IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 65662/16

In the matter between:

EARTHLIFE AFRICA JOHANNESBURG	Applicant
and	
THE MINISTER OF ENVIRONMENTAL AFFAIRS	First Respondent
CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS DEPARTMENT OF ENVIRONMENTAL AFFAIRS	Second Respondent
THE DIRECTOR: APPEALS AND LEGAL REVIEW DEPARTMENT OF ENVIRONMENTAL AFFAIRS	Third Respondent
THABAMETSI POWER PROJECT (PTY) LTD	Fourth Respondent
THABAMETSI POWER COMPANY (PTY) LTD	Fifth Respondent

APPLICANT'S HEADS OF ARGUMENT
2 February 2017

AN OVERVIEW OF THIS APPLICATION

1 The South African government accepts that climate change poses a substantial threat to our country.[1] As a result, the government has signed and ratified international agreements committing us to the global effort to combat climate change.[2]

2 The government also recognises that coal-fired power stations are the single largest source of this country's greenhouse gas emissions (GHGs) which cause climate change.[3]

3 In terms of the National Environmental Management Act 107 of 1998 (NEMA), a party seeking to construct a new coal-fired power station requires environmental authorisation to be granted by the relevant decision-makers in the Department of Environmental Affairs.[4] That much is common cause.

4 Against this backdrop, this application turns on a crisp question: *Is it necessary to properly assess the climate change impacts of a proposed coal-fired power station before such environmental authorisation is granted in terms of NEMA?* If the answer to this question is yes, it is clear that the present review must

[1] Founding Affidavit (FA), paras 90 – 96, Record pp 35 – 37; First to third respondents' answering affidavit (Department's AA), para 98, Record p 565. See South Africa's National Climate Change Response White Paper, Annexure PL 23, Record pp 389 – 418.

[2] FA paras 102 – 108, Record pp 39 - 41.

[3] FA paras 96-98, Record pp 37-38, Annexure PL 24, Record, pp 421-422; Department's AA, paras 98-100, Record pp 565-566.

[4] Sections 24(1) and (2) of NEMA read with "Listing Notice 2: List of Activities and Competent Authorities Identified In Terms Of Sections 24(2) and 24D", GNR 545 in *Government Gazette* No 33306 of 18 June 2010.

succeed. This is because, in the present case, environmental authorisation was granted without any proper climate change assessment having being done.

5 This application arises as follows:

5.1 It concerns a proposed 1200MW coal-fired power station. The power station will be built by the fifth respondent (Thabametsi) near Lephalale in the Limpopo Province.[5] If built, the power station will be in operation until at least 2061.[6]

5.2 On 25 February 2015, the Chief Director of the Department of Environmental Affairs (the Chief Director) granted Thabametsi an environmental authorisation in respect of the building of the power station in terms of NEMA.[7] At the time of his decision, the climate change impact of the power station had not yet been investigated or considered in any detail.

5.3 An internal appeal was then lodged by the present applicant (Earthlife) to the Minister of Environmental Affairs (Minister). In the internal appeal, Earthlife contested the Chief Director's decision, *inter alia*, on the ground that the climate change impacts of the power station had not been adequately assessed.[8]

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[5] FA paras 26 – 28, Record p 17 – 18.

[6] Reply para 7, Record p 902; Annexure PL 40, Record p 955.

[7] FA para 11.1, Record p 11; FA Annexures PL 10 – PL 11, Record, p 148 – 172. The authorisation was amended on 17 March 2015.

[8] FA para 50 - 53, Record p 22 – 23. Earthlife's appeal submissions appear as Annexure PL 13, Record pp 176 – 236, particularly paras 89 – 105, pp 222 – 228.

5.4 In this regard, according to the Department of Environmental Affairs itself, a climate change impact assessment requires, at the very minimum, an assessment of: [9]

5.4.1 The extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its greenhouse gas (GHG) emissions during construction, operation and decommissioning;

5.4.2 The resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and

5.4.3 How these impacts may be avoided, mitigated, or remedied.

5.5 In her appeal decision, dated 7 March 2016, the Minister agreed with Earthlife that the climate change impact of the power station had not been properly addressed. The Minister stated:

> *"I concur with the appellant in that the climate change impacts of the proposed development were not comprehensively addressed and / or considered prior to the issuance of the EA."*[10]

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[9] Supplementary founding affidavit (SFA) para 27, Record p 461; Annexure PL 33, Record p 512 – 513. These are the Department of Environmental Affairs' requirements for a climate change impact assessment, as reflected in the Department's comments on Thabametsi's draft scope of work report for the climate change impact assessment.

Earthlife maintains that a more extensive assessment is required which includes an assessment of the social cost of carbon and the ways in which the coal-fired power station will aggravate the harmful effects of climate change in the region. SFA para 29, p 462.

[10] FA Annexure PL 16, Record p 364.

5.6 The Minister accordingly found that it was necessary to order Thabametsi to conduct a full climate change impact assessment in respect of the power station.[11]

5.7 However, in a surprising turn, the Minister nevertheless proceeded to uphold the environmental authorisation, despite the absence of this climate change impact assessment.

5.8 The Minister merely added condition 10.5 to the environmental authorisation, requiring Thabametsi to complete a climate change impact assessment.[12]

5.9 In doing so, the Minister acted unlawfully and undermined the purpose of the climate change impact assessment and the environmental authorisation process. This is made especially clear by the fact that, even if the that climate change impact assessment indicates that environmental authorisation ought not to have been granted, it is common cause that the Chief Director and the Minister have no power to withdraw the environmental authorisation on this basis.[13]

6 In this application, Earthlife contends that it was unlawful, irrational and unreasonable for the Chief Director and the Minister to grant the environmental authorisation in the absence of a proper climate change impact assessment. It

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[11] Ibid.

[12] Ibid.

[13] FA paras 78-80, Record pp 31 – 32; Department's AA para 41.2, Record p 551; Thabametsi's AA, para 81, Record p 635.

seeks to set aside the decision in terms of PAJA.[14] Earthlife relies on the following main grounds of review in this regard:

6.1 First, there was material non-compliance with the mandatory requirements of section 24O(1) of NEMA, read with the 2010 EIA Regulations. Section 24O(1)(b) of NEMA requires the consideration of all "relevant" factors in reaching a decision on environmental authorisation. We submit that, on a proper interpretation, the climate change impact of a proposed coal-fired station is certainly a "relevant" consideration.

6.2 Second, the absence of a climate change impact assessment also rendered the impugned decisions irrational and unreasonable.

6.3 Third, the Minister committed several material errors of law in reaching her decision.

7 Earthlife contends that a climate change impact assessment had to be conducted before any environmental authorisation in respect of the power station could be granted. This was necessary to allow the relevant environmental decision-makers to determine:

7.1 Whether a proposed coal-fired power station should be allowed to be constructed in its proposed form at all, or on the proposed site; and

[14] It is clear that decisions granting environmental authorisation constitute administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000. *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) at para 38.

7.2 If it is allowed to be constructed, the conditions and safeguards that should be imposed to limit its climate change impact and to address the ways in which climate change will affect the coal-fired power station over its lifetime.

8 Indeed, on 27 January 2017, it was made public that Thabametsi's own experts have now concluded that its power station will have "*very large*" greenhouse gas emissions, judged by international standards, and "*substantial*" climate change impacts. The power station will generate approximately 8.2 million tonnes of CO_2 each year and over 246 million tonnes of CO_2 in its lifetime.[15] These experts also concluded that climate change poses "high" risks to the power station, particularly through increasing water scarcity at the proposed site, and that these risks cannot be effectively mitigated.[16]

9 Yet, because of the approach taken by the Minister in the appeal decision, this information was not considered in granting the environmental authorisation.

10 As a consequence, Earthlife seeks to have the matter remitted back to the Chief Director to allow for a fresh decision on environmental authorisation after the final climate change impact assessment report has been completed. This is necessary to preserve the integrity and lawfulness of the environmental authorisation process.

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[15] Applicant's supplementary affidavit para 13, Record p 962 – 963. Applicant's supplementary affidavit, Annexure PL 43, Record p 981. The respondents have objected to the filing of the supplementary affidavit. As we explain below, there is no merit to this objection.

[16] Ibid, Record pp 966 – 968.

11 In what follows in these heads of argument, we address the following issues in turn:

11.1 First, we address the factual and legal background;

11.2 Second, we address the core legal issue that must be determined: whether on a proper interpretation NEMA requires a climate change impact assessment to be done before environmental authorisation may be granted for a proposed coal-fired power station.

11.3 Third, we address the grounds of review.

11.4 Finally, we address the question of remedy.

FACTUAL AND LEGAL BACKGROUND

The threat posed by climate change

12 To provide context for this application it is necessary to outline, in greater detail, the South African government's position on climate change, the undisputed threat that climate change poses to South Africa, and the link between coal-fired power and climate change.

13 The government's stance is set out in the National Climate Change Response White Paper (White Paper), published in 2012, which "*presents the South African government's vision for an effective climate change response and the long-term, just transition to a climate-resilient and lower carbon economy and society.*"[17]

[17] FA, Annexure PL 23, pp 389 – 418.

14 The White Paper defines climate change as "*an ongoing trend of changes in the earth's general weather conditions as a result of an average rise in the temperature of the earth's surface often referred to as global warming."* It further explains the science on how human activity is causing climate change:

> "*This rise in the average global temperature is due, primarily, to the increased concentration of gases known as greenhouse gases (GHGs) in the atmosphere that are emitted by human activities. These gases intensify a natural phenomenon called the "greenhouse effect" by forming an insulating layer in the atmosphere that reduces the amount of the sun's heat that radiates back into space and therefore has the effect of making the earth warmer.*"[18]

15 The White Paper recognises that South Africa is extremely vulnerable to the effects of climate change:

> "*Climate change is already a measurable reality and along with other developing countries, South Africa is especially vulnerable to its impacts*."[19]
>
> …
> "*South Africa is extremely vulnerable and exposed to the impacts of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events, will disproportionately affect the poor. South Africa is already a water-stressed country and we face future drying trends and weather variability with cycles of droughts and sudden excessive rains. We have to urgently strengthen the resilience of our society and economy to such climate change impacts and to develop and implement policies, measures, mechanisms and infrastructure that protect the most vulnerable."*[20] (Emphasis added)

16 Even on the most conservative estimates, the outlook for South Africa is bleak unless urgent action is taken:

> *"It has been predicted that by mid-century the South African coast will warm by around 1 to 2°C and the interior by around to 3°C. By 2100, warming is projected to reach around 3 to 4°C along the coast, and 6*

[18] Ibid, Record p 397.

