered the layout plan and the grounds of appeal relating thereto raised by the eighth and tenth appellant in those proceedings.

[90] The Minister also considered the complaint that the EMPr and final layout provided insufficient information to decide the application. To this end, the Minister

noted that the site layout was refined to produce a final mitigated layout and found that the EIAr indicates that the layout alternatives were adequately assessed. The Minister referred, particularly, to paragraph 12.4 of the EIAr, which stated that in reaching the current proposed layout, the placement of turbines was refined on two occasions further to reduce the visual impact of the wind farm.

[91] Importantly, the Minister found that the EMPr was submitted to the competent authority, as per Regulation 19(1), and secondly that the EMPr contained all the information set out in section 24N of NEMA. Further to this, the final EMPr was submitted in support of the EA application and sufficiently evaluated by the Department. The Minister further found that she was accordingly satisfied that the Department considered, evaluated and assessed all relevant information and the applicable law before deciding to grant the EA to the applicant. The Minister further found that the final EIAr and EMPr adequately assessed the potential impacts associated with the proposed project and could not find that the granting of the EA without the approved EMPr constitutes a *fait accompli* as argued by the appellants.

[92] In the second EA appeal decision, the Minister specifically referred to the Minister's 2020 decision, and the reasons set out in that regard insofar as the grounds of appeal before her for the purposes of the Minister's EA decision were concerned. The Minister specifically asserted that in reaching her decision she has taken into consideration and carefully considered, *inter alia*, the Minister's 2020 decision, sixteen appeals lodged by the appellants and the information contained in the project file with specific reference to the FEIA, EMPr, the wake effect assessment, the socio-economic assessment of 17 May 2021 and the Chief Director's EA decision. The Minister alluded to the fact that the grounds raised by the appellants in the second appeal against the granting of the second EA (the 2021 EA) are similar to those grounds raised by the appellants against the granting of the 2020 EA and are unpersuasive.

[93] Evidently, the Minister considered all the grounds placed before her, including the grounds raised by the applicant. The argument that the applicant's grounds of appeal were not considered is accordingly contradicted by the Minister's second appeal decision. It cannot be said that the Minister acted mala fide or with an ulterior

motive, or that she failed to apply her mind or disregarded the express provisions of NEMA. From the above discussion, the Minister considered everything that was placed before her, including the applicant's complaint on this ground of review. Similarly, this ground of review must also fail.

Did the Minister ignore relevant information regarding black harriers?

[94] The applicant contends in his fifth ground for review that the Chief Director granted approval for the second EA, a decision subsequently affirmed by the Minister in her second appeal. The applicant maintains that this decision was made without adequately considering newly available information regarding the ecological significance of the site designated for the wind energy facility, particularly in relation to the Black Harrier species. According to the applicant, this rendered their decisions reviewable on the ground of a material mistake of fact. The applicant based its contention on two reports that Dr Rob Simmons and Dr Megan Murgatroyd prepared.

[95] In summary, Dr Rob Simmons of the Fitzpatrick Institute of African Ornithology, University of Cape Town, made the point that two Black Harrier nests were found in November 2021 within 5km of the proposed Boulders WEF, close to the first nest recorded in 2020 in the Paternoster Nature Reserve. Dr Megan Murgatroyd, on the other hand, stated that the new information regarding known nests near the Boulders WEF, and the fact that the greater area represents an important breeding ground for the species, may constitute a fatal flaw militating against the granting of environmental authorisation.

[96] It must be stressed that this ground of review is based on information which has recently come to light as regards the importance of the WEF site for Black Harrier. The reports relied upon by the applicant did not serve before the Minister and the Chief Director at the time of the first and second decisions to grant the EAs and were prepared in November 2022 after the decisions were taken. As was pointed out by the respondents during the argument, the review court's role is to assess whether the decision was reasonable, lawful, and procedurally fair, based on the information that was before the original decision-maker at the time the decision

was made, and not to retry the case with new evidence. This argument, in my view, is spot on and cannot be faulted.

[97] In any event, avifaunal impacts of the proposed Boulders WEF were investigated and considered during the EIA process. The impact on Black Harriers and their habitat was appreciated, assessed, and considered by the independent expert, Bioinsight South Africa and their report was before the decision makers. There is no claim by the applicant of any impropriety, bias or malice on the part of the decision makers which might justify usurping their authority.

[98] While it was acknowledged that collisions may occur, based on the thorough assessment that was undertaken, the resulting effects on the overall bird community are not expected to be significant. The specialist Avifaunal Impact Report recommended a list of mitigation measures according to the predicted negative impacts, as well as a monitoring programme to be implemented throughout the proposed Boulders WEF operational phase. This monitoring programme will, in turn, allow for an assessment of the need to define any additional mitigation measures. Given all these considerations, I am of the view that this ground of review must fail.

