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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 60924/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 2 May 2025

E van der Schyff

In the matter between:

TETRA4 (PTY) LTD

Applicant

and

THE NATIONAL ENERGY REGULATOR

First Respondent

THE MINISTER OF MINERAL RESOURCES AND ENERGY

Second Respondent

JUDGMENT

Introduction

[1] The applicant, Tetra 4 (Pty) Ltd (“Tetra4”), approached the court seeking a declarator on the regulatory reach or proper scope and ambit of the Gas Act 48 of 2001 (“the Gas Act”). The specific declarators sought in the notice of motion read as follows:

- “1. declaring that the licensing provisions of the Gas Act 48 of 2001 do not apply to any of the production activities and incidental activities related thereto, as authorised under a Production Right in respect of petroleum (as defined) and granted in terms of section 84 of the Mineral and Petroleum Resources Development Act 28 of 2002;
2. declaring that the Applicant does not require a licence in terms of section 15(1)(b) of the Gas Act for the operation of its production plant, including the liquefaction plant constructed or to be constructed for its Virginia Gas Project;
3. declaring that the Applicant does not require a licence in terms of section 15(1)(c) of the Gas Act for the trading in gas outside of the Piped Gas Industry.”

[2] When the matter was heard, Tetra4 submitted a draft order wherein it seeks additional consequential relief in that the following NERSA licences are sought to be set aside:

- a) Licence Number G[...] for the purpose of operating a gas liquefaction facility;

- b) Licence Number G[...]2 for the purpose of operating a gas storage facility; and
- c) Licence Number G[...]3 for the purpose of trading in gas.

[3] The application primarily raises the issue of the interpretation of the Gas Act.

[4] The first respondent, the National Energy Regulator of South Africa (“NERSA”) opposes the application.

Factual matrix

[5] The factual matrix underpinning this application is, for the most part, common cause. Tetra4 sets out the following common cause facts:

- a) On 20 September 2012, a production right for petroleum was granted to Tetra4 in terms of section 84 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The production right was duly executed and registered. It entitles Tetra4 to produce or extract petroleum, which by definition includes natural gas such as coal bed methane from which helium is later separated;
- b) Within its production area, Tetra4 makes use of a closed-loop gas-gathering network of pipelines to deliver the gas from the wells of its production area to its production plant;
- c) The production plant is located within the production area and includes a liquefaction process;
- d) The production facility is not connected to the distribution infrastructure of the Piped Gas Industry;
- e) In the production process, helium is separated from the methane gas through a cryogenic liquefaction and distillation process. In the process, both helium and methane are liquefied.

[6] NERSA provided additional facts that it regards as relevant, that is likewise common cause:

- a) Tetra4 drilled four exploration and production wells;
- b) Tetra4 installed gas gathering pipelines to collect gas and send it to its gas processing facility in one of the wells;
- c) The gas is cleaned and prepared for compression in the gas processing facility;
- d) From there, the gas is sent to a compressor station where it is compressed and filled into Compressed Natural Gas (CNG) cylinders. The CNG cylinders are then transported by trucks to the customers' sites, where gas is measured and then injected into the customers' buses through a pipeline.

[7] It is common cause that Tetra4 neither distributes, nor transports, nor transmits bulk gas by pipeline to points of ultimate consumption or to reticulation systems. Collected mixed gas flow in the Tetra4 system of closed-loop gas-gathering pipelines from the wells in its production area to its production plant, which is located within its production area.

The parties' respective contentions

[8] Tetra4 commences its argument from the viewpoint that the Gas Act regulates a national grid of pipelines for the distribution of hydrocarbon gas to consumers, hence the downstream piped gas industry. Liquefaction in this context is done to transport gas economically and effectively in liquid form over vast distances. Tetra4 submits that the Gas Act is thus not applicable to the production of petroleum as an upstream activity under an existing Production Right which was granted in terms of the MPRDA. Where the liquefaction process occurs as part of the production

process, it falls not under the piped gas industry but the petroleum extractive industry.

[9] Tetra4 places heavy emphasis on the fact that the methane gas produced is liquefied within a production plant as part of upstream production. The production plant is not connected to the distribution infrastructure of the piped gas industry. Ownership of what Tetra4 describes as 'the upstream petroleum products (such as the methane gas) as well as any byproducts thereof (such as helium) remains with Tetra4 and is not traded, as per the definition of trading in the Gas Act, or transferred during the process of upstream production in the production area of Tetra4.