[19] Ibid, Record p 394.

[20] Ibid, Record p 397.

> *to 7°C in the interior. With such temperature increases, life as we know it will change completely: parts of the country will be much drier and increased evaporation will ensure an overall decrease in water availability."*[21] (Emphasis added)

17 As indicated in these quotations, increasing water scarcity in South Africa is one of the primary threats posed by climate change:

> "*South Africa is a water scarce country with a highly variable climate and has one of the lowest run-offs in the world – a situation that is likely to be significantly exacerbated by the effects of climate change. Uniquely, South Africa shares four of its major river systems with six neighbouring countries. These four shared catchments amount to approximately 60% of South Africa's surface area and approximately 40% of the average total river flow.*
>
> *Based on current projections South Africa will exceed the limits of economically viable land-based water resources by 2050.*"[22] (Emphasis added)

18 The White Paper recognises that South Africa is significant contributor to global GHG emissions as a result of our reliance on coal for the generation of electricity:

> "*South Africa has relatively high emissions for a developing country, measured either per capita or by GHG intensity (emissions per unit of GDP). By any measure, South Africa is a significant emitter of GHGs.*
>
> *The energy intensity of the South African economy, largely due to the significance of mining and minerals processing in the economy and our coal-intensive energy system, has resulted in an emissions profile that differs substantially from that of other developing countries at a similar stage of development …Since coal is the most emissions-intensive energy carrier, South Africa's economy is very emissions-intensive … In 2000, average energy use emissions for developing countries constituted 49% of total emissions, whereas South Africa's energy use emissions constituted just under 80% of total emissions. Even in some fast-developing countries with a similar reliance on coal for energy, energy use emissions are lower than South Africa.*[23] (Emphasis added)

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[21] Ibid, Record pp 398.

[22] Ibid, Record p 406.

[23] Ibid, Record p 415.

19 The Department of Environmental Affairs' Greenhouse Gas Inventory for South Africa 2000 – 2010 supports this assessment. The Greenhouse Gas Inventory notes that the largest source of South Africa's emissions for the period 2000–2010 was electricity generation, which accounted for 55.1% of carbon dioxide equivalent ("CO2-eq")) of South Africa's total accumulated emissions, and that this is due to South Africa's reliance on coal.[24]

20 Coal-fired power stations not only contribute to climate change but are also at risk from the consequences of climate change. The White Paper notes that as water scarcity increases due to climate change, this will place electricity generation at risk, as it is a highly water intensive industry:

> *"Water availability is a key climate change-related vulnerability and negative impacts on the availability of water will be felt by people, ecosystems and the economy. As a result, climate change poses significant additional risks for water security, which in turn has knock-on effects on those sectors highly reliant on water such as agriculture, electricity generation as well as some mining and industrial activities"*[25]

21 None of these facts are in dispute in this application.[26]

The international law context

22 South Africa is party to a series of international agreements on climate change, committing South Africa to the international efforts to address this problem.

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[24] FA para 98, Record p 38; Annexure PL 24, Record p 73.

[25] White Paper, Annexure PL 23, Record 406.

[26] Department's AA para 98, Record p 565; Thabametsi's AA para 113, p 649.

23 South Africa has signed and ratified the United National Framework Convention on Climate Change[27] (Framework Convention) and its Kyoto Protocol,[28] international agreements that seek to address climate change.

24 As a party to the Framework Convention, South Africa participated in the 21st Annual Conference of Parties (COP21) which resulted in the adoption of the historic Paris Agreement in December 2015.[29] South Africa ratified the Paris Agreement on 1 November 2016, and the agreement came into force on 4 November 2016.[30]

25 The Paris Agreement commits states parties to limiting the global average increase in temperature to "*well below 2*°C *above pre-industrial levels*" and to "*pursue efforts to limit the temperature rise to 1.5* °C *above pre-industrial levels*".[31]

26 South Africa has outlined the contribution that it will make to these objectives in its Nationally Determined Contribution (NDC).[32]

26.1 The Paris Agreement requires all states parties to formulate NDCs, to report on their compliance with these NDCs, and to revise their NDCs every five years to adopt more stringent targets.[33]

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[27] Signed in 1993, ratified in 1997.

[28] South Africa acceded to the Protocol in 2002.

[29] FA para 103, Record p 39.

[30] SFA para 32, Record p 463.

[31] Paris Agreement, article 2(a).

[32] Annexure PL 25, Record pp 423 – 433.

[33] Paris Agreement, article 4(9).

26.2 South Africa's NDC recognises that near zero GHG emissions are required after 2050 in order to avoid the most harmful effects of climate change.[34] It is important to note that the proposed Thabametsi power station is planned to operate until at least 2061

26.3 The NDC sets out a "peak, plateau and decline" trajectory for these emissions, in terms of which South Africa's emissions will peak between 2020 and 2025, plateau in the following decade, and decline in absolute terms thereafter.[35]

27 These international agreements provide important context for the interpretation of the relevant provisions of NEMA, as we explain in greater detail below.

The Thabametsi power station

28 Thabametsi submitted a bid to the Department of Energy to be appointed as an independent power producer (IPP) under the Coal Baseload IPP Programme.

29 If approved, it will construct its 1200MW coal-fired power station near Lephalale in the Limpopo Province and will sell electricity to Eskom. This construction will occur in two phases of 600MW each.[36]

30 The Department of Energy's Coal Baseload IPP Programme has its origins in two policy instruments:

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[34] Annexure PL 25, Recordp 423.

[35] Ibid, Record p 429.

[36] FA para 26, Record p 17.

30.1 First, the 2011 Integrated Resource Plan for Electricity 2010-2030 ("**IRP**"), developed by the Department of Energy, indicated that a sizeable portion of South Africa's electricity will continue to be generated by coal-fired power stations.[37]

30.2 Second, in December 2012, the Minister of Energy issued a determination regarding the procurement of electricity generation capacity from IPPs, in terms of section 34(1) of the Electricity Regulation Act 4 of 2006. She determined that 2 500 MW will be sourced from IPPs operating coal-fired power stations.[38]

31 Tenders under the Coal Baseload IPP Procurement Programme are to be awarded following a competitive bidding process, as detailed in the Request for Qualifications and Proposals for New Generation Capacity ("Request for Proposals"), which sets out the procedures and requirements for this bidding process.[39]

32 The Legal Qualification Criteria, incorporated as volume 2 in the Request for Proposals, states that in order for a bid to be considered, a project must have an environmental authorisation, issued under NEMA, together with a number of other environmental licences and approvals.[40]

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[37] FA Annexure PL 4, pp 75 – 78.

[38] FA Annexure PL 5, pp 79 – 80.

[39] FA Annexure PL 6, Record pp 81 – 119.

[40] Ibid, Record p 111 – 112, para 4.1.1.

33 The Department of Energy has now appointed Thabametsi as a "*preferred bidder*" meaning that it is on the path to approval.[41] However, Thabametsi is still required to secure outstanding regulatory approvals as well as satisfying various commercial requirements before it can reach "financial and commercial close".[42]

The legal framework for environmental authorisations

34 Section 24(1) read with 24(2) of NEMA provides that any activities which are listed or specified by the Minister of Environmental Affairs must obtain an environmental authorisation before they may commence.

35 The construction of a coal-fired power station is one such listed activity and the Chief Director is designated as the "competent authority" that must decide on environmental authorisations for these power stations.[43]

36 Once an application for environmental authorisation has been made, an environmental impact assessment process must be undertaken. Section 24(1) of NEMA requires that the environmental impacts of a listed activity "*must be considered, investigated, assessed and reported on*" to the competent authority tasked with making decision on environmental authorisation.

37 Section 24O(1) of NEMA makes it mandatory for competent authorities to take account of "*all <u>relevant</u> factors*" in deciding on these applications, including "*any*

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[41] SFA para 12, Record p 455 – 456.

[42] SFA para 14, Record pp 456-457.

[43] "Listing Notice 2: List of Activities and Competent Authorities Identified In Terms Of Sections 24(2) and 24D", GNR 545 in *Government Gazette* No 33306 of 18 June 2010.

pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused". As we argue, below, the climate change impacts of a proposed coal-fired power station are certainly "relevant" factors.

38 An environmental impact assessment is meant to provide competent authorities with all of this relevant information on the environmental impacts of the proposed activity.[44] These impact assessments also address a host of related matters including —

> *"the consideration of reasonable and feasible alternatives to specific development proposals; engaging relevant specialists to address key issues; the application of the mitigation hierarchy (which prioritises avoiding or preventing impacts over minimising and remedying them); stakeholder engagement; intersectoral coordination; and the translation of mitigation measures into practicable environmental management plans or programmes that provide for monitoring and adaptive management to enable specific outcomes to be achieved."*[45]

39 Thabametsi's application for environmental authorisation was made and considered under the 2010 Environmental Impact Assessment Regulations (2010 EIA Regulations),[46] which specify the procedure that must be followed in conducting an environmental impact assessment.

40 In accordance with these 2010 EIA Regulations, Thabametsi appointed an independent environmental assessment practitioner, Savannah Environmental

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[44] Jan Glazewski and Susie Brownlie, *"Environmental Assessment"* in Jan Glazewski (ed) *Environmental Law in South Africa* (2013) para 10.1.1.

[45] Ibid.

[46] The 2014 Environmental Impact Assessment Regulations subsequently came into force in December 2014 ("2014 EIA Regulations"). In terms of the transitional provisions, the 2010 EIA Regulations continued to apply to all pending applications and appeals. As a result, the 2010 EIA Regulations continue to apply to Thabametsi.

