APPEAL TO THE MINISTER OF ENVIRONMENTAL AFFAIRS

In the matter between:

GROUNDWORK	**Applicant**
and	
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	**First Respondent**
ACWA POWER KHANYISA THERMAL POWER STATION (RF) (PTY) LTD	**Second Respondent**

SECOND RESPONDENT'S RESPONSE TO APPELLANT'S SUBMISSIONS IN TERMS OF REGULATION 60(4) OF THE 2010 EIA REGULATIONS

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INTRODUCTION

1 On 18 April 2017, the attorneys of the applicant ("Groundwork") submitted, on its behalf, "Submissions to the Minister in terms of Reg 60(4) of the 2010 EIA Regulations". Prior to that, on 29 March 2017, Groundwork filed its notice of intention to appeal in terms of regulation 60(1) of the Environmental Impact Assessment Regulations, 2010 ("the 2010 EIA Regulations").[1] Groundwork wants to appeal the decision of the Department of Environmental Affairs ("the Department") to grant an integrated environmental authorisation in respect of the Khanyisa Thermal Power Station ("Khanyisa").

2 Although Groundwork refers, in various places in its submissions,[2] to its "notice of appeal", it is assumed that it means to refer to its "notice of intention to appeal". Regulations 60 and 61 of the 2010 EIA Regulations distinguish between the notice of intention to appeal (already filed by Groundwork and in respect of which condonation is sought) and the appeal itself (which Groundwork will presumably file if condonation is granted). Regulation 60(4) envisages that, if the notice of intention to appeal is to be filed late, condonation from the Minister of Environmental Affairs ("the Minister') may be sought. The implication is that, if condonation is refused, no appeal may be lodged in terms of regulation 61.

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1 The 2010 EIA Regulations were published on 18 June 2010 in GN R543 in GG 33306. The 2010 EIA Regulations were repealed by the 2014 Environmental Impact Assessment Regulations. However, because the Khanyisa authorisation was granted when the 2010 Regulations were in force, Groundwork has followed the 2010 EIA Regulations in attempting to appeal the decision to grant the authorisation.

2 See, for instance, paragraphs 3 and 4

3 In an email from Ms Heloise van Schalkwyk, the Deputy Director: Appeals and Legal Review, ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Ltd ("ACWA") was invited to object to the condonation application. This is ACWA's objection. ACWA submits below that condonation ought to be refused. It submits that the case for condonation is so deficient that the Minister ought to refuse it without engaging the merits of Groundwork's appeal. However, it reserves the right to address the merits of the appeal in due course, should condonation be granted.

4 Groundwork says that it "only became aware" of the environmental authorisation in respect of Khanyisa in June 2015. It does not say precisely when in June 2015 it acquired this knowledge. However, the email annexed to the condonation application as Annexure A reveals that Groundwork acquired this knowledge on 10 June 2015.

5 One of the questions that the Minister will consider, when deciding whether to grant condonation, is how late the notice of intention to appeal was submitted by Groundwork. There are two ways to assess this question:

5.1 Regulation 60(1) requires a notice of intention to appeal to be submitted "within 20 days after the date of the decision". It does not say that the notice of intention to appeal may be submitted within 20 days of the date on which the appellant "became aware of the decision". This is a formulation that is used elsewhere,[3] and the drafter of the 2010 EIA

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[3] See, for example, regulation 14 of the Kwazulu-Natal Tourism Regulations, 2004; Section 36(1)(a) of the Property Valuers Profession Act 47 of 2000; regulation 14 of the Gauteng Heritage Resources Authority Regulation, 2002; and section 161 of the Kwazulu Nature

Regulations chose not to use it. On this basis, the notice of intention to appeal is approximately 3 years and 4 months late. (This is based on the following calculation: the environmental authorisation was granted on 31 October 2013. The 20-day period envisaged by regulation 60(1) expired on 20 November 2013. The notice of intention to appeal was filed some 3 years, 4 months and 9 days later). It is submitted that, on the clear wording of regulation 60(1), this is the correct approach.

