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

FIRST TO THIRD RESPONDENTS'
WRITTEN SUBMISSIONS

INTRODUCTION

1. Earthlife's case centres on the following proposition: That section 24O(1) of NEMA, properly interpreted, requires that a climate change impact assessment ("climate change IA") should have been conducted and considered before the grant of an environmental authorisation to the fifth respondent ("Thabametsi"). In other words, it contends that the completion of a climate change IA was a mandatory pre-requisite for the grant of the environmental authorisation.

2. Earthlife infers this proposition from the wording of section 24O(1) of NEMA, read together with various provisions of the 2010 EIA Regulations and interpreted in light of South Africa's domestic environmental policies, section 24 of the Constitution, and South Africa's obligations under international climate change conventions.

3. Earthlife's interpretation is unsustainable. There is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change IA must be conducted before the grant of an environmental authorisation. No such provision exists as part of South Africa's obligations under international law. Indeed, South Africa's international obligations to reduce greenhouse gas ("GHG") emissions are broadly framed – they do not prescribe particular measures that the government must implement to reduce emissions. Such measures fall within the government's discretion.

4. In the exercise of its discretion, the government has taken (and is taking) extensive steps to address the issue of climate change:

    4.1. It is developing a complex set of mitigation measures, which include—

        4.1.1. Identifying desired sectoral mitigation contributions. This entails defining desired emission reduction outcomes ("DEROS") for each sector and sub-sector of the economy, based on in-depth assessment of the mitigation potential, best available mitigation options, science, evidence and a full assessment of the costs and benefits. Where it is

appropriate, these desired emission reduction outcomes will flow down to the individual company or entity level.[1]

4.1.2. Defining company-level carbon budgets for significant GHG emitting sectors. This involves drawing up carbon budgets for significant GHG emitting sectors and sub-sectors. The carbon budget for each sector or sub-sector will then be translated into company-level desired emission reduction outcomes.[2]

4.1.3. Requiring mitigation plans from companies and economic sectors for whom desired emission outcomes have been established. Such plans must set out how they intend to achieve the desired emission reduction outcomes.[3]

4.1.4. Drafting regulations and controls for specifically identified GHG pollutants and emitters.[4]

4.2. Notably—

4.2.1. These measures are still under development. South Africa has committed to developing and demonstrating the above mix of policies

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[1] Department's AA, para 38.1, Record p 547; South Africa's Nationally Determined Contribution under the Paris Agreement ("South Africa's NDC"), FA Annexure PL25, Record p 424 and 428; National Climate Change Response White Paper, FA Annexure PL23, Record p 414.

[2] Ibid.

[3] Ibid.

[4] Department's AA, para 38.1, Record p 547; South Africa's Nationally Determined Contributions under the Paris Agreement, FA Annexure PL25, Record p 424; National Climate Change Response White Paper, FA Annexure PL23, Record p 414 - 415.

and measures over five-year periods, the first phase being from 2016 – 2021.[5]

4.2.2. These mitigation measures and polices must be formulated at a national level and then applied at a sectoral and company level. They cannot be formulated in a piecemeal fashion, on a project-by-project basis.

4.2.3. In order to develop and implement these measures, the Department requires detailed, complete, accurate and up-to-date emissions data. In this respect, the National Climate Change Response Paper states that the two essential elements for the definition of desired emission reduction outcomes and the development of carbon budgets are (i) emission data and (ii) data to monitor the outcome of specific mitigation actions.[6] In this regard, the data gathered in the climate change IA for the Thabametsi power station is directly relevant – it will contribute toward a pool of baseline data that can be used for monitoring purposes.

4.2.4. The mitigation system is intended to be dynamic and flexible. The prescribed measures will be regularly reviewed and adjusted in light of the latest available science, the success of this mix of mitigation policies and measures, new accessible and affordable technology,

[5] Department's AA, para 41.1.3, Record p 550; South Africa's NDC, FA Annexure PL25, Record p 428 – 429.

[6] National Climate Change Response White Paper, FA Annexure PL23, Record p 417.

increased capability and emerging mitigation opportunities.[7] This approach envisages that the Department will intervene periodically to change the conditions imposed on GHG emitters. For example, the Department may amend the conditions of an emitter's environmental authorisation to impose a reduced carbon budget or new mitigation requirements.