(Pty) Limited (Savannah), to carry out the environmental impact assessment process.

41 In terms of the 2010 Regulations, Savannah was required to conduct a scoping and environmental impact reporting process.[47] This required an initial scoping report before the environmental impact assessment commenced.

41.1 This scoping process is designed to allow the competent authority to give direction on the environmental impacts that must be investigated and reported on, taking into account comments received from interested and affected parties.[48]

41.2 The respondents contend that Thabametsi could not be required to conduct a climate change impact assessment, as there is no legislation giving explicit guidance for this process.[49]

41.3 However, the respondents ignore the fact that the very purpose of the scoping process is to provide this guidance on a case-by-case basis, taking into account the specific circumstances of each project.

42 The Chief Director approved the scoping report, without imposing any requirement to consider climate change impacts. Savannah proceeded to conduct the environmental impact assessment. It then prepared draft and final

[47] 2010 EIA Regulations, Regulation 20.

[48] 2010 EIA Regulations, regulations 26 – 35.

[49] Department's AA para 21, Record p 538; Thabametsi AA para 58, 82, Record pp 627, 635.

environmental impact assessment reports which were submitted to the Chief Director.

The failure to address climate change impacts in the environmental impact assessment

43 The final environmental impact assessment report, submitted in May 2014, failed to address the climate change impacts of the proposed coal-fired power station in any detail. Three deficiencies are most readily apparent.

44 First, the only reference to climate change in the report is a brief and unsubstantiated assertion that climate change impacts are expected to be "*relatively small*" and "*low*". The report states that:

> *"Indirect impacts associated with the S02 and N02 emissions relate to acidification, and those associated with CO and C0₂ relate to global warming. The magnitude of indirect impacts associated with the operational scenarios relates to the relative contribution to acidification and global warming. While quantification of the relative contribution of the Thabametsi Power Station is difficult, the contribution is considered to be relatively small in the national and global context. The significance of the Indirect impacts is therefore anticipated to be low for all operational scenarios."*[50] (Our emphasis)

45 Second, this unsubstantiated assertion was made in the absence of any meaningful attempt to quantify the GHG emissions from the coal-fired power station.

45.1 The report did not attempt to estimate the likely CO_2 and methane (CH_4) emissions from the coal-fired power station – the primary contributors to

[50] Thabametsi's AA para 75.1, p 632; Annexure AA 14, Record p 716; 774 – 775.

climate change.[51] Instead, the report focused on emissions of SO_2, NO_2, and particulates.[52]

45.2 This oversight was because the report was focused on localised issues of air quality rather than considering broader climate change impacts.[53]

46 Third, there was no attempt to assess the risks that climate change poses to the Thabametsi coal-fired power station over its lifetime and the impact that this power station may have on the region's resilience to climate change.

47 In particular, the portions of the report addressing water issues did not address impact that climate change may have on water scarcity in the region and how this will impact on the power station.

47.1 As detailed in the founding affidavit, the impact of climate change in South Africa, and particularly in the Waterberg region, will primarily be felt through increased water scarcity.[54] The Thabametsi power station will require 1,500,000m^3 of water each year in this highly water stressed region.[55]

47.2 As a result, it is important to assess the ways in which the Thabametsi power station may aggravate the impact of climate change in the region

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[51] Ibid.

[52] As appears in the executive summary to the air quality component of the report: Annexure AA 14, Record pp 714 – 717.

[53] Reply, para 35, pp 913 – 914.

[54] FA para 112, p 43 – 45.

[55] This revised figure appears in Thabametsi's Integrated Water and Waste Management Plan dated July 2016. Reply Annexure PL 39, Record p 952 – 953.

by contributing to water scarcity. In turn, the impact of increasing water scarcity on the viability of the power station over its lifetime also required full investigation.

48 These deficiencies in the environmental impact assessment report are highlighted by comparing that report with the draft climate change impact assessment report that was recently released on 27 January 2017. We address this draft climate change report below.

The Chief Director's decision to grant the environmental authorisation

49 On 25 February 2015, the Chief Director granted the environmental authorisation for the Thabametsi power station, subject to several conditions. The Department of Environmental Affairs issued an amended integrated environmental authorisation on 17 March 2015.[56]

50 In setting out the reasons for his decision, the Chief Director merely parroted the glib assertions on climate change that were contained in the environmental impact report. The Chief Director stated that: "*[w]hile quantification of the relative contribution of the Thabametsi power station [to climate change] is difficult, the contribution is considered to be relatively small in the national and global context. The significance of the indirect impacts is therefore anticipated to be low for all operational scenarios*".[57]

[56] FA para 11.1, Record p 11; FA Annexures PL 10 – PL 11, Record, p 148 – 172.

[57] SFA para 44, Record p 467; Annexure PL 38, Record pp 525 – 526.

51 As we argue in greater detail below, this conclusion was irrational in the absence of any evidence to support it. Furthermore, the Chief Director's uncritical repetition of the environmental impact report demonstrates a failure to apply his own mind to these climate change impacts.

The nature and effect of the Minister's decision on appeal

52 Earthlife duly submitted a notice of intention to appeal the environmental authorisation, in accordance with regulation 60(1) of 2010 EIA Regulations.

53 Section 43 of NEMA designates the Minister of Environmental Affairs as the relevant appeal authority. Section 43(6) of NEMA affords the Minister wide powers on appeal, including the powers to "*confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision*".[58]

54 In her decision, the Minister agreed with Earthlife that a climate change impact assessment was necessary and that the climate change impacts of the power station had not been sufficiently considered. The Minister reasoned as follows:

> *"In evaluating this ground of appeal, I am aware that climate change issues were addressed to some extent in the air quality assessment and impact study, and the Department considered these facts prior to the issuance of the EA.*
>
> *I must emphasise that in order for the country to meet its long term electricity demand, a mix of power generation technologies must be*

[58] New regulations on appeals (the National Appeal Amendment Regulations) were published on 12 March 2015. Regulation 3 stipulates that an appeal lodged against a decision taken in terms of the 2010 EIA Regulations must be dispensed with in terms of the 2010 EIA Regulations, as if they had not been repealed. As a result, Earthlife Africa's appeal followed the procedures prescribed in the 2010 EIA Regulations.

> *pursued, which includes coal-fired power stations. I must stress, furthermore, the Department's commitment to identifying cleaner power generation technologies in the medium and longer term.*
>
> *However, I concur with the appellant in that the climate change impacts of the proposed development were not comprehensively addressed and / or considered prior to the issuance of the EA."*[59] (Emphasis added)

55 Despite agreeing with Earthlife that the climate change impact had not been properly assessed, the Minister continued to uphold the environmental authorisation.

56 The Minister merely inserted the additional conditions that a climate change impact assessment should be conducted within six months:

> "*10.5 The holder of this authorisation must undertake a climate change impact assessment prior to the commencement of the project which is to commence no later than six months from the date of signature of the appeal decision. The climate change impact assessment must thereafter be lodged with the Department for review and the recommendations contained therein must be considered by the Department*"[60]

The respondents' attempts to reinvent the Minister's decision

57 In light of the Minister's reasoning, the respondents are faced with a dilemma.

57.1 If, as is plain from the Minister's decision, she agreed that a climate change impact assessment was relevant to the environmental authorisation, then section 24O(1) of NEMA required this climate change impact assessment

[59] FA Annexure PL 16, Record pp 364.

[60] Ibid.

to be completed and considered before taking a final decision on whether to grant environmental authorisation.

57.2 If, by contrast, the Minister did not agree that a climate change impact assessment was relevant or necessary, then it is not apparent on what basis she found it necessary to order Thabametsi to conduct a climate change impact assessment.

58 In response to this dilemma, the respondents have attempted to creatively reinvent the Minister's reasoning and the consequences of her decision.

59 In their answering affidavit, the first to third respondents now claim that the Minister found that "*the climate change impact of the project [had been] adequately addressed for the purposes of the environmental authorisation in the EIA report*."[61]

59.1 This claim is contradicted by the Minister's decision itself. Nowhere in that decision does the Minister state or imply that the climate change impact had been "*adequately addressed*". If the climate change impact had been "*adequately addressed*" then there is no reason for ordering a full climate change impact assessment.

59.2 Furthermore, in Earthlife's subsequent correspondence and meetings with the Department which sought to obtain clarity on the decision, the Department never sought to suggest that the reason for the Minister's

[61] Department's AA paras 9, 78, Record pp 534, 561.

decision was that she considered that climate change had been "*adequately addressed*".[62]

59.3 There is also nothing in the Rule 53 record pertaining to the Minister's decision that suggests that the reason for the Minister's decision was that she considered that climate change had been "*adequately addressed*".[63]

59.4 Finally, this suggestion is belied by the fact that the first to third respondents now purport to recognise that the outcome of the climate change assessment may necessitate an amendment or even ultimately a withdrawal of the environmental authorisation granted.[64]

60 Thabametsi and the first to third respondents also seek to reinterpret the purpose and effect of condition 10.5 which the Minister inserted into the environmental authorisation.

60.1 Thabametsi claims that this climate change impact assessment is merely a data-gathering exercise, designed to monitor emissions, that can have no effect on the project.[65]

60.2 The Department also agrees that this climate change impact assessment is primarily for emissions monitoring purposes.[66]

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[62] FA paras 63 – 75, Record pp 25- 30; Reply para 29, Record pp 910 – 911.

[63] Reply para 29, Record pp 910 – 911.

[64] Department's AA paras 41, 86, Record pp 549 – 553, 563.

[65] Thabametsi's AA para 83 - 84, Record pp 635 – 636.

[66] Department's AA para 41, Record pp 551 – 552.

