IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 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

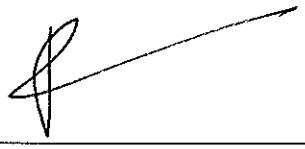
FILING SHEET:

FIFTH RESPONDENT'S HEADS OF ARGUMENT

PRESENTED FOR SERVICE AND FILING:

The fifth respondent's heads of argument, with the parties' joint practice note having been filed on 2 February 2017.

DATED at **SANDHURST** on this the **9th** day of **FEBRUARY 2017**



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FIFTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. Since 2011, the State's policy has been to procure a significant portion of new electricity from new, independently-owned coal-fired power stations.[1] That policy was adopted with the support of the Department of Environmental Affairs ("the DEA"), pursuant to an extensive public consultation process and after a full consideration of the climate change implications of such an approach.[2] It recognised the need to balance environmental protection against South Africa's urgent need for additional electricity generating capacity.[3]

2. In accordance with that policy, on 19 December 2012, the Minister of Energy determined, in terms of section 34(1) of the Electricity Regulation Act,[4] that:

> *"1. that baseload energy generation capacity is needed to contribute towards energy security, including 2500 megawatts (MW) to be generated from Coal, which is in accordance with the capacity allocated to "Coal (PF, FBC, Imports)", under the heading "New build", for the years 2014 to 2024, in Table 3 of the Integrated Resource Plan for Electricity 2010-2030 (published as GN 400 of 06 May 2011 in Government Gazette No. 34263) ("IRP 2010-2030");*
>
> *. . .*
>
> *4. electricity produced from the Coal, Natural Gas and Hydro energy sources described above ("the electricity"), shall be procured through one or more IPP procurement programmes as contemplated in the Regulations, which may include, where appropriate and having regard to all relevant circumstances, tendering processes, direct negotiation with one or more project developers, or other procurement procedures ("procurement programmes")".*

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1 See Integrated Resource Plan for Electricity 2010-2030 ("the Plan"), PL4 pp 75-78

2 Minister's AA pp 540-543 para 27; Thabametsi AA pp 611-615 paras 29-33; not disputed: RA p 932 paras 86-87; pp 943-944 paras 121-124

3 Thabametsi AA p 612 para 30; not disputed: RA pp 943-944 paras 121-124

4 Act 4 of 2006

3. That binding determination triggered a procurement process – the Coal Baseload Independent Power Producer Procurement Programme ("the Coal IPP Programme") – in terms of which applicants bid to be appointed as independent power producers, and permitted to construct and operate coal-fired power stations.

4. The fifth respondent, Thabametsi, has been appointed by the Department of Energy as a preferred bidder under the Coal IPP Programme. Thabametsi proposes to establish, own and operate a 630 megawatt coal-fired power station near Lephalale, Limpopo ("the power station").[5]

5. One of the requirements of the Coal IPP Programme is that a preferred bidder must procure an environmental authorisation from the DEA for the construction and operation of the proposed power station.[6] Thabametsi applied for and was granted such an environmental authorisation.

6. The applicant, Earthlife, appealed the grant of the environmental authorisation to the first respondent ("the Minister") but she dismissed the appeal. In these proceedings, it seeks to review and set aside both the grant of the authorisation and the dismissal of its appeal against such grant.[7]

7. We submit that the review cannot succeed for two principal reasons:

    7.1. Earthlife's challenge to the outcome of the internal appeal is based on a fundamental misreading of the Minister's decision. Properly understood, that decision accepted that climate change had been adequately considered for the purposes of the environmental authorisation, but called for a climate change impact assessment to be undertaken for future use.

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5 Thabametsi AA p 602 para 4; RA p 941 para 115

6 FA pp 15-16 para 21; Thabametsi AA p 622 para 48

7 NOM pp 1-2 paras 1.1 and 1.2

7.2. Earthlife's attack on the grant of the environmental authorisation centres on the claim that the climate change impact of the proposed power station had to be assessed through the conduct of a climate change impact assessment. But that is not so. While climate change is a relevant factor for the DEA to consider, the regulatory regime does not require the conduct of a climate change impact assessment as a prerequisite to the grant of an environmental authorisation. There is no basis for reading such an obligation into the regime.