4.3. In addition, the government has developed sector-specific plans that are climate-compatible. Of particular relevance is the *Integrated Resource Plan for Electricity 2010 – 2030* ("the IRP").[8]

4.3.1. The IRP was formulated in accordance with section 34 of the Energy Regulation Act, which provides that the Minister of Energy (in consultation with the Energy Regulator) may determine that new generation capacity is needed to secure the continued, uninterrupted supply of energy.[9]

4.3.2. The IRP does just that. It determines that additional energy-generating capacity is required to meet South Africa's energy requirements for 2030 and that such capacity must be provided by a mix of generation technologies. When deciding on the required mix, the Department of Energy sought to achieve an appropriate balance

[7] South Africa's NDC, FA Annexure PL25, Record p 428 – 429.

[8] Electricity Regulations on the Integrated Resource Plan 2010 – 2030, published under GN R400 in *GG* 34263 of 6 May 2011.

[9] Electricity Regulation Act 4 of 2006 ("the Electricity Act").

between the expectations of different stakeholders. It carefully considered key constraints and risks, including:

4.3.2.1. Reducing carbon emissions;

4.3.2.2. New technology uncertainties such as costs, operability and lead time to build;

4.3.2.3. Water usage;

4.3.2.4. Localisation and job creation;

4.3.2.5. Southern African regional development and integration; and

4.3.2.6. Security of supply.

4.3.3. The proposed IRP was subjected to an extensive process of public participation. During that process, 479 submissions were received from organisations, companies and individuals. Some of these raised concerns about the threat of climate change and the need for greater reliance on renewable energy and the proposed IRP was revised in light of these comments. Ultimately, the IRP determined that in order to secure the continued and uninterrupted supply of energy, the following mix of generation technologies were required: *a nuclear fleet of 9,6 GW; 6,3 GW of coal; 17,8 GW of renewables; and 8,9 GW of other generation sources*".[10]

[10] Department's AA, para 27.1 – 27.8, Record pp 540 – 543; See also Annexure ZH1 to Department's AA, Record p 576.

4.3.4. In accordance with the IRP, the Minister of Energy published a determination under section 34(1) of the Electricity Act on 19 December 2012 ("the section 34 determination"), stipulating that the following additional baseload energy generation capacity was needed to contribute toward energy security: 2500 MW to be generated from coal; 2652 MW to be generated from natural gas; 2609 MW to be generated from hydro energy sources. Such energy was to be procured through one or more of the Independent Power Producers (IPP) procurement programmes contemplated in the regulations.[11] Thabametsi has been appointed as a preferred bidder under one such programme, the Coal Baseload IPP Procurement Programme.[12]

5. The above set of mitigation measures and sectoral plans such as the IRP are aimed at balancing South Africa's development needs with its climate change imperatives. In this regard, South Africa stresses in its Nationally Determined Contribution under the Paris Agreement ("NDC") that:

5.1. It is currently facing "*acute energy challenges*" that hamper economic development.[13]

5.2. Given the historical development pathway of its energy sector, South Africa is "*currently heavily dependent on coal… as well as being reliant on a significant proportion of its liquid fuels being generated from coal*." Therefore, in the short-term (up to 2025), South Africa faces "*significant*

[11] FA Annexure PL 5, Record pp 79 – 80.

[12] Department's AA, para 27.10, Record p 543.

[13] South Africa's NDC, FA Annexure PL25, Record p 424.

rigidity in its economy" and any policy driven transition to a low carbon and climate resilient society must "*take into account and emphasise its over-riding priority to address poverty and inequality*." It states that South Africa's NDC's must be understood in the context of these and other national circumstances.[14]

6. Earthlife's submissions lose sight of this context entirely. Many of its arguments boil down to its general opposition to the use of coal-generated power. It fails to recognise that South Africa is facing an energy crisis and that the government is given scope within the domestic and international environmental law regime to make short- and medium-term adjustments to address that crisis (whilst still working to remain within the peak, plateau and decline trajectory that South Africa has committed to in its NDC).[15] In this respect, the Department acknowledges that coal-fired power stations are heavy GHG emitters, but accepts that some measure of coal-generated energy is necessary to meet South Africa's current and medium-term energy needs.[16] This balance is borne out in the IRP and the section 34 determination - neither of which have been challenged by Earthlife.