61 This explanation is equally unfounded. There was no suggestion in the Minister's decision, in the Rule 53 record or in correspondence with the Department that this climate change impact assessment was merely for data-gathering purposes.[67]

62 In any event, this claim is also illogical. It is unclear how the climate change impact assessment could serve an ongoing emissions monitoring exercise when condition 10.5 requires that it must be completed before any construction of the power station can commence. An impact assessment is necessarily concerned with likely future impacts and is not an ongoing monitoring exercise.[68]

63 In any event, we emphasise that the Minister cannot permissibly seek to alter the reasons for her decision via an answering affidavit. Still less can she (or Thabametsi) re-invent the nature of the decision itself as she now purports to do. This is made clear by decisions of English courts, which have been adopted by our courts. The position is well-summarised by Mayat J in the ***MTN*** decision.[69]

> *"[A]s stated by the English courts in this respect, a decision-maker such as ICASA is generally barred from justifying or retrofitting any decision ex post facto. The Court of Appeal in the case of R V Westminister City Council, ex parte Ermakov [1996] 2 All ER 302 (CA) at 315-316 held as follows in this regard:*
>
> > *"(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should….be very cautious about doing so….Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons….*

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[67] Reply para 42, Record p 916.

[68] Reply para 44, Record p 917 – 918.

[69] *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others* [2014] 3 All SA 171 (GJ) (31 March 2014) at paras 95 - 97

> *(3) …. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to the purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but gives rise to practical difficulties. "*
>
> *The above dicta in the Ermakov case were quoted with approval in the case of Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 at paras 11 and 12, where Cleaver J held that a decision-maker "should not be allowed to supplement the reasons for its decision by reasons, which were clearly taken ex post facto".*
>
> *The above view is also supported in the case of National Lotteries Board v SA Education and Environment , where Cachalia JA stated as follows:*
>
> > *"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show the original decision may have been justified. For in truth the later reasons are not true reasons for the decision, but rather an ex post facto rationalization of a bad decision."*[70]

64 For these reasons, the respondents' attempts to reinvent the Minister's reasoning and decision are entirely unsustainable. The Minister did indeed acknowledge that climate change impacts were relevant and had not been sufficiently assessed, necessitating an investigation of these impacts.

The consequences of the Minister's decision

65 The Minister was entirely correct in finding that a climate change impact assessment needed to be conducted. But where she erred was in upholding the

[70] 2012 (4) SA 504 (SCA) at para 27.

environmental authorisation despite the absence of this climate change impact assessment.

66 The consequence of the Minister's decision is that Thabametsi's environmental authorisation cannot be withdrawn if it is determined that the final climate change impact report warrants that outcome.

66.1 It is common cause that the Chief Director and the Minister are *functus officio* and have no express powers under NEMA or the 2010 EIA Regulations to withdraw the authorisation it they later change their mind, in light of the final climate change impact report.[71]

66.2 The Chief Director does have the power to amend the conditions attached to the authorisation if that is considered necessary.[72] However, a power of amendment is not a power of withdrawal.

67 In response, the first to third respondents now propose a convoluted process whereby the environmental authorisation may be amended and subsequently withdrawn if the climate change impact assessment warrants this outcome.[73]

67.1 In terms of Regulation 43 of the 2010 EIA Regulations, the Chief Director may amend the environmental authorisation, after providing Thabametsi

[71] Regulation 47(1) of the 2010 EIA Regulations merely gives the power to suspend. None of these grounds give a basis to suspend the environmental authorisation if the climate change impact assessment and additional information require that result.

[72] 2010 EIA Regulations, regulation 43.

[73] Department's AA paras 41.2, 86, Record pp 551-553, 563.

and interested and affected parties to make representations and allowing Thabametsi a right of appeal if it is dissatisfied with the amendment.[74]

67.2 After an amendment has been effected, and if Thabametsi fails to comply with it, a compliance officer may issue a notice under section 31N of NEMA. If Thabametsi still fails to comply, then the Minister may take a decision to revoke the environmental authorisation under section 31L of NEMA, after allowing Thabametsi to make representations.

68 But this convoluted and drawn-out process is no answer to Earthlife's challenge. This is for at least two reasons.

68.1 First, a power of amendment could never be used for the ulterior process of engineering the ultimate revocation of the environmental authorisation, which is what the first to third respondents seem to have in mind. To do so would undoubtedly lead to a review by Thabametsi of the Department's conduct.[75] (We address this material error of law in greater detail below, under the fourth ground of review.)

68.2 Second, and in any event, the contentions of all of the respondents before this Court are now that a climate change impact assessment is <u>not</u> a relevant factor to be considered in granting or refusing environmental authorisation. If that position were correct, then a climate change impact

[74] In terms of the process prescribed in the 2010 EIA Regulations, regulations 44 – 45, read with Chapter 7.

[75] See: *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at 999; *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 46.

assessment could not be relied on to amend the environmental authorisation – still less to revoke it.

The climate change impact assessment

69 After the Minister's decision in 2016, Savannah subsequently completed a climate change impact scoping report and a climate change impact assessment on Thabametsi's behalf.

70 The draft climate change impact report (draft report) was made available for the first time on 27 January 2016, the day after the applicant filed its replying affidavit.[76] As a result, it was necessary to file a supplementary affidavit to bring this draft report to this court's attention.[77]

71 The respondents have opposed the introduction of the supplementary affidavit. They do so only on the basis that it is irrelevant. [78] They do not seek to suggest that they would suffer any prejudice if it were admitted. We submit that there is no merit in the objection. If, as we submit, the Savannah report contradicts or undermines certain of the allegations made in the decisions under review or the answering affidavit, then it is plainly relevant and must be admitted.

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[76] Applicant's supplementary affidavit paras 3 – 4, Record p 959; Annexure PL 42, Record p 970.

[77] Supplementary Reply, Record pp 958 – 1004.

[78] Thabametsi's supplementary affidavit para 3, Record p 1006; Department's supplementary affidavit para 6.

72 The draft climate change report reaches three important conclusions which are highly relevant to this matter.[79]

73 First, the report concludes that the Thabametsi power station will have "significant" greenhouse gas (GHG) emissions and corresponding climate change impacts.[80]

73.1 The report estimates that the coal-fired power station will generate almost 8.2 million tonnes of CO_2 per year and over 246 million tonnes of CO_2 over its lifetime.[81]

73.2 The draft report confirms that these emissions are "Very Large", judged by international standards, and will constitute between 1.9% and 3.9% of South Africa's total GHG emissions.[82]

73.3 This finding is a clear demonstration of the inadequacy of the original environmental impact assessment report.[83] It directly contradicts the brief and unsubstantiated statements made in Thabametsi's original environmental impact assessment report that climate change impacts would be "*small*" and "*relatively low*".

74 Second, the draft report concludes that the GHG emissions from the Thabametsi power station will compare unfavourably with other modern coal-fired power

[79] As is noted in the supplementary affidavit, Earthlife reserves its rights to comment on the draft report in due course.

[80] Applicant's supplementary affidavit para 13, Record p 962 – 963.

[81] Applicant's supplementary affidavit, Annexure PL 43, Record p 981.

[82] Ibid.

[83] Applicant's supplementary affidavit paras 14 – 15, Record p 963.

stations. It will merely be on par with Eskom's existing fleet of coal-fired power stations and is predicted to perform only marginally better than Eskom's three oldest coal-fired power stations.[84]

74.1 These facts are summarised in the report as follows:

> *"The Project has relatively high emissions intensity (1.02 t CO_2 per MWH generated) compared to coal-fired power plants, and a similar emissions intensity to that of Eskom's current fleet (1.01 t CO_2) and coal-fired power plants specifically (1.04 t CO_2 in 2010-11). However, the emissions intensity of the plant represents an improvement on the three oldest Eskom coal-fired power plants that are due to be deconmmissioned before 2025: Camden (1.24 t CO_2 / MWH), Hendrina (1.18 t CO_2 / MWH), and Arnot (1.09 t CO_2 per MWH)"*[85]

74.2 These conclusions undermine claims made by the respondents in their answering affidavits. The respondents touted the Thabametsi coal-fired power station as a "*newer, cleaner and more efficient*" power station that will result in substantially lower carbon-emissions when compared with existing coal-fired power stations.[86]

75 Finally, the draft report concludes that climate change poses several "high" risks to the power station over its lifetime that cannot be effectively mitigated.

75.1 These "high" risks include higher temperatures in the region impacting on the efficiency of the power station; increasing water scarcity in the region affecting the operation of the plant and depriving local communities of

[84] Supplementary reply paras 16 – 17, pp 963 – 964.

[85] Annexure PL 43, Record p 983.

[86] Department's AA para 140.3, Record p 572; Thabametsi's AA para 116.1, Record p 650.

water; the risk of extreme weather events resulting in floods; and water shortages in the region depriving local communities of water.[87]

75.2 The draft report concludes that climate change may result in greater water scarcity in the region which will impact on the Thabametsi coal-fired power station, and cannot be effectively mitigated due to problems with the water supply.[88]

75.3 The report's findings directly contradict the first to third respondents' denials that these climate change impacts needed to be fully analysed. It also disproves the first to third respondents' contention "*that there is no basis for the claim that the Thabametsi power station will aggravate any existing [water] problems significantly*".[89]

76 Therefore, the draft climate change report is a clear indication that highly relevant environmental impacts were not adequately assesed and considered before granting the environmental authorisation, contrary to what the respondents have claimed in their affidavits.[90]

NEMA REQUIRES THE CONSIDERATION OF CLIMATE CHANGE IMPACTS

77 At the heart of this case lies the question of whether climate change impacts had to be considered in granting Thabametsi environmental authorisation. In this

[87] Supplementary Reply paras 21 – 22, Record p 966; Annexure PL 44, Record pp 996 – 997.

[88] Supplementary Reply para 24, pp 966 – 968; Annexure PL 44, Record pp 1000 – 1004.

[89] Department's AA para 67, p 559.

[90] Department's AA, para 49.1, Record p 54; Thabametsi's AA, paras 71 – 78, Record pp 630 - -633.

section of the heads of argument, we explain why this is indeed the effect of NEMA.