5.2 Alternatively, it may be assumed, for the sake of argument, that the clock only began to run when Groundwork became aware of the decision. On this basis, the notice of intention to appeal was filed 21 months late. (This is based on the following calculation: the 20-day period envisaged by regulation 60(1) would have expired, if calculated from 10 June 2015, on 30 June 2015. The notice of intention to appeal was filed one day short of 1 year and 9 months after this date.)

6 On either basis, therefore, the notice of intention to appeal was filed very, very late. ACWA submits below that Groundwork has given the Minister no good reason to condone its extremely late filing of its notice of intention to appeal.

Conservation Act 29 of 1992. All of these pieces of legislation, and many others, entitle an aggrieved party to appeal or review a decision within a certain number of days of having "become aware of the decision".

THE CASE FOR CONDONATION

7 Groundwork argues that it should be granted condonation for the following reasons:

7.1 It has good prospects of success on appeal.[4]

7.2 There have been changed circumstances since the environmental authorisation was granted, which warrant the reconsideration of the environmental authorisation.[5]

7.3 It has a good explanation for its delay:

7.3.1 Although the notice of intention to appeal was filed more than three years after the authorisation was first granted, the authorisation has been amended on four occasions. These amendments must be taken into account for the purpose of calculating the delay.[6]

7.3.2 A judgment of the High Court ("the *Thabametsi* judgment") was handed down on 8 March 2017.[7] The delay is justified because the *Thabametsi* judgment confirmed, for the first time, the legal duty on the part of the Department to conduct a climate-change assessment when deciding whether to grant

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4 Condonation application at paras 21-24 and para 44

5 Condonation application at paras 26-31

6 Condonation application at para 45

7 Earthlife Africa Johannesburg v Minister of Environmental Affairs [2017] JOL 37526 (GP)

an environmental authorisation in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA"). The judgment now provides certainty when, prior to this judgment, "the Department and the Minister maintained that there was no legal duty" to conduct such an assessment.[8]

7.3.3 While it may be so that, as a matter of "legal theory", the *Thabametsi* judgment only confirmed the pre-existing legal position, as a practical matter the judgment produced a shift in the prevailing position.[9] (This argument appears to be a response to some of the submissions set out below, which were mentioned briefly in correspondence sent by ACWA to the Department after the notice of intention to appeal was filed.)

7.3.4 Groundwork only became aware of the environmental authorisation in 2015. At that stage, it chose to prioritise the environmental authorisations of other Independent Power Producers. Only when the *Thabametsi* judgment was handed down, did it realise that the Khanyisa authorisation was unlawful and susceptible to appeal, at which point it brought the appeal.[10]

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8 Condonation application at paras 46-7

9 Condonation application at para 48

10 Condonation application at para 50

7.3.5 The changed circumstances described above could not have been addressed earlier.[11]

7.4 ACWA will not be prejudiced by condonation being granted. In this regard, Groundwork argues that:

7.4.1 ACWA is a long way from being able to commence construction of its power station because further approvals are outstanding.[12]

7.4.2 Any development work done thus far by ACWA on the project was at risk and a normal part of the process of seeking regulatory approval.[13]

7.4.3 Any minor prejudice to be suffered by ACWA as a consequence of condonation being granted is outweighed by the importance of the stakes of the appeal.[14]

7.5 A decision by the Minister to grant condonation will ensure consistency and fairness by treating the Thabametsi project and Khanyisa in the same way.[15]

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11 Condonation application at para 51

12 Condonation application at para 53

13 Condonation application at paras 54-55

14 Condonation application at para 56

15 Condonation application at paras 57-60

THE CASE FOR CONDONATION IS MERITLESS

8 It is submitted that, for the reasons given below, none of the arguments summarised above has any merit. Condonation should, therefore, be refused.