7. It is against this background that the Minister's decision must be assessed. In brief—

[14] South Africa's NDC, FA Annexure PL25, Record p 424.

[15] The timeframes are as follows: South Africa's GHG emissions will peak between 2020 and 2025, will plateau for approximately a decade and decline in absolute terms thereafter. See South Africa's NDC, FA Annexure PL25, Record p 433.

[16] Department's AA, paras 35 and 36, Record, p 546.

7.1. The Minister found that, for the purposes of granting the environmental authorisation, the Chief Director had adequately considered the climate change impacts of the Thabametsi station.[17]

7.2. However, she noted that such impacts had not been comprehensively assessed. As a consequence, she imposed condition 10.5, which required that a climate change IA must be conducted.[18] She intended that the climate change IA would serve a dual purpose –

7.2.1. First, it would enable the gathering of emissions data (which would be used, *inter alia,* for monitoring and reporting purposes); [19] and

7.2.2. Second, it would enable the Department to determine if and when it was necessary to amend or supplement the conditions in its environmental authorisation. For example, if the emissions from the Thabametsi station were significantly higher than provided in its carbon budget, or posed an unexpected and unacceptable health risk to surrounding communities, the environmental authorisation could be amended to impose additional mitigation measures.[20]

8. In the context of the regulatory regime described above, the Minister's decision cannot be impugned. There is no basis for Earthlife's claim that the Minister's decision is irrational, unreasonable, or unlawful.

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[17] Department's AA, para 8.1, Record, p 533; Minister's Appeal Decision, FA Annexure PL 16, Record p 333.

[18] Ibid.

[19] Department's AA, para 41.1, Record p 549 – 551.

[20] Department's AA, para 41.2, Record, p 551 – 553.

9. In the remainder of these submissions, we address the following issues:

9.1. First, the rationality and reasonableness of the decisions;

9.2. Second, the lawfulness of the decisions;

9.3. Third, the Minister's decision is not based on a material error of law;

9.4. Finally, we briefly discuss the supplementary affidavit sought to be adduced by Earthlife.

RATIONALITY AND REASONABLENESS

10. Earthlife contends that the decision to grant an environmental authorisation to Thabametsi in the absence of a climate change IA is irrational and unreasonable. We submit that this attack cannot be sustained on either the facts or the law.

(i) The rationality standard

11. At the outset, we note that the level of scrutiny applied in the rationality enquiry is extremely low. Rationality is a basic threshold enquiry to ensure that the means chosen by the decision-maker are rationally connected to the ends sought to be achieved. It does not involve testing whether a decision or legislation is fair or reasonable or appropriate.

12. These principles are neatly summarised in the recent Constitutional Court judgment of *Ronald Bobroff & Partners Inc v De La Guerre*:[21]

[21] *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at paras 6 – 7.

"[T]he principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of 'rationality':

> *'The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a Court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a Court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature.'*[22]

A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation." (Emphasis added)

13. Similarly, in *Pharmaceutical Manufacturers*,[23] the Court held:

> "*Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."*[24] (Emphasis added)

14. On occasion, attempts have been made to persuade the Constitutional Court to

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[22] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 63.

[23] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the RSA and Others* 2000 (2) SA 674 (CC)

[24] At para 90, emphasis added

extend and widen the ambit of rationality review. The Court has unhesitatingly dismissed these and has reaffirmed the principles enunciated in *Pharmaceutical Manufacturers.* In particular, in the *Law Society* case, the Court rejected arguments based on an extended rationality standard and reiterated that:

> *"[T]he requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise."*[25]

(ii) The reasonableness standard

15. The reasonableness enquiry imposes a higher level of scrutiny. It is context specific and calls for the balancing of a number of factors, include the following:

    15.1. The nature of the decision;

    15.2. The identity and expertise of the decision-maker;

    15.3. The range of factors relevant to the decision;

    15.4. The reasons given for the decision;

    15.5. The nature of the competing interests involved; and

    15.6. The impact of the decision on the lives and well-being of those affected. [26]

[25] *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 35.