[10] Tetra4 applied for and was granted a licence under section 15 of the Gas Act for its liquefaction facilities. I pause to note that NERSA avers that the licence was obtained for a storage facility. Tetra4 avers that the licence was applied for exclusively to comply with due diligence clauses in investment contracts concluded with foreign investors. Tetra4 was under pressure to qualify for a foreign investment from the Government of the United States of America. NERSA was, however, informed from the outset of Tetra4's view that, apart from section 28 thereof, the Gas Act does not apply to its production activities, and that Tetra4 believes its operations do not fall under NERSA's purview.

[11] Tetra4 holds the view that all of its production and incidental activities related thereto, under and in terms of its production right issued in terms of the MPRDA, fall outside the scope, ambit, and field of application of the Gas Act. Regarding its undisputed sale of methane gas, Tetra4 submits that the gas it produces falls outside the definition of 'gas' contained in the Gas Act, and that its sale operations do not fall under the definition of 'trading' as defined in the Gas Act. Trading is defined in the Gas Act as 'purchasing and selling' of gas and not 'producing and selling' as Tetra4 is currently doing.

[12] In its founding papers, Tetra4 identified four issues, which it termed narrower issues, for determination:

- a) Whether the production plant of Tetra4, together with its liquefaction plant and its closed-loop gas-gathering network of pipelines for the collection of the mixed gas from the various wells in its production area falls within the field of application of the Gas Act;
- b) Whether Tetra4 was required to obtain a construction licence for its production plant in terms of s 15(1)(a) of the Gas Act;
- c) Whether Tetra4 was required to obtain an operational licence for its production plant in terms of s 15(1)(b) of the Gas Act;
- d) Whether Tetra4 is required to obtain a trading licence for the products (methane and/or helium) as produced in its production plant in terms of section 15(1)(c) of the Gas Act where those products are not supplied to the national grid under the custodianship of NERSA, as Gas Regulator.

[13] NERSA submitted that the court should exercise its discretion against granting any of the declaratory orders Tetra4 seeks. NERSA avers that Tetra4 solicits legal advice from the court, since Tetra4 does not, in its papers, seek the review and setting aside of the licences granted. These licences, NERSA contends, valid or not, will remain in place and have legal consequences for a period of 25 years unless revoked by NERSA, or set aside by a court in proceedings for judicial review.

[14] NERSA contends that on a proper interpretation of the Gas Act and in light of the common cause facts, the activities for which Tetra4 has been licenced by NERSA are subject to regulation under the Gas Act. There are many statutes that grant various regulators concurrent jurisdiction to regulate the same or similar matters.

[15] NERSA submits that the only issue for determination arising from the pleaded case, having regard to the existing licences and the absence of a review application, is whether Tetra4's construction and operation of its liquefaction facility, storage and

transportation of gas, as well as its trading activities in gas fall within the ambit of the Gas Act. NERSA contends that a licence was granted for a storage facility because the compression aspect and operation of storage facilities by Tetra4 can be described as midstream activities.

[16] NERSA claims that it does not licence the production and processing of gas as upstream activities, since these activities fall within the domain of the Petroleum Agency of South Africa. NERSA contends that the operation of the CNG and liquefaction facilities falls within its regulatory purview. The proximity of a liquefaction facility to production facilities is irrelevant. NERSA avers:

“Tetra4 produces gas and cleans it. This is regulated as an upstream activity under PASA. However, the gas is produced with the sole intention to be taken to the market for sale and this is where NERSA gets involved. The fact that the processing facility is located next to the liquefaction facility does not make the latter an upstream activity that should not be licenced by NERSA.”

[17] NERSA contends that Tetra4 stores the gas it sells in its CNG cylinders. By selling gas, NERSA avers, Tetra4 trades in gas.

[18] NERSA denies that a connection to the national pipeline grid is an essential requirement for the Gas Act to find application. NERSA notes that the oil and gas industries have generally used various types of pipelines since the inception of their piped-gas businesses. These include gathering pipelines, feeder pipelines, transmission pipelines, and distribution pipelines. Each of these different types of pipelines falls within the dictionary meaning of a ‘pipe’ and all are used in the transportation of gas.