The statutory provisions

78 Section 24O(1) of NEMA prescribes that the Minister and the Chief Director had to take into account all "*relevant*" factors in considering Thabametsi's application for environmental authorisation. Section 24O(1) provides as follows:

> *"If the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority considers an application for an environmental authorisation, the Minister, Minister of Minerals and Energy, MEC or competent authority must —*
> *(a) comply with this Act;*
> *(b) take into account all relevant factors, which may include —*
> *(i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;*
> *(ii) measures that may be taken —*
> *(aa) to protect the environment from harm as a result of the activity which is the subject of the application; and*
> *(bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;*
> *(iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;*
> *(iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;*
> *(v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frameworks, to the extent that such information, maps and frameworks are relevant to the application;*
> *(vi) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minister of Minerals and Energy, MEC or competent authority in connection with the application;*
> *(vii) any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and*

(viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and

(c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question." (Emphasis added)

79 The Constitutional Court has confirmed that section 24O(1) imposes "*peremptory*" requirements.[91] Decision-makers "*must*" make their decisions in compliance with NEMA and "*must*" consider "*all relevant factors*".

80 Section 24O(1) of NEMA must be read with the relevant provisions of the 2010 EIA Regulations, which prescribe what must be contained in an environmental impact assessment report.

80.1 Regulation 31(2) of the 2010 EIA Regulations requires that the environmental impact assessment report "*must contain all information that is necessary for the competent authority to consider the application and to reach a decision*". This includes, inter alia:

"*(l) an assessment of each identified potentially significant impact, including-*

(i) cumulative impacts;

(ii) the nature of the impact;

(iii) the extent and duration of the impact;

(iv) the probability of the impact occurring;

(v) the degree to which the impact can be reversed;

(vi) the degree to which the impact may cause irreplaceable loss of resources; and

(vii) the degree to which the impact can be mitigated"

[91] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 12.

80.2 In terms of regulation 34(2)(b), the competent authority is required to reject the environmental impact assessment report if it "*does not substantially comply with the requirements in regulation 31(2)".*

81 Reading these provisions in conjunction, it is clear that if a climate change impact assessment is "*relevant*" for the purposes of section 24O(1)(b) of NEMA then it follows that this information is "*necessary*" for the purposes of regulation 31(2). Where relevant information is missing, the environmental impact assessment report must be rejected under regulation 34(2)(b) and environmental authorisation should be refused.

The principles of interpretation

82 It is trite that all legislation must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation.[92]

83 Section 39(2) of the Constitution mandates constitutionally compatible interpretation. It provides:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

[92] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

84 As recently summarised in ***Makate v Vodacom***,[93] section 39(2) of the Constitution imposes various duties on courts when interpreting legislation:

> *"[S]ection 39(2) introduced to our law a new rule in terms of which statutes must be construed. … [T]his new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.*
>
> *The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in Fraser:*
>
> > *"Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights."*

85 The provisions of NEMA must not only be interpreted consistently with the Constitution, but must also be interpreted consistently with international law.

85.1 Section 39(1) provides that courts "*must*" consider international law in interpreting the Bill of Rights.

85.2 Section 233 of the Constitution further provides that:

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."*

85.3 Therefore, the various international agreements on climate change are highly relevant to the proper interpretation of section 24O(1)(b) of NEMA.

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[93] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87-89

The plain textual reading of section 24(1)(b)(i)

86 The starting point for any interpretation is the "*language used in light of the ordinary rules of grammar and syntax*".[94] A plain reading of section 24O(1) demonstrates that climate change impacts are indeed "relevant" factors that must be considered.

87 The section 24O(1)(b) injunction to consider all "*relevant*" factors, includes "*any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused".* Section 1 of NEMA defines the underlined terms as follows:

87.1 The "*environment*" is defined as —

> ***"****the surroundings within which humans exist and that are made up of -*
> *(i) the land, water and atmosphere of the earth;*
> *(ii) micro-organisms, plant and animal life;*
> *(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and*
> *(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing;*

87.2 "*Pollution*" is defined in equally broad terms:

> ***"****'pollution' means any change in the environment caused by -*
>
> *(i) substances;*
>
> *(ii) radioactive or other waves; or*
>
> *(iii) noise, odours, dust or heat,*
>
> *emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or wellbeing or on the composition,*

[94] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.

resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future" (Emphasis added)

88 Reading these terms together, it is clear that the emission of greenhouse gases from a coal-fired power station is "*pollution*" that brings about a "*change in the environment*" that has an "*adverse effect on human health or wellbeing*" and on the "*composition and resilience … of ecosystems*" and will "*have such an effect in the future*". South Africa's White Paper on climate change, summarised above, puts these matters beyond doubt.

89 Section 24O(1)(b) lists other relevant factors to be considered in assessing these climate change impacts, including:

> *(ii) measures that may be taken —*
> *(aa) to protect the environment from harm as a result of the activity which is the subject of the application; and*
> *(bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;*
> *(iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;*
> *(iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;*

90 These considerations all enjoin competent authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project. This entails that a full assessment of Thabametsi's climate change impact had to consider how these impacts could be avoided, reduced or remedied.

91 This plain reading of section 24O(1) is consistent with the requirements of section 24 of the Constitution and the broader provisions of NEMA which seek to give effect to this right.

The section 24 constitutional right

92 Section 24 of the Constitution provides as follows:

> "*Everyone has the right –*
> *(a) to an environment that is not harmful to their health or well-being; 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.*"

93 Section 24(a) provides a right to a decent environment for all South Africans. In ***Save the Vaal***[95] the SCA explained that

> *"Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country."*[96]

94 Section 24(b) reflects the principle of "*sustainable development*". In ***Fuel Retailers***,[97] Ngcobo J, writing for a majority of the Constitutional Court, explained this principle as follows:

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[95] *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 (2) SA 709 (SCA).

[96] Ibid at 719.

[97] *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).

> *"The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment."*[98]

Ngcobo J acknowledged that sustainable development requires an appreciation that economic development cannot occur without environmental protection:

> *"[D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."*[99]

95 Climate change poses is a substantial risk to sustainable development in South Africa. As the White Paper acknowledges, the effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters, all imperil future development.

96 Sustainable development is integrally linked with the principle of "*intergenerational justice*". This is reflected in section 24(b) which requires the state to take reasonable measures protect the environment "*for the benefit of*

[98] Ibid para 45.

[99] Ibid at para 44

present and future generations". This is rejection of short-termism as it requires the state to consider the long-term impact of development on future generations.

97 In ***Company Secretary, Arcelormittal v Vaal Environmental Justice Alliance***,[100] the Supreme Court of Appeal acknowledged that climate change raises urgent questions of intergenerational justice, requiring steps to be taken to protect future generations:

> *"As we continue to reset our environmental-sensitivity barometer, we would do well to have regard to what was said about planet Earth by Al Gore, a former vice-president of the United States and an internationally recognised environmental activist engaged in educating the public about the dangers of global warming and those steps to be taken in response to reduce carbon emissions (for which he was a joint recipient of the 2007 Nobel Peace Prize):*
>
> > *'You see that pale, blue dot? That's us. Everything that has ever happened in all of human history, has happened on that pixel. All the triumphs and all the tragedies, all the wars, all the famines, all the major advances . . . . It's our only home. And that is what is at stake, our ability to live on planet Earth, to have a future as a civilization. I believe this is a moral issue, it is your time to seize this issue, it is our time to rise again to secure our future.'*
>
> *On the importance of developing a greater sensitivity in relation to the protection and preservation of the environment for future generations, Gore had the following to say:*
>
> > *'Future generations may well have occasion to ask themselves, What were our parents thinking? Why didn't they wake up when they had a chance? We have to hear that question from them, now.'*
>
> *We would, as a country, do well to heed that warning."*[101] (Emphasis added)

98 Taking intergenerational justice seriously requires adequate consideration of climate change. Short-term needs must be balanced with these long-term

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[100] *Company Secretary, Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) at para 84.

[101] Ibid at para 84.

consequences, particularly when considering environmental authorisation for a coal-fired power station that will remain in operation until at least 2061.

99 When section 24O(1)(b) is read in light of these constitutional principles, it is clear that the right to a healthy environment, sustainable development and intergenerational justice are all better promoted by considering climate change impacts to be "relevant" factors that must be adequately considered before granting environmental authorisation for a coal-fired power station. That is the interpretation that best gives expression to these principles.

The broader purposes and principles of NEMA

100 If there is any remaining doubt about the proper interpretation of section 24O(1) of NEMA, the broader text and purposes of NEMA puts the matter beyond doubt.

101 NEMA seeks to give effect to section 24 of the Constitution and the principles of sustainable development and intergenerational justice that underpin it.[102]

102 Section 2 of NEMA sets out a series of binding principles that must inform all decisions taken under the Act, including decisions on environmental authorisations.[103] These principles reflect NEMA's commitment to sustainable development.

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[102] *Fuel Retailers,* para 56.

[103] Section 2(1)(c) provides that these principles "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment".

102.1 Section 2(3) provides that "*[d]evelopment must be socially, environmentally and economically sustainable.*"

102.2 Section 2(4)(a) then sets out considerations that must be considered in advancing sustainable development. These section 2(4)(a) principles add two important dimensions to the principle of sustainable development:

102.3 First, decision-makers must comply with the "*hierarchy of mitigation*" (section 2(4)(a)(i)-(iv) and (viii)) which provides that environmental harms must be avoided if at all possible, and only if they cannot be avoided should those harms be minimised and remedied.

102.4 Second, there is the "*precautionary principle*", reflected in section 2(4)(a)(vii), which requires decision-makers to adopt a risk-averse and cautious approach in the face of incomplete information.

102.5 At the very least, precaution requires decision-makers to make sure that all reasonable investigations and enquiries are conducted before taking a decision. This was the approach endorsed by the Constitutional Court in ***Fuel Retailers***. The Court berated the authorities for breaching the precautionary principle as they had failed to ensure that the potential impact of a filling station on underground water supplies was fully investigated.[104]

Section 2(1)(e) further provides that these principles must "guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

[104] *Fuel Retailers* at para 98-99.

103 Sections 23 and 24 require competent authorities to take into account the section 2 principles when considering applications for environmental authorisation.[105] As quoted above, section 24(1) provides that environmental impacts "*must be considered, investigated, assessed and reported on"* so as to "*give effect to the general objectives of integrated environmental management laid down in this Chapter*", which include the section 2 principles.

104 As a consequence, the environmental impact assessment process is required to promote sustainable development, by ensuring that the need for development is sufficiently balanced with full consideration of the environmental impacts of the project.