8. Earthlife's review accordingly falls to be dismissed.

9. As importantly for present purposes, it is clear from its papers that Earthlife brings this review in pursuit of two distinct objectives.

10. First, it seeks to establish that a coal-fired power station can only be granted an environmental authorisation after its climate change impact has been "*properly*" assessed.[8] This, it claims, necessitates the conduct of a formal climate change impact assessment which considers, at a minimum, the cumulative impact of climate change and the ways in which climate change will impact on the proposed power station over its lifetime.[9]

11. In other words, it seeks to establish the conduct of a comprehensive climate change impact assessment, as a jurisdictional prerequisite to the grant of an environmental authorisation for the establishment of coal-fired power stations – despite the absence of such requirement from the regulatory regime.

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8 See Earthlife heads p 2 para 4

9 Earthlife heads p 59 para 128.1.2

12. Second, it seeks to prevent Thabametsi from ever being permitted to construct and operate its proposed power station. This is apparent from the following:

12.1. Earthlife has repeatedly issued public statements recording its absolute opposition to the establishment of any new coal-fired power stations in South Africa.[10] Indeed, the present review proceedings have been expressly identified as part of a strategy to halt the construction of coal-fired power stations.[11]

12.2. In these proceedings, Earthlife has confirmed it considers the coal-fired power stations an inappropriate means to generate electricity since "*other forms of power generation are more sustainable and less damaging to the environment and people of South Africa*".[12]

12.3. It has also repeatedly averred that a climate change impact assessment is necessary not only to ascertain what conditions and safeguards should be imposed to limit the power station's climate change impact, but also to determine whether a proposed coal-fired power station should be permitted at all.[13]

12.4. Finally, it has appealed the majority of environmental authorisations granted to coal IPPs to date.[14]

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10 Thabametsi AA pp 637-639 para 87; see also annexures AA15 to AA17 pp 783-791

11 Thabametsi AA p 638, excerpting from AA16 p 789

12 RA pp 927-28 para 72

13 See RA p 904 paa 14.1. See also Earthlife heads p 6 para 7.1

14 Thabametsi AA p 640 para 88; not disputed: RA pp 949-950 paras 140-142

13. Indeed, the DEA has recognised, in separate proceedings, that Earthlife is motivated by the "*untenable"* view that all coal-fired power stations should be refused because they contribute to CO_2 emissions globally.[15] Earthlife has not disavowed such goal in these proceedings – despite an express invitation to do so.[16]

14. Properly understood then, this review is directed at derailing the establishment of the Thabametsi power station, by depriving Thabametsi of the environmental authorisation it requires to be appointed as an independent power producer.

15. Neither of these objectives can competently be achieved through these review proceedings. As we address below, the first objective required a challenge to the legislative regime governing environmental impact assessments. The second necessitated an attack on the Minister of Energy's determination regarding the procurement of baseload energy from coal. Earthlife has not taken either of these steps.

16. In the heads of argument:

    16.1. We begin by describing the policy and regulatory context within which the environmental authorisation was granted. We seek to show that the State's policy and legislative position demands the establishment of new coal-fired power stations. Neither Earthlife nor the DEA can frustrate that objective.

    16.2. We then address the lack of any requirement for a climate change impact assessment to be undertaken.

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15 See finding in Colenso internal appeal, AA8 p 691 para 4.7, quoted in Thabametsi AA p 625 para 54.4.

16 See Thabametsi AA pp 642-643 paras 93-94; RA p 950 para 142

16.3. Next, we deal with the Minister's decision in the internal appeal to suggest that Earthlife's challenge is based on a misreading of it. Properly understood, neither the legal framework nor the Minister's decision required the conduct of a climate change impact assessment as a prerequisite to the grant of an environmental authorisation.

16.4. We show that Earthlife blows hot and cold in relation to the Minister's decision: it has engaged extensively in the climate change impact assessment process required by the Minister's decision and in so doing has used the decision, which it contends is invalid, to seek to impose substantial additional obligations on Thabametsi.

16.5. We briefly advance two points in limine against the Earthlife review

16.5.1. The review must fail because it is, in truth, a challenge to a regulatory framework which Earthlife failed to challenge when it was promulgated and cannot indirectly and belatedly challenge in the present proceedings; and

16.5.2. The review is incompatible with the election that Earthlife made in deciding to engage with the climate change impact assessment process that flowed from the Minister's decision.