Preliminary remarks

[19] The Supreme Court of Appeal made it clear that when interpreting a statute, the factual circumstances of a case have no bearing on the analysis.¹ In the current matter, NERSA disputes the need to engage in the interpretative exercise. NERSA contends that Tetra4 did not seek any consequential relief in its founding papers, only declaratory relief. NERSA contends that the issue on which declaratory relief is sought is academic because Tetra4 is currently the holder of licences issued in terms of the Gas Act.

[20] NERSA submits that the relief sought in the notice of motion does not amount to a review application. Tetra4 did not, in the notice of motion, seek the setting aside of the decision to grant the licences. NERSA submits that the additional relief sought when the matter was heard should not be considered, as it was not included in the original relief requested. Tetra4 contends that the relief subsequently sought is consequential relief that flows naturally from a finding that the scope of the Gas Act is to be limited in accordance with the interpretation proposed by Tetra4.

[21] This issue requires the court to revisit the legal principles applicable when declaratory relief is considered.

When will a court consider granting declaratory relief?

[22] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*² Jafta J said of section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, the predecessor to section 21(1)(a) of the Superior Courts Act 10 of 2013, that:

“Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court

¹ *Desert Place Hotel Resort (Pty) Ltd v Northern Cape Gambling Board* 2007 (3) SA 187 (SCA) at para [7].

² 2005 (6) SA 205 (SCA) at para [16].

that he/she is a person interested in an “existing, future or contingent right or obligation” and noting more is required.”

[23] When an applicant has satisfied the court that they are a person, natural or juristic, interested in an ‘existing, future, or contingent right or obligation’, the court must decide whether the case is a proper one for the exercise of the discretion conferred upon it.³

[24] While the absence of an existing dispute is not an absolute bar to the grant of a declaratory order, a court may decline to grant such an order if it regards the question raised before it as hypothetical, abstract or academic.⁴

[25] In *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others*⁵ the Supreme Court of Appeal opined that the interpretative exercise that stood to be undertaken if the declaratory relief was to be considered, did not concern a ‘discrete point of statutory construction’ but that it would be inextricably linked to the facts. Thus, the court held ‘absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue’ (*sic.*)⁶ In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa*⁷ reiterated that courts-

‘do not give advice gratuitously. They decide real disputes and do not speculate or theorise... Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.’

³ *Durban City Council v Association of Building Societies* 1942 AD 27 at 32, *Family Benefit Friendly Society v Commissioner for Inland Revenue* 1994 (2) PH F43 (TPD), *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* (325/2022) [2023] ZASCA 87 (7 June 2023) at para [10].

⁴ *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others*, *supra*, at para [12], *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2011] 1 All SA 487 (SCA) at para [45].

⁵ [2011] ZASCA 164 (SCA) at paras [16]-[19].

⁶ *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services*, *supra*, at para [16].

⁷ 2005 (1) SA 47 (SCA) at para [41].

[26] In *Geldenhuys & Neethling v Beuthin*⁸ Innes CJ observed-

“After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or to advise upon differing contentions, however important.”

[27] The mere fact that existing licences have been granted to Tetra4 does not mean that there is no ongoing dispute between the parties, as evidenced by the consequential relief now expressly sought by Tetra4. This aspect of the application will be revisited below. However, section 21(1)(c) of the Superior Courts Act 10 of 2013 explicitly provides that the court can, in its discretion, enquire into and determine any ‘existing, future or contingent right or obligation, notwithstanding that the interested person who seeks the relief, ‘cannot claim any relief consequential upon the determination’. Where consequential relief is claimed in addition to seeking declaratory relief, it indicates a live or existing dispute between the parties; however, it is not a jurisdictional requirement for granting declaratory relief.

[28] Determining the scope and ambit of the regulatory regime embodied in the Gas Act against the factual matrix of the application is a question of law that stands to be determined without regard to the specific facts of Tetra4’s situation, although the application of this interpretation will have a direct impact on Tetra4. The declaratory relief sought will define the parties’ rights regarding the legal question that underpins this application and state the existing legal situation. The affidavits reveal the existence of a genuine dispute that is not theoretical or abstract. NERSA has an interest in opposing the declarator sought, and this ironically supports Tetra4’s submission that this case meets the requirement for declaratory relief to be granted. The declaration will have a practical effect once it is granted, as it will clarify a pre-existing position in delineating the regulatory ambit of the Gas Act and determining the parties’ rights and the limits thereof in terms of the Act. A declaration will guarantee certainty and accountability. In the circumstances and having regard

⁸ 1918 AD 426 at 441.

to the parties' relationship, it will not only amount to presenting an answer to a hypothetical question of law.