Conclusion

[99] As a result of the foregoing, the impugned decisions are not susceptible to review. Even if, on a highly technical reading of the various provisions, it can be said that the Chief Director and Minister failed to give effect to the legislative provisions governing the grant of the EAs, section 47A(1)(a) of NEMA requires two factors before EAs are invalidated. This section provides:

‘A regulation or notice, or an authorisation, permit or other document, made or issued in terms of this Act or a specific environmental management Act –
(a) but which does not comply with any procedural requirement of the relevant Act, is nevertheless valid if the *non-compliance is not material* and does *not prejudice any person*’. (emphasis added)

[100] In the light of the purpose of the legislation, namely, to protect the environment and to ensure that only authorised activities can be undertaken, it can hardly be said that the approval of the EA in the form issued in the present matter amounted to a material failure on the part of the Chief Director. The Minister's dismissal of the appeals likewise does not give rise to a material failure to implement NEMA and the 2014 EIA Regulations. Consequently, it is my firm view that there is no merit to any of the review grounds raised by the applicant and the applicant's application must be dismissed.

Costs

[101] As regards costs, Mr Rosenberg submitted that section 32(2) of NEMA and the *Biowatch* principle ought to be applied, namely that: should the applicant succeed in its review, the Minister should be directed to pay the applicant's costs, including the costs of two counsel and should the applicant fail in its review, no adverse costs order should be made against the applicant. Mr Jacobs and Ms Rajab-Bundlender prayed that the applicants' application must be dismissed with costs including the costs of two counsel on Scale C.

[102] It is a trite that a court considering an order of costs exercises a discretion which must be exercised judiciously after due consideration of the salient facts of each case.³⁰ The general rule is that costs should follow the result. However, the *Biowatch* principle is an exception to that general rule. As explained above, the applicant relies on the *Biowatch* principle and on section 32(2) of NEMA. The *Biowatch* principle comes from *Biowatch Trust v Registrar, Genetic Resources, and Others*.³¹ It states that parties that seek to vindicate constitutional rights as against the state are not liable to pay the state's legal costs if they are unsuccessful.³² However, this approach does not apply where an application is

³⁰ *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

³¹ 2009 (6) SA 232 (CC).

³² At para 57.

frivolous or vexatious, or in any other way manifestly inappropriate which includes where an applicant unreasonably delays.³³

[103] Section 32(2) of NEMA, on the other hand, buttresses the *Biowatch* principle and provides that courts may decide not to award costs against a party who failed to secure the relief sought in respect of a breach of NEMA as long as it acted in the public interest or in the interests of protecting the environment. Like *Biowatch*, this is dependent on whether the court is of the opinion that the party acted out of public interest, or in this particular instance, in the interests of protecting biodiversity and the environment.

[104] In the present matter, the applicant sought to vindicate a right in terms of section 24 of Constitution read with the provisions of NEMA. There is no suggestion in this case that the applicant's application was frivolous or vexatious. The third respondent argued that the assertion by the applicant, 'a wealthy businessman protecting his own claimed interests in large tracts of land, of what he considers to be the interests of 'vulnerable and disadvantages communities' (albeit without having sought any mandate from such communities, and despite the opportunity of such communities to participate in the public participation process and express such concerns had they wished to) is cynical and self-serving'. I do not agree with this proposition.

[105] It may be so that the application is partly self-serving. However, the issues raised by the applicant in this application relating to Avifaunal impact and the risk of collision of certain birds' species against the proposed pylons underscore the authenticity of this application. While the first and second respondents have been successful in this application, I am of the view that the *Biowatch* principle must apply. As discussed, above, the *Biowatch* principle ordinarily applies where a private entity is unsuccessful against the State. However, as between two private entities, such as the applicant and the third respondent, that principle does, ordinarily, not apply.

³³ *Beweging vir Christelike-Volkseie Onderwys and others v Minister of Education and others* [2012] 2 All SA 462 (SCA) para 68; See *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) paras 23 – 24.

Notwithstanding, section 32(2) of NEMA embraces the *Biowatch* principle and applies between private entities.

[106] Therefore, in environmental litigation, the essence of the *Biowatch* principle is applicable, and extends to litigation between private entities such as the applicant and the third respondent.³⁴ Consequently, section 32(2) of NEMA brings the applicant herein within the protection of NEMA. From this analysis, it follows therefore that each party must pay its own costs.

Order

[107] Given all these considerations, the following order is granted:

107.1 The applicant's application is hereby dismissed.

107.2 Each party is ordered to pay its own costs.

LEKHULENI J
JUDGE OF THE HIGH COURT

I agree:

NJOKWENI AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

³⁴ *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) para 70.

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