The role of the amendments

9 When it comes to calculating the extent of Groundwork's delay, it is necessary to address the relevance of amendments that have been made to the Khanyisa environmental authorisation. As shown above, Groundwork submits that the amendments to the authorisation (some being effected recently) must be "taken into account" when calculating the period of delay. Despite the fact, therefore, that it seems to accept that its delay in appealing has been lengthy, it seeks to muddy the waters by referring to recent amendments to the environmental authorisation.

10 It is not clear on what basis these amendments are alleged to be relevant. On Groundwork's own version[16] (which is correct), the amendments had the following effect:

10.1 The amendment of 28 July 2015 increased the permissible capacity of the power station from 450MW to 600MW and made provision for road realignment.

10.2 The amendment of 25 February 2016 related, again, to road realignment.

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16 See Condonation Application at para 9

10.3 The amendment of 2 February 2017 related to the name of the applicant and the name of the property on which the station is to be erected.

10.4 The amendment of 3 April 2017 related to the date by which kinetic leach testing for the plant must be conducted (and extended that date).

11 The only one of these amendments which could possibly have been material to Groundwork's appeal was the first one, in which the potential capacity of the project was increased from 450MW to 600MW. However, this amendment was made less than two months after Groundwork claims first to have become aware of the impugned decision, and *after* it went on record as an interested and affected person.[17] Therefore, even if one were to allow the date of that amendment (i.e. 28 July 2015) to be taken into account when calculating the delay, the delay would be almost two years.

12 In short, therefore, the fact that the environmental authorisation was amended on several occasions does not assist Groundwork in its attempts to justify the very late filing of its appeal.

No legal basis for condonation

13 Section 24O of NEMA came into force on 1 May 2009.[18] Some of the criteria to be taken into account by the Minister when deciding whether to grant

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17 See Annexure A to Groundwork's submission

18 Section 24O was introduced by section 8 of the National Environmental Management Amendment Act 62 of 2008, which was assented to on 5 January 2008 and commenced on 1 May 2009.

environmental authorisations have been amended since that date. However, the obligation to take account of "any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused" has been included in section 24O(1)(b) since inception (i.e., 1 May 2009). This is the provision on which Groundwork relies in this application, and which enjoyed the court's attention in the *Thabametsi* judgment.

14 The main premise of Groundwork's condonation application is that:

14.1 The *Thabametsi* judgment found "for the first time in our law" that section 24O(1) of NEMA requires the Department to take account of climate change when deciding whether to grant an environmental authorisation.

14.2 The notice of intention to appeal was filed within 20 days of the *Thabametsi* judgment.

14.3 Condonation should therefore be granted. Or (although this is never expressly said), perhaps was not necessary in the first place.

15 However, these submissions are indefensible in law:

15.1 It is well-accepted that judges do not make law; they interpret law. It is also well-accepted that our law adopts an objective approach to validity and meaning – the validity and meaning of statutes are to be

determined at enactment, and not when a particular interpretive question comes before court.[19]

15.2 The consequence of this is that, even if the court in *Thabametsi* was correct, the judgment (which is, in any event, distinguishable from the present case in several respects) did not make law or change the legal position. It simply informed the parties of the correct interpretation of section 24O(1)(b), as it has read since 1 May 2009.

15.3 There is therefore nothing magical about the judgment when it comes to the calculation of time. If the Court in *Thabametsi* was correct in its interpretation of section 24O(1)(b), then that was the meaning of section 24O(1)(b) from the date on which it was enacted (1 May 2009). That means that it bore the same meaning on the date when the Khanyisa authorisation was granted (31 October 2013) and on the date on which Groundwork alleges to have become aware of it (10 June 2015).

15.4 There is a good reason why the law adopts this stance: the unavoidable consequence of the approach proposed by Groundwork in this condonation application is that, from the moment the *Thabametsi* judgment was handed down, every EA granted since section 24O came into force would be vulnerable to being set aside, even years later. The law turns its face against such chaos.