105 These principles and purposes necessitate the full consideration of the climate change impacts of a proposed coal-fired power station.

South Africa's international obligations to combat climate change

106 Finally, this reading of section 24O(1) of NEMA is further supported by South Africa international obligations to combat climate change.

107 Under the Framework Convention, South Africa has a number of binding obligations, including the following:

[105] Section 23(a) provides that the chapter 5 provisions of NEMA, governing environmental authorisations, have the purpose of promoting "the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment".

107.1 Article 3(3) of the Framework Convention sets out a specific "precautionary principle" which requires all states parties to take precautionary measures to anticipate, prevent or minimise causes of climate change. Given that coal-fired power stations are a substantial contributor to climate change, this precautionary principle favours a proper climate change impact assessment before granting environmental authorisation for a coal-fired power station.

107.2 Article 4(1)(f) of the UN Framework Convention specifically addresses the need for impact assessments as it imposes the obligation on all states parties to —

> "*[t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change"*

107.3 The respondents claim that the construction of new coal-fired power stations is part of South Africa's mitigation strategy to reduce GHG emissions. The merits of that strategy are dubious, but in any event Article 4(1)(f) of the Framework Convention requires an impact assessment of this mitigation strategy.

108 Under the Paris Agreement, South Africa's NDC commits us to a trajectory of peak emissions between 2020 – 2025, a plateau in emissions between 2025 and 2035, and absolute decline thereafter. South Africa has also set broad emissions targets for these periods.

108.1 If South Africa is to make good on its commitments under the NDC, this requires a case-by-case assessment of each new coal-fired power station to determine whether the emissions over its lifespan will be consistent with these targets.

108.2 The climate change impacts of these coal-fired power stations cannot simply be ignored, as occurred in this case.

109 The fact that the Paris Agreement only entered into force after Thabametsi submitted its application for environmental authorisation does not entail that the Paris Agreement has no relevance for the interpretation of section 24O(1).[106] Our courts have always interpreted the duty to consider international law broadly.

109.1 In ***Glenister II,*** the Constitutional Court held that these duties to consider international law apply irrespective of whether an international agreement has been domesticated by South Africa.[107]

109.2 In ***Makwanyane***, the Constitutional Court further held that the duty to consider international law applies both to binding and non-binding international law.[108]

109.3 In any event, this Court is required to interpret this statutory provision here and now. It simply cannot ignore an agreement which has become binding on South Africa.

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[106] Thabametsi AA para 69, Record p 630.

[107] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras 182, 192 – 195.

[108] *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

Comparative law

110 It is notable too that United States courts have held that climate change is a relevant and material consideration in administrative decisions, including the granting of environmental approval.

110.1 In the context of administrative rule-making, the Ninth Circuit upheld a challenge to the National Highway Traffic Safety Administration (NHTSA) rule on fuel economy standards for its failure adequately to consider greenhouse gas implications (even though the National Environmental Policy Act (NEPA) did not expressly require it), and its failure to prepare an Environmental Impact Statement (preparing instead a more cursory Environmental Assessment).[109] The impact of greenhouse gas emissions on climate change was, the Court held, "*precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct*".[110]

110.2 This followed an earlier decision by the US Supreme Court, which held that the Environmental Protection Agency (EPA) was required under the Clean Air Act to take regulatory action to combat greenhouse gas emissions, unless it could determine that they did not contribute to climate change.[111] Notably, the Court held that the Department of Transport's setting of energy-promoting mileage standards "*in no way licences EPA to shirk its environmental responsibilities*."[112]

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[109] *Centre for Biological Diversity v National Highway Traffic Safety Administration* 538 F.3d 1172 (9th Cir.2008).

[110] *Centre for Biological Diversity* at 1217.

[111] *Massachusetts et al. v. Environmental Protection Agency* 549 U.S. 497.

[112] *Massachusetts* at para 9.

110.3 In the context of granting environmental approval for specific projects, courts in California have been emphatic that the time to consider the climate change impact is before, not after, granting approval. In ***Communities for a Better Environment v City of Richmond***,[113] the City approved Chevron's application to construct an energy and hydrogen renewal project subject to a requirement that Chevron hire an independent expert to identify emissions and possible mitigation measures within a year. The California Court of Appeal endorsed the lower court's view that the City had "*improperly deferred the formulation of greenhouse gas mitigation measures*"[114] by allowing Chevron to prepare a mitigation plan up to a year after the Project's approval, citing a similar case, which held:

> "*A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing [the California Environmental Equality Act].*"[115]

110.4 The Court emphasized that the mitigation measures ought to have been identified and formulated during the Environmental Impact Report (EIR) process and before final approval was sought, holding that –

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[113] 184 Cal.App.4th 70 (2010).

[114] *Communities for a Better Environment* at 494.

[115] *Communities for a Better Environment* at 494-5, quoting *Sundstrom v. County of Mendocino* 202 Cal.App.3d 296, 307, 248 (1988)

> *"The solution was not to defer the specification and adoption of mitigation measures until a year after Project approval; but, rather, to defer approval of the Project until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment."*[116]

110.5 In short, where a climate change impact had been identified, the deferral of the identification of measures to mitigate climate change until after approval had been granted was held to be unlawful.

110.6 The present facts are arguably even more damaging for the Minister and Thabametsi. Here, not only have any potential mitigation measures associated with the proposed power plant been deferred, but the very identification and assessment of the project's full impact on climate change has been left to a time after the granting of approval, when it cannot be revoked.

The respondents' arguments

111 The respondents contend that there is no legal duty to carry out a climate change impact assessment of a proposed coal-fired power station.

112 First, the respondents contend that there is not yet any explicit legal duty to conduct a climate change impact assessment. They further point to the fact that

[116] Ibid at 497.

specific legislation on climate change and emissions targets are in the pipeline.[117]

112.1 The absence of express language requiring a climate change impact assessment does not entail that there is no legal duty. While comprehensive legislation on climate change would be welcomed, the absence of an express provision simply does not answer the relevant interpretative question.

112.2 On the contrary, for all the reasons presented above, a proper interpretation of section 24O(1) of NEMA and the 2010 EIA Regulations demonstrates that a climate change impact assessment is required in order to arrive at a full assessment of the environmental impact of a coal-fired power station.

113 Second, the respondents complain that without explicit guidance in the law on climate change impact assessments, Thabametsi could not be required to conduct a climate change impact assessment as there is no clarity on what is required.[118]

113.1 In response, we point out that the environmental impact assessment process is inherently open-ended and context specific. Many environmental impacts, such as traffic impact assessments, are not

[117] Department's AA paras 21 – 23, Record p 538; Thabametsi's AA paras 52 – 55, pp 623 – 625.

[118] Department's AA para 21, Record p 538; Thabametsi AA para 58, 82, Record p 627, 635.

specifically provided for in legislation, but are an accepted part of the environmental impact assessment process.[119]

113.2 In any event, the scoping process that precedes an environmental impact assessment for a coal-fired power station provides ample opportunity to provide guidance on the nature of the climate change impacts that must be assessed and considered.

113.3 This is precisely what happened in this case, as the Department of Environmental Affairs and interested and affected parties provided Thabametsi with guidance on how to conduct the climate change impact assessment before this assessment commenced.[120] The draft climate change impact assessment report is ample proof that this scoping process works.

114 Finally, the respondents contend that the new Thabametsi coal-fired power station is consistent with South Africa's NDC under the Paris Agreement, as this NDC envisages that South Africa's emissions will peak between 2020 and 2025. They also contend that this is consistent with South Africa's commitment to newer, cleaner and high-efficiency power stations.[121]

114.1 This contention misses the point. The argument is not whether new coal-fired power stations are permitted under the Paris Agreement and the

[119] Reply para 130, Record p 946.

[120] This process is detailed in SFA paras 15 – 30, Record pp 457 – 462.

[121] Department's AA paras 33 – 39, Record pp 545 – 549.

NDC. Instead, the question is whether a climate change impact assessment is required before authorising these coal-fired power stations.

114.2 As argued above, a climate change impact assessment is necessary to ensure that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NDC. This is particularly important as the Thabametsi power station will be operational until at least 2061, long after South Africa intends to bring about absolute reductions in its GHG emissions.[122]

114.3 Finally, a climate change impact assessment is also required to ensure that any new coal-fired power station are indeed cleaner and more efficient than existing power stations. As Thabametsi's draft climate change impact assessment now shows, the claims about Thabametsi's efficiency and emissions-savings have been exaggerated at best.[123]

Conclusions on the proper interpretation

115 For all these reasons, the text, context, purpose and constitutionally compatible reading of section 24O(1) of NEMA all support the conclusion that climate change impacts of coal-fired power stations are "relevant" factors that must be considered before granting environmental authorisation.

[122] Reply para 53, Record p 920 – 921.

[123] Compare the findings in Annexure PL 43, Record p 983 with the claims made in Thabametsi's AA para 116.1, Record p 650 and the Department's AA para 140.3, Record p 572.

FIRST GROUND OF REVIEW: ULTRA VIRES AND UNLAWFUL

116 The first ground for reviewing and setting aside the impugned decisions is that these decisions are unlawful, as the absence of a climate change impact assessment constituted material non-compliance with the mandatory requirements of section 24O(1) of NEMA read with the 2010 EIA Regulations.

117 On this basis, the impugned decisions stand to be reviewed and set aside in terms of section 6(2)(b) of PAJA and the constitutional principle of legality, among other grounds.[124]

118 We have already explained why, properly interpreted, NEMA required that climate change impacts be assessed prior to environmental authorisation being granted. We now turn to explain that this obligation was not complied with.

The deficiencies in the environmental report

119 It is difficult to understand how, in light of the Minister's own decision, it can be seriously contended that the climate change assessment impact was adequately assessed. The Minister herself concluded that:

> *"I concur with the appellant in that the climate change impacts of the proposed development were not comprehensively addressed and / or considered prior to the issuance of the EA."*[125]

[124] FA para 131, Record p 50.

[125] FA Annexure PL 16, Record pp 364.