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

16. Although the reasonableness enquiry introduces substantive requirements, the Court in *Bato Star* cautioned that courts must take care not to usurp the functions of administrative agencies:

> *"Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. 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."*[27]

(iii) The Minister's Decision

17. Earthlife contends that the Minister, in her decision, acknowledged that the climate change impact of the Thabametsi project had not been adequately assessed. Despite this, so it is contended, she upheld the Chief Director's grant of the environmental approval. This decision, Earthlife contends, is both irrational and unreasonable. The irrationality is exacerbated by the fact that the Minister, having seemingly accepted that the climate change impact assessment was irrelevant for the purposes of the environmental authorisation, imposed a condition requiring that such an assessment be conducted.[28]

18. In making this argument, Earthlife's relies on an incorrect reading of the Minister's decision. It repeatedly claims that the Minister found that the climate change impact of the project had <u>not been adequately assessed</u>. This is incorrect. In her appeal decision, the Minister stated the following:

> *"In evaluating the ground of appeal, I am aware that climate change issues were addressed, to some extent, in the air quality assessment and impact*

[27] *Bato Star* at para 45.

[28] Earthlife's HOA, para 137 – 143.5, pp 62 – 66.

study, and that the Department considered these factors 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 pursued, which includes coal-fired power stations. I must stress furthermore the Department's commitment to identifying cleaner power technologies in the medium and longer term.

However, I concur with the appellate in that climate change impact of the proposed development were not comprehensively assessed and/or considered prior to the issuance of the EA.

In view of the above, the EA is accordingly amended by insertion of condition 10.5."[29] *(Emphasis added)*

19. Earthlife has erroneously equated the term "*comprehensively*" with "*adequately*" or "*properly*". This distorts the meaning of the Minister's statement. As is clear from the decision itself, as well as the Department's answering affidavit (to which the Minister signed a confirmatory affidavit),[30] the true import of the Minister's decision is the following:

19.1. The climate change impact of the project was adequately assessed in the EIA report for the purposes of the environmental authorisation.[31]

19.1.1. In this respect, the Minister noted that the climate change impact of the decision had been considered, to some extent, in the air quality

[29] Minister's Appeal Decision, FA Annexure PL 16, Record p 333. Condition 10.5 reads:

"*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 the signature of the Appeal Decision. The climate change impact assessment must therefore be lodged with the Department for review and the recommendations therein must be considered by the Department*."

[30] Confirmatory Affidavit of Bomo Edith Edna Molewa, Record p 597.

[31] Department's AA, paras 9 – 10 and 78, Record, pp 534 – 544 and 561.

assessment and the water impact study and "*that the Department considered these factors prior to the issuance of the EA*".[32]

19.1.2. In addition, the climate change impacts of new coal-fired power stations established under the Coal Baseload IPP Procurement Programme were considered in the formulation of the IRP – the government departments carefully assessed and balanced a number of risks and constraints (including the carbon emissions of the different energy-generating sources) against the critical need to secure additional energy generation capacity that is affordable and reliable.[33] They ultimately decided that a mix of energy generation technologies was needed, including coal-fired power stations. The section 34 determination was accordingly promulgated. Neither of these decisions have been challenged by Earthlife. As such, they stand.[34]

19.1.3. The Chief Director and Minister were fully aware of the IRP and the section 34 determination when making the impugned decisions.[35] The IRP is discussed in the Final EIA Report and was raised by Thabametsi in its submissions to the Minister for the internal appeal.[36] Indeed, the Minister's decision specifically refers

[32] Minister's Appeal Decision, FA Annexure PL 16, Record p 333.

[33] Department's AA, para 27, Record p 540 - 542.

[34] Department's AA, para 27.9 – 29, Record pp 543 - 544.

[35] Department's AA, para 49.2, Record p 554 - 555.

[36] Final EIA Report, FA Annexure PL 9, Record p 135; Thabametsi's written submissions in the internal appeal, FA Annexure PL 14, para 5.13.1.4, record p 257.

to the need for a mix of power generating technologies including coal-fired stations.[37]

19.2. As a consequence, the Minister decided to uphold the environmental authorisation. However, she recognised that the climate change impacts of the project had been adequately, but not comprehensively, assessed. As such, she ordered that a climate change IA of the Thabametsi power station be carried out. [38]

19.3. The climate change IA was intended to serve the following purposes:

19.3.1. The collection of data, which may be used in the formulation of policy and mitigation measures (such as the creation of carbon budgets and DEROS)[39] and to enable the Department to fulfil its reporting obligations under international law.[40]

19.3.2. A climate change IA will enable the Department to assess and monitor the climate change impact of the Thabametsi power station and to determine whether and when it is necessary to

[37] Minister's Appeal Decision, FA Annexure PL 16, Record p 333.