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[19] See New National Party of SA v Government of South Africa 1999 (3) SA 191 (CC) at para 22

15.5 There was, therefore, no legal impediment that prevented Groundwork from filing its notice of intention to appeal within 20 days of the decision being made or, at the very least, within 20 days of becoming aware of the decision. However, it waited almost two more years before doing so.

15.6 Specialist litigants – such as an NGO focusing on environmental questions that wishes to litigate on an environmental matter – are presumed to know the area of law in which they operate.[20] Groundwork's contention that it did not know that the Department's Khanyisa decision was "unlawful" until it received the *Thabametsi* judgment is therefore not to be accepted.

15.7 It is also irrelevant what stance the Department previously adopted to this question. It was always open to Groundwork to appeal against the Khanyisa authorisation decision and advance all arguments available to it, in support of its contention that the decision should be set aside. If the Minister rejected these arguments, then Groundwork was entitled to take the Minister on review. Indeed, it has threatened to do so in this very case.[21] In the *Thabametsi* judgment, in an extract relied upon by Groundwork, the Court held that "a plain reading of section 24O(1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered".[22] If that is so, then there was nothing stopping

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20 See, for example, S v Molubi 1988 (2) SA 576 (BG) at 581; See also S v de Blom 1977 (3) SA 513 (A) at 528-533; Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd 2016 JDR 2255 (SCA) at para 64

21 See paragraph 25 of the condonation application.

22 Thabametsi judgment at para 88; Groundwork condonation application at para 17

Groundwork advancing this argument when it first became aware of the environmental authorisation.

15.8 It is, for this reason, also wrong of Groundwork to rely on the alleged need to treat Thabametsi and Khanyisa equally, for the sake of fairness (see paragraph 7.5 above). The *Thabametsi* judgment makes clear that, unlike Groundwork, Earthlife Africa (the NGO applicant in the *Thabametsi* case) took advantage of its internal remedies, prosecuted its appeal promptly and then instituted a review when the appeal was against it.[23] That is precisely what Groundwork ought to have done in this case. Litigants who behave differently are treated differently. There is nothing unfair about this. On the contrary, it would be unfair on ACWA to permit Groundwork to appeal now.

16 The argument summarised in paragraph 15 above is not merely "legal theory".[24] It is a summary of the prevailing legal position, to which the Minister (and, indeed, Groundwork) is bound. Therefore, the contrast that Groundwork seeks to draw between "legal theory" and the practical implication of the *Thabametsi* judgment is impermissible. Groundwork would in principle be entitled to rely on the reasoning in the judgment when arguing the merits of the appeal. However, the judgment is totally irrelevant when it comes to calculating Groundwork's delay.

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23 See para 2 of the *Thabametsi* judgment which shows that the entire appeal process, including the Minister's decision, was completed within 1 year of the environmental authorisation being granted.

24 See paragraph 48 of the condonation application

Delay causes uncertainty and prejudice

17 There is another, related, reason why our law does not accept the approach proposed by Groundwork. It is because of the importance of legal certainty:

17.1 Our law assumes administrative decisions to be valid.[25] It also, based on this assumption, considers citizens to be entitled to act on the validity of such decisions.[26] Accordingly, undue delay in challenging administrative decisions precludes them from being challenged at all, even if actual prejudice has not been shown.[27]

17.2 When the environmental authorisation was granted in October 2013, section 24O(1)(b), in its present form, was in force. The Khanyisa application was made with a view to complying with that provision. When it was granted, all stakeholders were entitled to assume that it was validly granted. When no appeal was brought within the requisite time period, and thereafter for many months, this assumption was only strengthened and entrenched. This is the basis on which our law proceeds.