Determining the scope and regulatory reach of the Gas Act

Interpretation guidelines

[29] The principles that courts apply when interpreting statutes, as well as the process through which they apply these principles, reflect the constitutional relationship between the courts and the other branches of government. It is the court's role to make legally binding decisions regarding the interpretation of statutes when disputes arise. Whenever the court is called upon to interpret legislation, it calls to the fore the constitutionally entrenched relationship between the legislative and executive branches of government. The constitutional limits of judicial power prohibit courts from writing or rewriting statutes and set the permissible bounds of interpretation. If there are omissions or vacuums in a statute, rectification is the mechanism to remedy such shortcomings. The legislature must remedy any omissions, as the court is not the drafter of legislation.

[30] It is trite that South African courts have moved away from a literal interpretation of statutes to one where both the text and context play a role, 'even where the words to be construed are clear and unambiguous'.⁹ The court's task, within the permissible bounds of interpretation, is to give effect to the purpose of the statute under consideration. Controversial provisions should thus be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.¹⁰

[31] Context is multi-layered or multifaceted. An essential part, and the core facet of the context within which any statute stands to be interpreted, is the constitutional imperative that legislation must be interpreted in a manner that promotes the spirit,

⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [90].

¹⁰ The principle likewise finds application in other legal jurisdictions, and was aptly verbalised by Lord Bingham in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at paras [7] and [8] – referred to by Wallis M 'Interpretation Before and After *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 4 SA 593 (SCA)' PER/PELJ 2019 (22) 9.

purport, and objects of the Bill of Rights.¹¹ Context is furthermore obtained through a reasoned assessment of the broad purpose underlying a statute's enactment. This often requires a consideration of the mischief the legislature sought to address by enacting the specific statute. Legislative history is thus another source of relevant context.¹² Context is also provided by the content of the legislation as a whole.

[32] Context can never be used or relied on to create a meaning that the language, when viewed in context, is incapable of bearing.¹³ This would be crossing the constitutional boundaries of interpretation. Text and context play a unique yet co-determinative role in the interpretation process. Neither is predominant, but both are elements of a unitary interpretative process. The clearer the language used in the text and the more obvious its meaning in accordance with the ordinary understanding of language, the less the influence of context in arriving at a conclusion. The more meanings there are and the more finely balanced they are, the more powerful the influence of contextual factors will be.¹⁴

The Gas Act

[33] The Gas Act was assented to on 12 February 2002 and commenced on 1 November 2005. It is proclaimed in the preamble that the Act was promulgated to:

- a) promote the orderly development of the piped gas industry,
- b) establish a national regulatory framework;
- c) establish a National Gas Regulator as the custodian and enforcer of the national regulatory framework, and
- d) provide for matters connected therewith.

¹¹ S 39(2) of the Constitution.

¹² *Santam Insurance Ltd v Taulor* 1985 (1) SA 514 (A) 526-527B.

¹³ Wallis, note 10, above, 15.

¹⁴ Note 10, above, 14.

[34] The definition section of the Gas Act commences with a disclaimer. The meaning attributed to specific words or phrases in the Gas Act bears the particular meaning contained in the definition section, 'unless the context indicates otherwise.'¹⁵

[35] Gas is defined as:

“all hydrocarbon gases transported by pipeline, including natural gas, artificial gas, hydrogen rich gas, methane rich gas, synthetic gas, coal bed methane gas, liquefied natural gas, compressed natural gas, re-gasified liquefied natural gas, liquefied petroleum gas or any combination thereof.”

[36] Other relevant definitions are:

“**distribution**” means the distribution of bulk gas supplies and the transportation thereof by pipelines with a general operating pressure of more than 2 bar gauge and less than 15 bar gauge or by pipelines with such other operating pressure as the National Energy Regulator may permit according to criteria prescribed by regulation to points of ultimate consumption or to reticulation systems, or to both points of ultimate consumption and to reticulation systems, and any other activity incidental thereto, and “distribute” and “distributing” have corresponding meanings.