16.6. Finally, we address each of Earthlife's substantive grounds of review in turn and show that there is no merit to any of them.

THE REGULATORY CONTEXT DEMANDS COAL-FIRED POWER STATIONS

17. Government has recognised that coal is "*the most emissions-intensive energy carrier"*,[17] and that coal-fired power stations inevitably emit significant volumes of greenhouse gases ("GHGs"), which cause climate change. Indeed, as Earthlife points out, the government has identified coal-fired power stations as the single largest national source of GHG emissions.[18]

18. Yet despite this, government has determined that coal-fired power stations are an essential feature of its medium-term electricity generation plans. It has done so in:

    18.1. its national environmental policy, through the National Climate Change Response White Paper ("the White Paper");

    18.2. its national energy policy, through the adoption of the Integrated Resource Plan for Electricity 2010-2030;

    18.3. the Department of Energy's binding determination on the mix of electricity generation technologies, adopted in terms of the Electricity Regulation Act; and

    18.4. at the international level, in its Nationally Determined Contribution ("NDC"), its climate change commitment made under the Paris Agreement.

19. We deal briefly with each of these enactments in turn.

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17 White Paper, PL23 p 415

18 Earthlife heads p 2 para 2

The White Paper[19]

20. The White Paper recognised that climate change is "*a measurable reality"* in South Africa,[20] and acknowledges that South Africa is vulnerable to its impacts. It sets out South Africa's "*vision for an effective climate change response and the long-term, just transition to a climate-resilient and low-carbon economy and society"*.[21] It proposes that climate change be addressed by:

    20.1. managing South Africa's climate change impacts through interventions that build and sustain its social, economic and environmental resilience and emergency response capacity; and

    20.2. making a fair contribution to the global effort to stabilise GHG concentrations in the atmosphere.[22]

21. The White Paper identified adaptation and mitigation measures that South Africa proposed to adopt across various sectors.[23] The DEA has confirmed, in its answering affidavit, that it has taken steps to give effect to the policy objectives identified in the White Paper, including:

    21.1. the development and implementation of a National Climate Change Response Adaptation Strategy;

    21.2. the development and implementation of a GHG emission reduction system; and

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19 The White Paper is included in the record as annexure PL23 pp 389-418

20 White Paper, PL23 p 394

21 White Paper, PL23 p 394

22 White Paper, PL23 p 400

23 White Paper, PL23 pp 405-418

21.3. the adoption of a national GHG mitigation framework.[24]

22. But the White Paper expressly recognised that South Africa's reliance on coal for electricity generation was, and would continue to be, a significant contributor to GHG emissions.[25] It recorded that a shift to low-carbon electricity generation options would only be possible in the medium term, and not immediately.[26] Consequently, South Africa's GHG emissions were expected to increase and peak in the short term, before plateauing and declining over time.[27]

23. The White Paper thus anticipated that South Africa's reliance on coal-generated power would continue, not that it would immediately abate.

The Integrated Resource Plan for Electricity

24. South Africa's electricity generation plans for the period 2010 to 2030 are set out in the Integrated Resource Plan for Electricity 2010-2030 ("the Plan").[28] The Plan records government's policy on the future use of different technologies to meet South Africa's energy requirements.[29]

25. The Plan was prepared by the Department of Energy in consultation with various government departments (including the DEA),[30] and was amended pursuant to a

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24 DEA AA pp 544-545 para 30

25 White Paper, PL23 p 415

26 White Paper, PL23 pp 415-416

27 White Paper, PL23 p 416

28 The Plan was published under GNR400 in Government Gazette 34263 of 6 May 2011. Excerpts are included in the record as PL4 pp 75-78.