17.3 ACWA has explained, in correspondence to the Minister (annexed as **ACWA1** to this submission), that, since 2013, it has been developing the Khanyisa project on the strength of the valid environmental authorisation, at significant cost. Development work is ongoing and it

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25 See Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC) at paras 44-5

26 See Gqwetha v Transkei Development Corporation Ltd 2006 (2) SA 603 (SCA) at para 22-3

27 See Gqwetha (supra) at para 23; Opposition to Urban Tolling Alliance (OUTA) v SANRAL 2013 JDR 2297 (SCA)

has entered into a material agreement in terms of which the necessary measures to commence the authorised activities have begun.

17.4 In elaboration of what was said in the correspondence, it must be emphasised that ACWA has acted in reliance on the validity of the environmental authorisation:

17.4.1 In terms of the bidding process, there are two important phases. First, there is the identification of the preferred bidders. Secondly, there is commercial negotiation leading to financial close. Once financial close is reached, a power purchase agreement ("PPA") is concluded.

17.4.2 In order to make the necessary arrangements to reach the point of financial close, ACWA has spent approximately ZAR28 million thus far and has committed a further ZAR32 million. This money has been spent and/or committed in reliance on the validity of the environmental authorisation. The arrangements to reach financial close have involved the conclusion of various contracts with Engineering, Procurement and Construction ("EPC") Contractors, Operations & Maintenance Contractors and suppliers, who have also incurred costs in fulfilment of the agreements. These costs are not included in the above figures.

17.4.3 In preparation for the signing of the PPA, ACWA has entered into an LNTP (limited notice to proceed) agreement with its

EPC Contractor in terms of which it has committed a further US$10 million and under which:

17.4.3.1 detailed engineering for the project has been largely completed;

17.4.3.2 the EPC Contractor has been mobilized to undertake site geotech investigations which are imminently to commence; and

17.4.3.3 other critical activities that are required to ensure delivery of the project will soon begin.

17.4.4 Critical activities are necessary to be undertaken before the construction on the project commences. This includes the relocation of a road which is necessary to prepare the site for construction of the power station once the power purchase agreement has been signed.

17.4.5 The risk that ACWA Power is seeking to manage by acting as outlined above and prior to the power purchase agreement being signed, is that if the above activities do not take place at this stage, it may result in the Project not being ready for completion in accordance with the time periods contemplated for preferred bidders to meet their obligations.

17.5 Groundwork argues, in rejecting the notion of prejudice to ACWA, that it is a normal part of the process of applying for regulatory approval that

costs should be incurred "on risk". However, Groundwork overlooks the trite principles of law described in paragraphs 17.1 and 17.2 above. It is a "normal part of the regulatory process of applying for regulatory approval" that decisions are presumed to be valid unless challenged and are to be challenged promptly. That is, after all, the whole point of the certainty principle acknowledged by our law and summarised in paragraphs 17.1 and 17.2 above. It should furthermore be emphasised, as explained above, that the nature of the bidding process requires preferred bidders to incur substantial expenses in order to bid and once declared preferred bidder, to ready themselves for commercial close and the conclusion of a PPA. This makes the timeous challenge of administrative decisions, on which the preferred bidder is entitled to rely, all the more important.

17.6 It is therefore simply not open to Groundwork to delay for, on the best interpretation for it, two years in bringing its appeal and then dismiss ACWA's prejudice as being a normal part of the process.[28]

17.7 It should, in any event, again be emphasised that it is not necessary for ACWA to show actual prejudice when resisting the condonation application. As shown above, the law does not countenance undue delay, even where no actual prejudice has been established.

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[28] See, generally, the judgment in Arandis Power (Pty) Ltd v President of the Republic of Namibia 2016 JDR 1315 (Nm). In that case, the court expressly rejected the argument that preparatory work was done "on risk" on facts very similar to those in the present case (see paras 27 to 29).

Changed circumstances inadmissible

18 Groundwork relies on alleged changed circumstances, since the time when the environmental authorisation was first granted, to justify its attempt to appeal now. It argues that changed circumstances justify the granting of condonation.