“**liquefaction**” means converting natural gas from a gaseous state to a liquid state;

“**mine**” means “mine” as defined in the Minerals Act, 1991 (Act No. 31 of 1991) [the Minerals Act is Act 50 of 1991];¹⁶

¹⁵ S 1 of the Gas Act.

¹⁶ The term, when used as a noun, is defined in the now repealed Minerals Act 50 of 1991 - “**mine**” means, when—

“production” means the recovery, processing, treating and gathering of gas from wells in the earth up to the boundary of the mine, or the manufacture of synthetic or artificial gas, or the manufacturing of any gases in the refining process up to the boundary of the factory, and any other activity incidental thereto, and **“produce”** and **“producing”** have corresponding meanings;

“re-gasification” means converting liquefied natural gas to a gaseous state at a re-gasification plant;

“storage” means the holding of gas as a service and any other activity incidental thereto, but excludes storage of gas in pipelines which are used primarily for the transmission and distribution of gas;

“trading” means the purchase and sale of gas as a commodity by any person and any services associated therewith, excluding the construction and operation of transmission, storage, and distribution systems, and **“trading services”** has a corresponding meaning;

“transmission” means the bulk transportation of gas by pipeline supplied between a source of supply and a distributor, reticulator, storage company, or eligible customer, or any other

(a) used as a noun

- (i) any excavation in the earth, including the portion under the sea or under other water or in any tailings, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral; or
- (ii) any other place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or exploitation or for the processing of such mineral: Provided that if two or more such excavations, boreholes or places, or excavations, boreholes and places, are being worked in conjunction with one another, they shall be deemed to comprise one mine unless the Director: Mineral Development notifies the owner thereof in writing that such excavations, boreholes or places, or excavations, boreholes and places, comprise two or more mines'

activity incidental thereto, and “**transmit**” and “**transmitting**” have corresponding meanings;

[37] The objects of the Act, as captured in section 2, are to –

“(a) promote the efficient, effective, sustainable and orderly development and operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities and the provision of efficient, effective and sustainable gas transmission, storage, distribution, liquefaction, re-gasification and trading services;

(b) facilitate investment in the gas industry;

(c) ensure the safe, efficient, economic, and environmentally responsible transmission, distribution, storage, liquefaction, and re-gasification of gas;

(d) promote companies in the gas industry that are owned or controlled by historically disadvantaged South Africans by means of licence conditions so as to enable them to become competitive;

(e) ensure that gas transmission, storage, distribution, trading, liquefaction and re-gasification services are provided on an equitable basis and that the interests and needs of all parties concerned are taken into consideration;

(f) promote skills among employees in the gas industry;

(g) promote employment equity in the gas industry;

(h) promote the development of competitive markets for gas and gas services;

(i) facilitate gas trade between the Republic and other countries; and

(j) promote access to gas in an affordable and safe manner.”

[38] The Gas Act ascribes certain functions to the Gas Regulator in section 4 thereof. This include the issue of licences for (i) the construction of gas transmission, storage, distribution, liquefaction and re-gasification facilities; (ii)

the conversion of infrastructure into transmission, storage, distribution, liquefaction and re-gasification facilities; (iii) operation of gas transmission, storage, distribution, liquefaction and re-gasification facilities; and (iv) trading in gas. The Gas Regulator is also tasked with promoting the optimal use of available gas resources and to promote competition in the gas industry.

[39] Section 15 of the Act prescribes the activities that require a licence. The section provides that –

“(1) No person may without a licence issued by the Gas Regulator—

- (a) construct gas transmission, storage, distribution, liquefaction and re-gasification facilities or convert infrastructure into such facilities;
- (b) operate gas transmission, storage, distribution, liquefaction or re- gasification facilities; or
- (c) trade in gas.”

[40] Section 28 of the Act requires that the owner of an operation involving the production or importation of gas, a person engaged in the transmission of gas for that person’s exclusive use, and small biogas projects in rural communities not connected to the national pipeline grid, must register their operations with the Gas Regulator.