[38] Minister's Appeal Decision, FA Annexure PL 16, Record p 333.

[39] Department's AA, para 53.2, Record p 556; and para 41.1, Record pp 540 – 551.

[40] South Africa has legally binding obligations under the United Nations Framework Convention for Climate Change and the Kyoto Protocol to monitor and periodically report to the international community on the country's GHG inventory, the steps taken to and envisaged to implement the UNFCCC, and any other information relevant to the achievement of the objective of the UNFCCC, including information relevant for the calculation of global emission trends. Department's AA at para 41.1.4, Record pp 550 – 551.

amend or supplement the conditions in its environmental authorisation.[41]

20. In light of the reasons given by the Minister, it was both rational and reasonable for her to uphold the grant of the authorisation and impose condition 10.5 on this basis.

21. Earthlife dismisses the Minister's explanation as an "*ex post facto explanation*" and a "*reinvention of the Minster's decision*".[42] It claims that her explanation is disingenuous and unsustainable because "*nowhere in that decision does the Minister state or imply that the climate change impact has been adequately addressed*".[43] In addition, it claims that there is nothing in the correspondence between the parties or the Rule 53 Record pertaining to the Minister's decision that suggests that the Minister considered that the climate change impacts had been adequately addressed.[44]

22. These arguments are unsustainable, for the following reasons:

    22.1. The Minister's explanation is consistent with the language of her appeal decision. There is nothing in the wording of the decision that contradicts it. Indeed, the ruling strongly supports her explanation – it would make no sense for the Minister to pointedly agree that the climate change impacts

[41] Department's AA at para 41.2, Record pp 551. The process by which an environmental authorisation may be amended is set out in Regulations 44 and 45 of the EIA 2010 Regulations.

[42] Earthlife's HOA, para 140.1 and 140.2, p 64.

[43] Earthlife's RA, para 29.1, Record p 910.

[44] Earthlife's RA, para 29.3 and 29.4, Record p 911.

of the project had not been adequately assessed, only to grant the environmental authorisation anyway.

22.2. The correspondence between the parties supports the Minister's explanation. In a letter to Earthlife's attorneys, the Department emphasised that the Minister's instruction to Thabametsi to undertake a climate change impact assessment "*In no way constitutes an acknowledgement by the Minister that the decision by the Department to issue the environmental authorisation was unlawful.*"[45]

22.3. The Minister has gone under oath and confirmed the import of her appeal decision. There is no basis to distrust or disregard her sworn testimony.

22.4. Insofar as there is a dispute of fact in this regard, the Court will apply the rule in *Plascon Evans*.[46] In essence, this rule requires that the respondent's version be accepted except in exceptional circumstances (when the allegations or denials by the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them). In this instance, the Minister's version is neither far-fetched nor untenable and must be accepted.

22.5. Finally, the courts have held, when considering judicial decisions, that the decision-maker is not required to engage every step of his or her

[45] FA Annexure PL 19, Record p 382.

[46] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* 1984 (3) SA 623 (A).

reasoning in the judgment. In *Rex v Dhlumayo*,[47] the Appellate Division stated that:

> *"Indeed, even in a written judgment it is often impossible, without going into the facts at undue length, to refer to all the considerations that arise. Moreover, even the most careful Judge may forget, not to consider, but to mention some of them. In other words, it does not necessarily follow that, because no mention is made of certain points in the judgment more especially, of course, if that judgment be an oral and extempore one they have not been taken into account by the trial Judge in arriving at his decision. No judgment can ever be perfect and all-embracing. It would be most unsafe invariably to conclude that everything that is not mentioned has been overlooked*." [48]

This principle applies with greater force to the Minister's decision. It does not follow that, because the Minister does not explain every step of her reasoning, she did not consider it when arriving at her ruling.

LAWFULNESS

23. Earthlife maintains that the decision to grant the environmental authorisation in the absence of a climate change impact assessment is unlawful and ultra vires. It does so on the basis that the climate change IA is a mandatory pre-requisite for the grant of an environmental authorisation.