29 Thabametsi AA p 615 para 37; not disputed: RA pp 943-944 paras 121-124. See also letter from DOE, AA2 p 658 paras 3.2-3.4; p 659 para 3.8

30 DEA AA p 541 para 27.5; Thabametsi AA p 611 para 29.2; not disputed: RA pp 943-944 paras 121-124. See also letter from DOE, AA2 p 658 para 3.6

public participation process.[31] Concerns about the threat of climate change and the need to reduce carbon emissions were given particularly careful attention, in preparing, adjusting and finalising the Plan.[32] The Plan was ultimately adopted by Cabinet, and thus represents the policy of government as a whole.[33]

26. After weighing various relevant policy factors and modelling various scenarios, the Plan provides for 6.3 GW of electricity over the period from 2010 to 2030 to be provided from coal. That entailed bringing forward anticipated coal generation projects, originally expected only after 2026, for earlier implementation.[34]

27. In particular, Table 5 and paragraph 6.2 of the Plan expressly envisaged that coal-fired power plants would be established by independent power producers, in 2014/2015 "*in order to avoid security supply concerns"* and that these privately operated power stations would generate electricity through the fluidised bed combustion process. Paragraph 6.3.1 stated, in this regard, that:

> *"Coal fluidised bed combustion (FBC) 2014/15: These coal units will be built, owned and operated by IPPs. They need to be firmly committed to by the private investors, in a timely manner, to ensure that this expected capacity will be met. From a central planning perspective, an alternative will be required to replace this capacity by 2019 if it does not materialise."*[35]

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31 DEA AA p 541 para 27.5; Thabametsi AA p 611 para 29.2; not disputed: RA pp 943-944 paras 121-124

32 DEA AA p 542 para 27.8.2; Thabametsi AA pp 612-614 para 31; not disputed: RA pp 943-944 paras 121-124. See also letter from DOE, AA2 p 658 para 3.6

33 See also letter from DOE, AA2 p 659 para 3.8

34 Thabametsi AA p 614 para 32; not disputed: RA pp 943-944 paras 121-124

35 Thabametsi AA p 614 para 33; not disputed: RA pp 943-944 paras 121-124

28. The Plan thus provided for the urgent roll-out of coal-fired power stations using fluidised bed combustion technology as part of government's national policy on energy procurement.

The Minister of Energy's Determination

29. Section 34 of the Electricity Regulation Act[36] empowers the Minister of Energy, in consultation with the National Energy Regulator, to:

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[36] Section 34 states:

> ***"34. New generation capacity.—***
>
> *(1) The Minister may, in consultation with the Regulator—*
>
> *(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;*
>
> *(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;*
>
> *(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;*
>
> *(d) determine that electricity thus produced must be purchased by the persons set out in such notice;*
>
> *(e) require that new generation capacity must—*
>
> *(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;*
>
> *(ii) provide for private sector participation.*
>
> *(2) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to—*
>
> *(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;*
>
> *(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;*
>
> *(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act No. 73 of 1989) or the National Environmental Management Act, 1998 (Act No. 107 of 1998), or as may be required by any other law, for or on behalf of the State or prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;*
>
> *(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;*

"(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

. . .

(e) require that new generation capacity must—

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

(ii) provide for private sector participation."

30. On 19 December 2012, the Minister of Energy, in consultation with the National Energy Regulator, determined, in terms of section 34(1), that 2500 megawatts of new electricity generation capacity would be generated from coal, and that such coal-generated electricity would be produced by independent power producers ("the Determination").[37] The Determination gave binding effect to aspects of the electricity generation policy outlined in the Plan including those aspects of the Plan that required the construction by independent power producers of coal power stations using fluidised bed combustion technology.[38]

(e) subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business.

(3) The Regulator, in issuing a generation licence—

(a) is bound by any determination made by the Minister in terms of subsection (1);

(b) may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.

(4) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act No. 86 of 1968)."

[37] The determination was published in GN1075 in Government Gazette 36005 of 19 December 2012. It is included in the record as annexure PL5 pp 79-80

[38] See the reference in PL5 p 79 paragraph 1 to *"the capacity allocated to 'Coal (… FBC …)" under the heading "New Build" for the years 2014 to 20124 in Table 3 [of the Plan]"*

31. Nationally, then, the government has developed a cohesive energy-generation strategy that demands the establishment and operation of new coal-fired power stations using fluidised bed combustion technology, like that proposed by Thabametsi. It has done so with due regard to the climate change implications of such an approach, and in order to safeguard the security of South Africa's energy supply.[39]

32. The government is constitutionally empowered to strike a balance between environmental protection and sustainable development in this way. As the Constitutional Court found in *Fuel Retailers*:[40]

> *"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 s 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."*[41]

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39 Thabametsi AA p 614 para 33; not disputed: RA pp 943-944 paras 121-124. See also letter from DOE, AA2 p 659 para 3.12

40 *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); 2007 (10) BCLR 1059 (CC)

41 *Fuel Retailers* para 45. See also para 61, which states:

> *"Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact of the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplated that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development."*

33. Neither this Court, nor Earthlife, may simply disregard the policy approach adopted by the State and the role that coal-fired power stations play in it.