Discussion

[41] Oil and gas are major industries in the energy market, playing a significant role in the global economy as the world’s primary fuel sources. South Africa has initiated the transition from a fossil fuel-based electricity generation system to one based on renewable sources, aiming to meet its greenhouse gas emission reduction

goals.¹⁷ The Integrated Resource Plan (IRP) is a government-developed plan that attempts to forecast the elements needed for power generation in the future. Gas-fueled dispatchable energy generation is considered to be a significant element of this forecast.¹⁸ Currently, natural gas contributes 3% to the total energy supply in the country.¹⁹ Gas can play a significant role in the energy mix in the sectors of electricity production (gas to power) and transportation (gas-to-liquid, compressed natural gas, and liquefied natural gas).²⁰

[42] In this matter, both parties explained that the gas value chain in South Africa consists of three value chain components: upstream, midstream, and downstream.²¹ The exploration for and production of gas constitute the upstream component. The midstream component's role is to transport and store gas. The downstream component is responsible for distributing gas to end-users. Both parties rely on the differentiation between these components to substantiate their respective views. Tetra4 essentially argues that liquefaction in their production area occurs as part of the production phase and is an upstream activity, not regulated by NERSA but by the Petroleum Agency of South Africa. NERSA argues that liquefaction is a midstream activity irrespective of whether it occurs in the production area.

[43] It is declared in the preamble to the Gas Act that the Act was promulgated to promote the orderly development of the piped gas industry.²² The term 'industry' broadly denotes an organised economic activity concerned with manufacturing,

¹⁷ See Clark, S., Van Niekerk, J., Petrie, J., and McGregor C. 'The role of natural gas in facilitating the transition to renewable electricity generation in South Africa' *Journal of Energy in South Africa* 2022, vol 33:3.

¹⁸ Integrated Resource Plan Department of Energy 2011 – 2019. Each iteration of the IRP mentions the use of gas for dispatchable energy generation. In the 2023 IRP it is reiterated that natural gas has emerged as a critical part of South Africa's future energy mix.

¹⁹ The South African Energy Sector Report 2023, Department Mineral resources and Energy.

²⁰ Mokrani, T. 'The Role of Natural Gas in the South African Energy Mix' *Chemical Engineering Transactions* 2022, vol 96.

²¹ A similar explanation is set out in the Gas Master Plan published in Government Gazette No. 50569 on 26 April 2024, 48.

²² The various aspects listed in the preamble should be read in conjunction with one another. Read in seclusion, the second declaration in the preamble that the Gas Act was promulgated to establish a national regulatory framework, is incomplete and does not make sense. If the question is asked, what national regulatory framework is to be established in terms of the Act, the answer is found in the first declaration – a national regulatory framework for the piped gas industry.

extracting and processing raw materials.²³ The gas industry, in general, is thus concerned with the exploration, extraction, refining, transportation, storage, and distribution of gas.

[44] This raises the question of what the 'piped gas industry' comprises. To give meaning to the term 'piped gas industry', and simultaneously determining the regulatory scope of the Gas Act, it is informative and relevant that the definition of gas in the Gas Act defines the term gas as all hydrocarbon gases transported by pipeline.²⁴

[45] The definition of the term 'gas' in the Gas Act limits its meaning to a distinct class of compounds, to wit, hydrocarbon gases. This definition excludes any noble gas from the ambit of the Act. As it currently reads, the Gas Act does not provide the regulatory context within which the transmission, storage, distribution, liquefaction, re-gasification, and trade of non-hydrocarbon gases like noble gases are regulated. Helium is a noble gas, and this disposes of the question of whether helium is regulated in terms of the Gas Act.

[46] Different types and phases of hydrocarbon gases are then listed in the definition to emphasise the broad application matrix of the Gas Act as it pertains to hydrocarbon gases. The hydrocarbon gas in question can be natural gas, artificial gas, or synthetic gas. This clearly indicates that all hydrocarbon gases fall within the definition of the term 'gas', irrespective of whether the hydrocarbon gas in question is naturally occurring, produced artificially, or synthetically. The composition of hydrocarbon gas is irrelevant for the purposes of the definition of gas. Hence, it includes hydrogen rich, methane rich or coal bed methane gas. The specific phase or state of a hydrocarbon gas when converted from its gaseous state to a liquefied state, or the reduction of the hydrocarbon gas volume, does not exempt it from the scope of the Gas Act. Hence, the hydrocarbon gas is still defined as a gas, whether

²³ Collins English Dictionary. The term is defined in the Cambridge Dictionary as 'the companies and activities involved in the process of producing goods for sale, especially in a factory or specialised area.' The term can also refer to a specific type of business.