24. There is no express requirement in our law that a climate change climate change IA must be conducted prior to the grant of an authorisation. Rather, Earthlife seeks to interpret section 24O(1) of NEMA and regulation 31(2) of the 2010 EIA Regulations to incorporate such a requirement. In this regard:

[47] Rex v Dhulmayo and Another 1948 (2) 677 (A).

[48] Ibid at 701.

24.1. Section 24O(1) of NEMA requires that, when considering an application for an environmental authorisation, the competent authority must take into account "*all relevant factors*", which may include any pollution, environmental impacts or environmental degradation likely to be cause by the project. Earthlife contends that climate change is a relevant factor for the purposes of this provision;

24.2. Regulation 31(2) requires that the EIA report must contain all information necessary for the competent authority to consider the application and to reach a decision. This includes an assessment of the identified impact, including cumulative impacts; the nature, extent and duration of the impact; the probability of the impact occurring and the degree to which it can be reversed or mitigated.

25. Earthlife concludes that, when read together, these provisions require that a climate change IA must be conducted and considered before an environmental authorisation may be granted. It claims that this interpretation is supported by South Africa's international obligations to combat climate change,[49] as well as the government's obligation under domestic law and the Constitution to protect the environment and promote sustainable development.[50]

26. Earthlife's interpretation cannot prevail, for the following reasons:

[49] Earthlife's HOA, para 106 – 110, pp 44 – 49.

[50] Earthlife's HOA, para 92 – 99, pp 39 – 42.

26.1. As is explained above, there is no provision in domestic environmental law that expressly requires that a climate change IA must be conducted. Nor is South Africa bound by any such a provision in international law.

26.2. At present, the imposition of climate change IA requirement will not aid (and may harm) South Africa's efforts to reduce its carbon emissions.

26.2.1. The system of mitigation measures and emission policies (described above) is still under development. Carbon budgets and emission targets for particular sectors and companies have not yet been determined.[51] In the absence of such targets, a climate change impact assessment will be of limited use or relevance in the decision to grant an environmental authorisation – the Department may be provided with the emissions data for an applicant, but will not be able to measure whether its emission levels fall within an acceptable range.

26.2.2. In such circumstances, the Department would have to elect either to ignore the carbon emission data for the purposes of granting the authorisation, or to estimate and impose emission limits on a case-by-case basis. In the latter case, the Department would be imposing a retrospective requirement on the applicant, which is prohibited under the rule of law.

26.2.3. In addition, the imposition of limits on a case-by-case basis would hamper the government's attempt to regulate and reduce South

[51] Department's AA, para 30.1 – 30.2, Record p 544.

Africa's emission targets. The government intends to develop carbon budgets and emission targets at a national level (having carried out an economy-wide analysis); it will then "cascade" this down into sector specific and company-level carbon budgets.[52] The implication of Earthlife's argument is that emission targets or budgets would be imposed in a piece-meal fashion at a company-level.

27. Therefore, there is no basis to interpret NEMA and the 2010 EIA Regulations to include a climate change impact assessment as a mandatory pre-requisite for the grant of the environmental authorisation.

28. Properly interpreted, the requirements of section 24O(1) were met by the decisions. In this regard, we submit that the climate change impact of the Thabametsi project were taken into account by the Chief Director and the Minister:

    28.1. As explained above, the climate change impacts were considered in the air quality assessment and the water impact study.

    28.2. In addition, they were considered comprehensively in the formulation of the IRP and the section 34 determination. The Minister and Chief Director were fully aware of the IRP and balancing process it involved. In addition, the

[52] Department's AA, para 38.1, Record p 547; South Africa's Nationally Determined Contribution under the Paris Agreement ("South Africa's NDC"), FA Annexure PL25, Record p 424 and 428; National Climate Change Response White Paper, FA Annexure PL23, Record p 414.

climate change issues were raised in the submissions made to the Minister and were engaged with in her decision.

28.3. Ultimately, Earthlife's complaint is not that the climate change impacts of the project were not considered. Its complaint is rather that insufficient weight was placed on these impacts. However, this does not constitute a ground of review.

28.4. This principle was affirmed by the Supreme Court of Appeal in the *Clairison's* case.[53] When considering a decision of the MEC for Environmental Affairs and Development Planning in the context of a review application, the Court held that:

> *"When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."*[54]

28.5. The Court is went on to state that—

> *"It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter:*
>
> > *'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so*

[53] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA).