19 The question, therefore, is whether "changed circumstances" may be considered by the Minister when deciding whether to grant condonation. This, in turn, requires a consideration of whether, when deciding the appeal itself, the Minister will be entitled to take changed circumstances into account.

20 The questions summarised in paragraph 19 above are interpretive questions. They require an interpretation of the 2010 EIA Regulations, and in particular the provisions dealing with appeals, to determine whether changed circumstances may be taken into account on appeal.

21 The proper approach to interpretation is to look at the plain meaning of the document (in this case the 2010 EIA Regulations) understood in the context of the document as a whole.[29] It is submitted that, applying this approach, changed circumstances cannot be taken into account by the Minister in deciding an appeal. They are, therefore, irrelevant when it comes to consider whether condonation should be granted:

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29 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18; See also Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at paras 11-12

21.1 It is trite that an appeal is directed at the correctness of the appealed decision at the time that it was taken.[30] Therefore, one would have expected the 2010 EIA Regulations to permit the Minister, expressly, to take account of changed circumstances when deciding an appeal if that was the intention of the drafters. There is no such permission.

21.2 Indeed, the role played by changed circumstances *counts against* condonation being granted:

21.2.1 The 2010 EIA Regulations require a notice of intention to appeal to be filed within 20 days of the appealed decision being made. The regulations then contemplate the following timetable for the further conduct of the appeal:

21.2.1.1 The appeal itself must be filed within 30 further days of the filing of the notice of intention to appeal.[31] That takes the time period to a total of 50 days.

21.2.1.2 The respondents are then afforded a 30-day period in which to file an answering statement.[32] That takes the time-period to a total of 80 days.

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30 See the discussion in National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd 1993 (2) SA 245 (C) at 248J-250E

31 Regulation 62(1) of the 2010 EIA Regulations

32 Regulation 63(1) of the 2010 EIA Regulations

21.2.1.3 The Minister must make a decision within a further 90 days of receiving all of the relevant submissions and information.[33] Therefore, unless condonation is granted along the way, the full appeal is meant to be finalised within 170 days, less than six months.

21.2.2 The regulations therefore contemplate a speedy process to resolve appeals. While it is true that condonation for the late filing of appeals (and further documents relevant to the appeal) may be granted, this does not detract from the fact that the Regulations envisage the prompt finalisation of appeals. This demonstrates that, as an interpretive matter, it was never intended for appeal processes to remain open indefinitely, constantly taking account of changed circumstances.

21.2.3 The point is this: if changed circumstances could be taken into account for the purpose of granting condonation, every condonation application (no matter how late) would have to be granted. The longer the delay, the greater the likelihood of changed circumstances. On Groundwork's approach, any change in circumstances would warrant the reopening of the process, even years later: the very antithesis of the certainty principle described above.

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[33] Regulation 66(2) of the 2010 EIA Regulations

21.3 Lastly, the principles of interpretation mentioned in paragraph 20 above require the 2010 EIA Regulations, as a whole, to be considered when determining the scope of the Minister's appeal powers.

21.3.1 In this regard it is highly relevant that, in regulation 38(2)(b), the Minister (or her delegate) has the express power to amend an environmental authorisation on his or her own initiative.

21.3.2 Regulation 43(a) of the 2010 EIA Regulations provides that one of the bases on which the Minister may amend an authorisation is to "prevent deterioration, or further deterioration, of the environment".

21.3.3 Therefore, the regulations themselves envisage a specific vehicle for the type of changed considerations relied upon by Groundwork to be taken into account by the Minister, and to form the basis of future amendments to the environmental authorisation.

22 The discussion above demonstrates that Groundwork is wrong when it says that changed circumstances suggest that condonation should be granted now. They also demonstrate that Groundwork is wrong when it argues that, because of the long lifespan of Khanyisa, a speculative assessment of climate change must be conducted now. The regulations have a built-in mechanism to ensure that, should any deterioration be detected or anticipated, the Department has the power to amend (or even suspend – see regulation 47(1)(b)) the environmental authorisation granted in respect of Khanyisa.