²⁴ Section 1 of the Gas Act commences with a disclaimer 'unless the context indicates otherwise'. This is the context within which the term is used in the Act.

it is a compressed gas, liquefied natural gas, re-gasified liquefied gas, or liquefied petroleum gas.

[47] The definition, however, does not end with the scientific identification of the substance to which the Gas Act relates. It adds an additional identifying characteristic to the hydrocarbon gas regulated under the Gas Act, namely, its mode of transportation.

[48] By specifically defining the term 'gas' in relation to the substance's transportation method, irrespective of its state or form, the application field of the Gas Act and the Gas Regulator's regulatory ambit are limited to exclude upstream production activities.

[49] Production refers to the recovery, processing, treating, and gathering of gas from wells in the earth up to the boundary of the mine, or the production area.²⁵ The gas is not static in this process, it flows through pipes. However, this flowing or moving of the gas cannot be regarded as the transportation of gas since the gas is not transported by pipeline between a supplier and another point of consumption or reticulation across the boundaries of the production area. NERSA's submission that the gas is transported by pipeline in Tetra4's production area, hence meeting the requirement of 'transported by pipeline', does not hold water if read in conjunction with the definition of production. It is insightful that a differentiation is made in terminology used in the Gas Master Plan when reference is made to 'indigenous natural gas production' on the one hand, and 'the importation of natural gas, in the form of piped gas and LNG from neighbouring countries'.²⁶ The identification of gas transported in a pipeline by the usage of the term 'piped gas' is acknowledged and confirmed by policymakers in the sector.

[50] By referring to the piped gas industry and limiting the meaning of the term gas to gas transported by pipeline, the legislature limited the application sphere of the Gas Act to the midstream and downstream activities related to gas. This conclusion is supported when regard is had to the definition of trading as contained in the Gas

²⁵ S1 of the Gas Act.

²⁶ Gas Master Plan, *supra* 72.

Act. The term is defined as the 'buying and selling' of gas. The legislature clearly did not anticipate a scenario where gas would be produced and sold by the same entity.

[51] This limited application scope of the Gas Act is ascribed to the fact that the gas industry in South Africa, to date, primarily comprises hydrocarbon gas transported by pipeline from Mozambique. Until recently, all gas operations were linked to the national pipeline grid. South Africa's primary gas supply originated from the Pande and Temane fields in Mozambique and was transported via the ROMPCO pipeline, jointly owned by Sasol and the governments of Mozambique and South Africa, to Sasol's facilities in Sasolburg and Secunda. Other national pipelines are the Lilly Pipeline owned by Transnet that carries methane-rich gas from Sasol in Secunda to Durban with offtake points in Newcastle, Empangeni, Richards Bay, and Durban. Sasol owns and operates several gas pipelines originating in Secunda, reaching destinations such as Johannesburg, Ekurhuleni, Pretoria, Sasolburg, and Emalahleni. PetroSA owns a subsea pipeline to Mossel Bay. The Gas Act came into existence in this specific context. It has its genesis in an environment where gas production occurred elsewhere, and the regulatory authority was only concerned with regulating the transmission, storage and distribution of gas in the country.

[52] The conclusion reached herein is further supported if regard is had to section 4 of the Gas Act. Section 4(a) obliges the Gas Regulator to issue licences for the construction of transmission, storage, distribution, liquefaction, and re-gasification facilities. No mention is made of production and the processes incidental thereto. Section 4(b), on the other hand, prescribes that the Gas Regulator must gather information relating to the production, transmission, storage, distribution, trading, liquefaction, and re-gasification of gas. Production is specifically included in section 4(b). Production and liquefaction are listed as separate activities. This supports the view that liquefaction, regulated in the Gas Act, is the process of converting natural gas to a liquid to facilitate its transportation in a pipeline. It stands apart from, and does not refer to, the production of gas where the liquid gas is a byproduct in the production process of e.g., helium.