120 On this basis, it would be surprising if the respondents offered any sustained argument in support of a contention that a climate change impact was properly done.

121 In any event, as explained above, there were at least three material deficiencies in the original environmental impact assessment report. These deficiencies have now been further highlighted by the draft climate change impact report that has now been circulated for public comment.

121.1 First, the original environmental impact report made only passing mention of climate change impacts, dismissing these as being of "low" and "relatively small" significance. The draft climate change report confirms that these impacts are indeed significant, as the Thabametsi coal-fired power station will produce "very large" GHG emissions over its lifespan.[126]

121.2 Second, the original report contained no quantification of CO_2 emissions, in contrast with the detailed analysis provided in the draft climate change report.[127]

121.3 Third, the environmental impact report also made no attempt to consider how climate change may impact on the coal-fired power station over its lifetime and how this power station may aggravate the effects of climate change. By contrast, the draft report confirms that climate change poses

[126] Applicant's supplementary affidavit para 13, Record p 962 – 963; Annexure PL 43, Record pp 981, 983.

[127] Ibid.

several "high risks" that cannot be effectively mitigated, most significant being the threat of increasing water scarcity in the Lephalale district.[128]

The IRP and Ministerial determinations

122 In an effort to side-step these difficulties, the respondents make much of the fact that the Integrated Resource Plan 2010 – 2030, developed by the Department of Energy, envisages that coal-fired power will continue to contribute a sizeable portion of our electricity supply. They also refer to the Minister of Energy's 2012 determination calling for an additional 2500 MW to be generated from coal.

123 According to the Department and Thabametsi, the IRP and the ministerial determination are relevant in two respects.

124 First, they suggest that the IRP and the ministerial determination are somehow binding on a competent authority when they are assessing the environmental impact of a proposed coal-fired power station.

124.1 Thabametsi's answering affidavit makes the following claim:

> *"The adoption of the Coal Baseload IPP Procurement Programme by the Minister of Energy constitutes a binding administrative decision. It has not been impugned by Earthlife to date. For as long as it stands, neither Earthlife nor the DEA is entitled to circumvent its terms or frustrate the establishment of the coal-fired power stations that it authorises."*[129]

[128] Supplementary Reply paras 21 – 22, 24, Record p 966 - 968; Annexure PL 44, Record pp 996 – 997, 1000-1004.

[129] Thabametsi's AA para 40, Record p 616.

124.2 The first to third respondents frame this in slightly softer terms, suggesting that "*when considering an application for an environmental authorisation, the decision-maker must take these decisions [the IRP and the ministerial determinations] into account.*"[130]

124.3 However, the first to third respondents also appear to draw the conclusion the IRP and the 2012 determination precludes the need for a climate change impact assessment as part of the environmental impact assessment process.

125 The flaw in this approach is that policy developed by the Department of Energy cannot alter the requirements of environmental legislation or exempt aspirant coal-fired power stations from the full environmental impact assessment process.

125.1 Section 24(2) of NEMA makes it clear that listed activities cannot commence without environmental authorisation and section 24(8) provides that authorisations granted under other laws "*[do] not absolve the applicant from obtaining authorisation*" under NEMA.

125.2 If authorisations under other laws do not constitute exemptions from the requirements of NEMA, then mere policy determinations by the Department of Energy surely cannot suffice.

125.3 Moreover, the fact that policy has been made cannot exempt competent authorities from considering all relevant factors under section 24O(1)(b) of NEMA, read with the 2010 EIA Regulations.

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[130] Department's AA, para 29, Record p 544.

126 Second, the respondents go on to contend that the climate change impacts of additional coal-fired power stations were considered in making the IRP and the 2012 ministerial determination, precluding any further need for this assessment of climate change impacts in the environmental impact assessment process.[131]

127 But this argument is unsustainable in the light of the Constitutional Court's decision in ***Fuel Retailers***.[132]

127.1 *Fuel Retailers* concerned an environmental authorisation granted for the construction of a petrol service station. In granting the authorisation, the competent authority made a similar argument to the one advanced here, suggesting that it was unnecessary to consider the socio-economic impacts of the project, as these impacts had been fully considered by the local authority in granting zoning approval in terms of an Ordinance. The Ordinance required an assessment of the "*need and desirability*" of the proposed project.

127.2 The Constitutional Court held that NEMA required more than a mere assessment of "*need and desirability*", with the consequence that the competent authority had misunderstood the nature of the NEMA requirements.

> *"The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that*

[131] Department's AA paras 27 – 28, Record pp 540 – 543 ; Thabametsi's AA paras 30 and 32, Record pp 612 and 614.

[132] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department Of Agriculture, Conservation And Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).

> *assumption. They misconstrued the nature of their obligations under NEMA and as a consequence failed to apply their minds to the socio-economic impact of the proposed filling station, a matter which they were required to consider. This fact alone is sufficient to warrant the setting aside of the decision."*[133]

127.3 Moreover, the Constitutional Court held that even if the considerations under NEMA and the Ordinance were similar, it was impermissible for the competent authority to effectively delegate their duties under NEMA to consider all relevant impacts. Section 24(1) of NEMA imposes a clear obligation on competent authorities to consider these impacts, a duty which cannot be shirked:

> *"[The environmental authorities] left the consideration of this vital aspect of their environmental obligation entirely to the local authority. This in my view is manifestly not a proper discharge of their statutory duty. This approach to their obligations, in effect, amounts to unlawful delegation of their duties to the local authority. This they cannot do."*[134]

And further:

> *"It is no answer by the environmental authorities to say that had they themselves considered the need and desirability aspect, this could have led to conflicting decisions between the environmental officials and the town-planning officials. If that is the natural consequence of the discharge of their obligations under the environmental legislation, it is a consequence mandated by the statute. It is impermissible for them to seek to avoid this consequence by delegating their obligations to the town-planning authorities."*

127.4 In unlawfully delegating these decision-making powers, the competent authority had also failed to comply with mandatory and material requirements of NEMA.[135]

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[133] Ibid para 86.

[134] Ibid at para 88.

[135] Ibid at para 89.

128 The Constitutional Court's reasoning in ***Fuel Retailers*** applies with equal force in this case.

128.1 There is no evidence to support the assertion that the IRP and the ministerial determination gave adequate consideration to climate change.[136] In any event, even if these policy instruments had given proper consideration to climate change in the abstract, that does not suffice for the purposes of an environmental authorisation under NEMA.[137]

128.1.1 An abstract, macro-level assessment of the climate change impact of additional coal-fired power could not cast any light on the specific climate change impacts of specific coal-fired power stations located at specific sites.

128.1.2 These site-specific factors that will need to be considered include, *inter alia*, the nature of the technology used at each proposed site, the location of the proposed site, the cumulative impact of other copolluters in the area, and the ways in which climate change will impact on the proposed coal fired power station over its lifetime, among a host of other factors.

128.2 Furthermore, an abstract assessment could also not determine the specific avoidance, mitigation or remedial measures that need to be put in place at each coal-fired power station to address climate change impacts

[136] Reply para 24, Record p 908.

[137] Reply para 25. Record pp 908 – 909.

128.3 These are all "relevant" considerations for the purposes of section 24O(1)(b) of NEMA that had to be adequately considered.

128.4 Therefore, to the extent that the Chief Director and the Minister purported to rely on IRP and the ministerial determination, they fundamentally misunderstood the nature of the impact assessment required of them under section 24O(1) of NEMA. Abstract, macro-level assessments would not suffice to provide a full appreciation of the relevant environmental impacts of the project.

129 Finally, as ***Fuel Retailers*** makes clear, it was not permissible for the Chief Director and the Minister to abdicate their responsibilities under section 24 of NEMA to consider all relevant environmental impacts by effectively delegating these functions to the Department of Energy. That is both an unlawful delegation and a failure to comply with the mandatory and material requirements of NEMA.

Conclusion on the first ground of review

130 On this basis, there was indeed non-compliance with the provisions of section 24O(1) of NEMA, with the result that the impugned decisions stand to be reviewed and set aside in terms of section 6(2)(b) of PAJA, read with 6(2)(f)(i) and 6(2)(i).[138]

[138] FA para123, Record p 47. See further *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others (No 1)* 2014 (1) SA 604 (CC) at paras 22, 30.

131 At the very least, in granting the environmental authorisation without having sight of a climate change impact assessment report and without any power to withdraw the environmental authorisation upon receipt of the report, the Chief Director and the Minister overlooked relevant considerations. Their decisions accordingly fall to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA. [139]

SECOND GROUND OF REVIEW: UNREASONABLENESS AND IRRATIONALITY

132 The impugned decisions were also irrational and unreasonable, making them liable to be reviewed and set aside in terms of sections 6(2)(f)(ii) and 6(2)(h) of PAJA and the principle of legality.[140]

133 PAJA recognises several grounds of irrationality. Under section 6(2)(f)(ii) of PAJA, a decision may be irrational if the decision does not bear a rational connection to the:

133.1 Purpose of the empowering provision;

133.2 The purpose for which the decision was taken;

133.3 The information before the decision maker; or

133.4 The reasons given for it by the administrator.

[139] FA paras 124 – 126, Record p 48. *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) at para 47.

[140] FA paras 127 – 131, pp 48 – 50.

134 The impugned decisions are also subject to the more searching standard of reasonableness review under section 6(2)(h) of PAJA. Section 6(2)(h) provides that administrative action is reviewable where:

> *"the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."*

135 Despite this convoluted wording, in ***Bato Star***[141] the Constitutional Court explained that this provision should be understood as simply interrorgating whether the decision is reasonable.

136 Reasonableness analysis ultimately calls for a balancing exercise to determine whether the decision achieves a proportionate balance between competing considerations. In ***Bato Star***, O'Regan J explained the considerations forming part of a reasonableness analysis:

> *"Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. … The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."*[142]

137 In this case, the Chief Director's decision is both irrational and unreasonable, as he failed to apply his mind to the need for a climate change impact assessment.

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[141] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC) at para 45.

[142] Ibid at para 45.

137.1 First, the Chief Director's decision was not rationally or reasonably connected to the purpose of the empowering provisions of NEMA, which require decisions on environmental authorisation to take account of all relevant environmental impacts in order to promote sustainable development. In the absence of any meaningful assessment of the climate change impacts, the Chief Director's decision was not rationally connected to this purpose.