CONCLUSION

23 ACWA submits that Groundwork has provided no basis for the Minister to grant condonation. Its application is so late, and its explanation so indefensible, that even if the appeal itself had the strongest of merits (which is denied) it would not justify the granting of condonation.

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RE: NOTICE OF INTENTION TO APPEAL AGAINST THE INTEGRATED ENVIRONMENTAL AUTHORISATION ISSUED IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 AND THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2010 FOR THE ESTABLISHMENT OF A 600MW COAL-FIRED POWER STATION AND ASSOCIATED INFRASTRUCTURE – IPP KHANYISA POWER STATION NEAR EMALAHLENI, MPUMULANGA PROVINCE

We represent ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Limited ("our client") which intends constructing and operating the coal-fired Khanyisa Power Plant with a capacity of 306MW (the "Project").

We have been sent a copy of the letter sent to you by the Centre for Environmental Rights ("CER") on 29 March 2017 in which it provides confirmation of its client, groundWork's

intention to appeal the environmental authorisation granted to our client in 2013 (the "**Environmental Authorisation**"). By way of background, we confirm that the Environmental Authorisation for the Project was initially granted to Anglo Operations but it has since been transferred to our client which is now the holder of the Environmental Authorisation which is set to be the subject of groundWork's appeal.

We note in the penultimate paragraph of the CER's letter that it has requested that the Department provides it with an extension for the late filing of its notice of intention to appeal in terms of regulation 60(4) of the 2010 Regulations.

It is our client's submission that the Minister should decline to extend the period envisaged by regulation 60(1) for, amongst others, the following reasons:

1. It is a well-accepted principle that the law is objectively-ascertainable. Judges do not make law but simply interpret the law as determined by the legislature. Section 24(1) of NEMA, which is the provision that formed the basis of the decision in *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, has been in force since 29 January 1999, when NEMA first came into force. Assuming (as argued by the CER on behalf of groundWork, but denied by our client) that the *Earthlife* judgment correctly interpreted section 24(1) of NEMA, section 24(1), from inception (in 1999), required climate change to be taken into account when environmental authorisations are considered. It is therefore not open to a litigant such as groundWork to bring an appeal at this late stage. Rather, it ought to have brought an appeal at the time that the Environmental Authorisation was granted. The sole basis for seeking condonation given by the CER is that the *Earthlife* judgment was recently handed down. Since this reason is bad in law, condonation cannot be granted.

2. The recent Supreme Court of Appeal decision in Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others (90/2013) [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (9 October 2013) ("the *OUTA* judgment") has confirmed that holders of authorisations such as that held by our client are entitled to act and rely on the principle of legal certainty. Administrative law proceeds on the premise that decisions such as our client's Environmental Authorisation are valid and binding. The *OUTA* judgment placed great emphasis on that principle when holding that, ordinarily, litigants should not be permitted to attack administrative decisions (whether by review or by internal appeal) when they have delayed unreasonably in doing so. To provide otherwise, and allow an appeal at this late stage, would simply erode that principle.

Since 2013, our client has been developing the Project on the strength of a valid Environmental Authorisation, at significant cost. Development work is ongoing and our client has entered into a material agreement in terms of which the necessary measures to commence the authorised activities have begun. Any appeal at this late stage will clearly result in significant prejudice to our client, which is the very circumstance that motivated the Supreme Court of Appeal's decision in the *OUTA* judgment.

For the reasons given above, there is no lawful basis on which the Minister may be expected to extend the 20-day period envisaged by regulation 60(1) of the 2010 Regulations on the facts of this case. It is accordingly our respectful submission that the Minister ought simply to refuse the request and decline to accept the notice of intention to appeal. The implication of this would be that no appeal may be lodged by groundWork in due course. This is because it is a jurisdictional requirement to lodge an appeal that a valid notice of intention to appeal has first been lodged.

Yours faithfully

Fasken Martineau