[53] The legislature is clearly aware of the limited application scope of the Gas Act, a fact evinced by the publication of the Gas Amendment Bill.²⁷ This Bill proposes to amend the Gas Act by amending and inserting certain definitions, among others, to provide for the orderly development of the gas industry and to enhance the national regulatory framework of the gas industry. Notably, any reference to the 'piped' gas industry is done away with in this Bill. The definition of the term gas is proposed to be amended, among other, by deleting the phrase 'transported by pipeline'. The term 'distribution' is proposed to be redefined not to refer exclusively to the distribution and transportation of bulk gas supplies by pipeline, but to include transportation by pipeline as a possible transportation mechanism.

[54] In the result, I hold that the production of gas and all activities incidental thereto are excluded from the regulatory ambit of the Gas Act, save for the requirement to register production operations with the Gas Regulator. NERSA is correct in submitting that the legislative framework of the petroleum extractive industry, in principle, allows for other regulatory bodies to require that licences be obtained to authorise certain actions. The necessary legislation must, however, be in place to empower regulatory authorities to assert regulatory power. In its current form, the Gas Act does not empower the Gas Regulator to fulfill a dual regulatory function as far as the production of gas is concerned.

[55] The Gas Act only finds application when gas that was produced is transported by pipeline and supplied to a distributor, reticulator, storage company, or eligible consumer. As far as helium is concerned, the Gas Regulator holds no regulatory powers over the midstream and downstream activities involving helium. It is completely excluded from the Gas Regulator's regulatory reach.

[56] Courts are called upon to interpret legislation. Courts can, however, not step into the legislature's shoes to create legislation where voids exist. This would be overstepping the clear boundaries set by the principle of separation of powers. If the legislature intends to extend the Gas Act's regulatory ambit and NERSA's custodial

²⁷ B-2023, published in Government Gazette No. 50009 of 19 January 2024.

responsibilities to the gas production stage beyond requiring the registration of production operations, the legislation stands to be amended.

[57] In the factual setting of the matter before me, Tetra4 gathers, processes, and treats gas in the production area. Through cryogenic processing, the helium is separated from the natural gas. The liquid methane is a byproduct of this cryogenic processing, which is integral to the production of helium. Tetra4's current operations do not fall under the purview of the Gas Regulator.

[58] In addition to the declarators sought, Tetra4 seeks the setting aside of the licences it applied for and that were issued by NERSA under the Gas Act. Tetra4 submits that the setting aside of these licences is a consequence of a finding that its activities are not regulated under the Gas Act.

[59] I disagree. Tetra4 applied for the licences because, on its own version, it was obliged to do so by its funders and foreign investors. The funders were not cited as parties to this application. I have had no insight into the agreement concluded between Tetra4 and its funders. On the face of it, the funders and foreign investors have a direct interest in an order setting aside the licences. I cannot grant an order setting aside the licences in the absence of parties that ostensibly have an interest in the matter.

[60] In considering the determination of costs, the general principle is that costs follow success. No case was made out for costs to be granted on a punitive scale. The issues involved were complex, and both parties were represented by more than one counsel.

ORDER

In the result, the following declarators and order are granted:

1. The licensing provisions of the Gas Act 48 of 2001 do not apply to any of the production activities and incidental activities related thereto, authorised under a Production Right in respect of petroleum (as

defined) and granted in terms of section 84 of the Mineral and Petroleum Resources Development Act 28 of 2002;

2. The Applicant does not require a licence in terms of section 15(1)(b) of the Gas Act for the operation of its production plant, including the liquefaction plant constructed or to be constructed for its Virginia Gas Project as long as the liquefaction facility is used during the production stage of gas;
3. The Applicant does not require a licence in terms of section 15(1)(c) of the Gas Act for the trading in gas outside of the Piped Gas Industry;
4. The First Respondent is to pay the costs of the application on a party and party scale. Such costs to include the costs of two counsel on Scale C.

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

For the applicant: Adv. M. Oosthuizen SC

With: Adv. J. Rust SC

Instructed by: Faskens Incorporated

For the first respondent: Adv. N. Maenetjie SC

With: Adv. R. Tshetlo

Adv. S. Mashiane

Instructed by: Cheadle, Thompson & Haysom
Incorporated

Date of the hearing:

6 March 2025

Date of judgment:

2 May 2025