[54] *Clairison's*, at para 18.

> *could constitute a usurpation of the decision-maker's discretion."*[55]
>
> …
>
> *"The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere".* [56]

29. Both the Chief Director and the Minister considered and weighed the relevant factors and made a decision in good faith. In these circumstances, there is no basis for the court to interfere with those decisions.

MATERIAL ERRORS OF LAW

30. Earthlife claims that the Minister's decision is tainted by a number of material errors of law. We deal with the alleged errors in turn.

31. First, Earthlife claims that the Minister's decision was based on a material error of law to the extent that she believed that she had the power to immediately or automatically withdraw the environmental authorisation if the climate change IA warrants that outcome. The Minister has never claimed that she has the power to automatically revoke the authorisation. As such, no error of this kind existed.

32. Second, Earthlife claims that the Minister's decision was based on the mistaken belief that she could use the provisions that allow for the amendment of the

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[55] *Clairison's*, at para 20.

[56] *Clairison's*, at para 22. See also *Engen Petroleum Limited v The Business Zone 1010 CC t/a Emmarentia Convenience Centre* (20513/2014) [2015] ZASCA 176 (27 November 2015) at para 20.

environmental authorisation to "*engineer*" the revocation of the authorisation should the climate change IA warrant that outcome.

32.1. This is a misrepresentation of the case put forward by the Department and there is no basis for Earthlife's attempt to attribute bad faith to the Minister's conduct.

32.2. The Department neither claimed nor implied that the amendment procedures could be used to engineer a withdrawal of the authorisation. Rather, the Department explained that, should the information gathered by climate change impact assessment warrant an amendment to the environmental authorisation, the Department would be empowered to do so.[57]

32.3. For example, if it appears from the climate change IA that the emissions from the Thabametsi station are significantly higher than anticipated or pose an unacceptable health risk to nearby communities, the Department could amend the environmental authorisation to require additional abatement measures or design alterations.[58] These amendments would be affected in a good faith.

32.4. The Department would only resort to the process of issuing compliance notices and revoking the environmental authorisation if Thabametsi failed to comply with these lawfully imposed conditions.[59] Hence, there is no

[57] Department's AA, para 41.2.2, Record, p 551 - 552.

[58] Department's AA, para 41.2.3, Record, p 552.

[59] Department's AA, para 41.2.4, Record, p 552.

basis for the claim that the Department would be exercising its powers for an ulterior purpose.

33. Third, Earthlife claims that the Department suggests that the IRP and section 34 determination render it unnecessary to consider the climate change impact of the Thabametsi station. This, it contends, is a material error of law.

33.1. This claim has no basis in fact. As explained above, the climate change impacts of the project were considered as part of the air quality assessment and the water study. The climate change impacts were raised by the parties in their submissions and were addressed by the Minister in her decision.

34. In light of the above, Earthlife has failed to establish that the impugned decisions were based on one or more material errors of law.

EARTHLIFE'S SUPPLEMETARY AFFIDAVIT

35. Earthlife seeks the admission of an additional supplementary affidavit in these proceedings. In the affidavit, Earthlife seeks to introduce, and draw inferences from, the draft climate change impact assessment report on the Thabametsi power station, which was published on 27 January 2016 ("the draft report").

36. The Department opposes the admission of the affidavit and the draft report, on the ground that the production of the report has nothing to do with, and can have no bearing on, the decision under review. It was released well after the Chief Director's decision to grant the environmental authorization to Thabametsi and the Minister's decision to dismiss Earthlife's subsequent review. It could not have influenced the decision-makers at the time that the decisions were made. As

such, it is irrelevant to the determination of this review and is inadmissible in these proceedings.[60]

37. The draft report will be dealt with in accordance with the appropriate procedures. If and when it is finalized, the Department will carefully assess the report. If action is required, it will take the steps that are necessary in terms of the applicable legislation.[61]

CONCLUSION

38. In light of the arguments set out above, we submit that Earthlife has failed to establish grounds to review and set aside the impugned decisions.

G MARCUS SC

M MAENETJE

E WEBBER

Chambers, Sandton

9 February 2017

[60] Department's Supplementary Affidavit, Record, p 1426 – 1428.
[61] Ibid.