137.2 The Chief Director's decision was also not rationally connected to the information before him. In upholding the environmental authorisation, the Chief Director repeated the glib statement contained in the environmental impact assessment report on the "*relatively small*" and "*low*" "indirect" climate change impacts of the project.[143] These assertions were not supported by any evidence in the environmental impact assessment report. Without a full assessment of the climate change impact of the project, there was no rational or reasonable basis for the Chief Director to endorse these baseless assertions. This is an indication that the Chief Director failed to apply his mind.[144]

138 The Minister's decision is tainted by further irrationality and unreasonableness as she agreed that the climate change impact had not been adequately assessed, she ordered that a climate change impact assessment be conducted, but upheld the environmental approval anyway.

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[143] SFA, Annexure PL 38, Record pp 524 – 526.

[144] SFA para 44, Record p 467.

139 There are two possible explanations for the Minister's decision, with both demonstrating that the Minister's decision was irrational and unreasonable.[145]

140 The first possibility is that the Minister may have believed that the climate change impacts could have no bearing on the outcome of the environmental authorisation but could only potentially warrant an amendment.

140.1 That is the *ex post facto* explanation now provided by the first to third respondents, as they suggest that the climate change impact assessment purely serves as a data collection exercise, with some possibility of resulting in an amendment to the environmental authorisations if required.[146]

140.2 For the reasons set out above, this reinvention of the Minister's decision cannot be accepted. But even if it were accepted, then the Minister's decision is patently irrational and unreasonable as she could not have reached the conclusion that climate change impacts were not material to the outcome of the environmental authorisation without having sight of the final climate change impact assessment report.

140.3 It would be patently irrational and unreasonable for the Minister to pre-empt the findings of the final climate change impact assessment report, particularly given the precautionary principle mandated by NEMA and international law. These precautionary principles require decision-makers

[145] FA paras 129 – 130, Record pp 49 – 50; Reply para 60, p 923.

[146] Department's AA para 41, Record pp 549 – 552.

to err on the side of caution and to make all reasonable efforts to acquire necessary information.

141 The second, and more likely, possibility is that the Minister accepted that the climate change impact assessment could have a material effect on whether the environmental authorisation should be granted. If that was so, then her decision was also irrational and unreasonable as the Minister has no automatic power to withdraw the environmental authorisation if the final climate change impact assessment report warrants that outcome.

142 Therefore, on all possible explanations of the Minister's decision, it was irrational and unreasonable. If the climate change impact assessment could have a material effect on the decision whether to grant the environmental authorisation, then the rational and reasonable response was to order the climate change impact assessment to be conducted and to then take a decision once the final climate change impact assessment report had been finalised.

143 Furthermore, if the first to third respondents' explanation of the effect of the Minister's decision is accepted, then the Minister's decision is irrational and unreasonable in another respect.

143.1 As indicated above, the respondents contend that the Minister intended the climate change impact assessment primarily as an ongoing emissions monitoring exercise.[147]

[147] Department's AA para 41.1, Record pp 549 – 551.

143.2 However, the effect of the Minister's decision is that the climate change impact assessment has to be concluded before construction commences and is concerned with estimating likely future consequences. It is not an ongoing monitoring exercise of actual emissions.

143.3 As a result, if the first to third respondents' explanation is accepted, then the Minister was fundamentally confused about the nature and effect of her decision.

143.4 In the Supreme Court of Appeal's recent decision in ***e.tv v Minister of Communications***,[148] the SCA held that a decision-maker's confusion about the meaning and effect of a decision is a further ground of irrationality. The SCA found that "*[t]he Minister's confusion as to the effect of the amendment shows its irrationality, and for that reason too it is in breach of the principle of legality and invalid.*"[149]

143.5 For the same reasons, the Minister's confusion in this case is further proof of the irrationality and unreasonableness of her decision.

THIRD GROUND OF REVIEW: MATERIAL ERRORS OF LAW

144 The final ground of review is that the Minister's decision is tainted by several material errors of law.[150]

[148] 2016 (6) SA 356 (SCA).

[149] Ibid at para 54.

[150] FA para 132 – 137, Record pp 50 – 52; Reply paras 63 – 68, pp

145 Section 6(2)(d) of PAJA permits judicial review where "*the action was materially influenced by an error of law*." Material errors of law are also grounds for review under the principle of legality. In ***Johannesburg Metropolitan Municipality v Gauteng Development Tribunal***,[151] the Constitutional Court held that an error of law will be material where it affects the outcome of a decision.

146 In the founding affidavit, it was contended that the Minister's decision was based on a material error of law to the extent that she believed that she has the power to immediately withdraw the environmental authorisation if the final climate change impact assessment necessitates that outcome.[152]

146.1 It is now common cause that the Minister and other officials have no automatic power to withdraw the environmental authorisation if the climate change impact assessment warrants that outcome.

146.2 Therefore, to the extent that the Minister took her decision in this mistaken belief, then this was a material error of law.

147 The first to third respondents' answering affidavit now introduces an entirely new explanation for the Minister's decision that was never presented by the Minister, nor was this explanation provided in the correspondence between the applicant's legal representatives and the Department. If accepted, this explanation contains two further material errors of law.[153]

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[151] 2010 (6) SA 182 (CC) at para 91.

[152] FA para 132 – 137, Record pp 50 – 52.

[153] Reply paras 64 – 68, Record pp 924 – 926.

148 The first of these material errors is the first to third respondents' apparent belief that the Minister's power to amend an environmental authorisation could be used to engineer its withdrawal if the final climate change impact assessment warrants that outcome.

148.1 At paragraphs 76 to 80 of the founding affidavit, Earthlife alleged that if the final climate change impact report warrants the withdrawal of the environmental authorisation, then the Minister's hands will be tied, as she has no automatic powers of withdrawal.[154]

148.2 In response, at paragraph 86 of the first to third respondents' answering affidavit, the respondents contend that if the final climate change impact assessment warrants the withdrawal of the environmental authorisation, this can be achieved using the powers of amendment under Regulation 43 of the 2010 EIA Regulations, coupled with the non-compliance process under section 31L and 31N of NEMA.[155]

148.3 The fatal difficulty with this contention, as prefaced above, is that this power of amendment could not be used for this purpose of effecting withdrawal. Powers may not be used for purposes other than for which they are granted.[156] A power to amend an environmental authorisation is not a power to engineer its ultimate revocation.

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[154] FA paras 76 – 85, Record pp 30 – 34.

[155] Department's AA para 86, Record p 563.

[156] *Van Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A)* at 999; *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 46.

148.4 Therefore, to the extent that the Minister took her decision believing that withdrawal could be effected using powers of amendment coupled with sections 31L and 31N of NEMA, then this was a material error of law.

149 Second, the first to third respondents also make the suggestion that the IRP and the 2012 determination made by the Minister of Energy somehow render it unnecessary to consider the climate change impact of the Thabametsi power station.[157] For the reasons presented above, this was a material error of law to the extent that the Minister accepted that reasoning.

150 As a result, the Minister's material error of law is compounded by the explanation now proffered on her behalf.

REMEDY

151 Earthlife seeks to have the environmental authorisation reviewed and set aside, and for the matter to be remitted to the Chief Director for a fresh decision upon final completion of the climate change impact assessment.

152 The starting point is that all invalid administrative action must be declared unlawful prior to any decision whether to exercise a discretion in setting it aside.[158]

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[157] Department's AA, para 29, p 544,

[158] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 84.

153 Following a declaration of invalidity, a court has a discretion under section 8(1) of PAJA to grant a just and equitable remedy. However, the default position is that the invalid administrative action should be set aside. As Froneman J held in ***Allpay II***:

> "*Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality."*[159]

154 Under certain circumstances, courts have permitted deviations from this "*corrective principle*".[160] But they have stipulated that relief that does not give "*full effect*" to the finding of invalidity must be justified by the circumstances of the case,[161] giving primacy to the public interest and balancing the parties' interests.[162]

155 In the present circumstances, there is no basis to depart from the default position.

156 We emphasise that Earthlife does not ask this Court to substitute the environmental authorisation with a decision of its own. In the interests of preserving the separation of powers, Earthlife maintains that the decision should be remitted back to the Chief Director to allow for a fresh decision after the final climate change impact report has been completed.[163] This will preserve the

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159 Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC) at para 30.

[160] *Allpay II* at paras 32 and 34.

[161] *Bengwenyama Minerals* at para 84.

[162] *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at paras 22, 28-9, 32; *Allpay* at paras 32-3

[163] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 47.

integrity of the environmental authorisation process and ensure that climate change impacts receive full and ample consideration.

CONCLUSION

157 For the reasons set out above, we submit that this application should succeed and the respondents should be ordered to pay the applicant's costs, including the costs of two counsel.[164]

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Chambers, Sandton

2 February 2017

[164] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at paras 19 – 28. See also section 32(2) of NEMA.

TABLE OF AUTHORITIES

South African cases

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others (No 1) 2014 (1) SA 604 (CC)

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others 2004 (4) SA 490 (CC)

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC)

Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC)

Company Secretary, Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA)

Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)

Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment 1999 (2) SA 709 (SCA)

e.tv v Minister of Communications 2016 (6) SA 356 (SCA)

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)

Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA)

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC)

Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC)

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA)

Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others [2014] 3 All SA 171 (GJ) (31 March 2014)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA).

S v Makwanyane 1995 (3) SA 391 (CC)

Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245 (CC)

Van Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A)

Foreign cases

United States

Centre for Biological Diversity v National Highway Traffic Safety Administration 538 F.3d 1172 (9th Cir.2008)

Communities for a Better Environment v City of Richmond 184 Cal.App.4th 70 (2010)

Massachusetts et al. v. Environmental Protection Agency 549 U.S. 497

Sundstrom v. County of Mendocino 202 Cal.App.3d 296, 307, 248 (1988)

Books

Jan Glazewski and Susie Brownlie, *"Environmental Assessment"* in Jan Glazewski (ed) *Environmental Law in South Africa* (2013)