The importance of the Thabametsi power station

34. The development of the Thabametsi power station is not just permitted under the Plan and the Determination; it is integral to giving effect to them.

35. The Request for Proposals that gave rise to the development of the Thabametsi power station was expressly framed as a request for proposals for new generation capacity *"under the Coal Baseload IPP Procurement Programme"*[42]

36. The Independent Power Producer Office of the Department of Energy has confirmed that:

36.1. "*The Determination requires that the Department [of Energy] procures capacity and energy output from various Baseload Energy sources and the Department has designed the Coal Baseload IPP Procurement Programme and has accordingly selected the Thabametsi Project to procure that part of the capacity and energy output which the Determination requires to be derived from coal power generation."*[43]

36.2. *"the Thabametsi Project was selected by the Department as a Preferred Bidder after a competitive and rigorous procurement process in terms of the Coal IPP Programme. <u>The Thabametsi Project is viewed by the Department as a critical project required to meet the country's electricity</u>*

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[42] Annexure "PL6" p 81.

[43] Letter from DOE, AA2 p 659 para 3.13. See also Thabametsi AA p 621 para 45.6; only relevance of the DOE's views disputed: RA p 945 para 126

<u>demand</u> in terms of Government policy under the IRP and Determination, having weighed up the negative impacts of climate change."[44]

36.3. In addition, the Thabametsi Project has been registered as a strategic infrastructure project in terms of the Infrastructure Development Act by the Presidential Infrastructure Coordinating Commission, due to its economic and social importance. [45]

South Africa's international obligations

37. South Africa's international obligations similarly anticipate and permit the development of new coal-fired power stations in the immediate term.

38. South Africa has signed and ratified the UN Framework Convention on Climate Change, acceded to the Kyoto Protocol and signed the Paris Agreement (but not yet enacted it domestically).[46]

39. The UN Framework Convention and the Kyoto Protocol oblige developed countries, identified in Annex I to the Convention, to adopt measures to mitigate climate change and to limit GHGs to set emissions targets. South Africa is not an Annex I country, and is not bound to any emissions targets under these treaties.

40. The Paris Agreement requires State parties to commit to Nationally Determined Contributions, which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue.

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[44] Letter from DOE, AA2 p 660 para 3.14; emphasis added. See also Thabametsi AA p 621 para 45.6; only relevance of the DOE's views disputed: RA p 945 para 126

[45] Letter from DOE, AA2 p 660 para 3.14. See also Thabametsi AA p 621 para 45.6; only relevance of the DOE's views disputed: RA p 945 para 126

[46] It is common cause that South Africa has signed the Paris Agreement, but that has not yet enacted it domestically: see DEA AA p 545 para 32; Thabametsi AA p 627 para 61.3; RA p 933 para 92

41. Significantly, South Africa's NDC[47] expressly anticipates the establishment of further coal-fired power stations and an increased carbon emission rate until 2020.[48] It records the adoption and planned implementation of the Plan, and describes it as a "*climate-compatible sectoral plan*"[49] – notwithstanding the Plan's anticipated reliance on new coal-fired power stations.

42. The NDC explains the rationale underpinning government's approach as follows:

> "*South Africa faces the challenge of climate change as a developing country, with overriding priorities to eliminate poverty and eradicate inequality. Eliminating poverty and eradicating inequality requires addressing major challenges in creating decent employment, which in turn requires sustainable economic development, improving basic education, health and social welfare and many other basic needs such as access to food, shelter and modern energy services. In addition, South Africa is presently facing acute energy challenges that hamper economic development. As a result of the historical development pathway of its energy sector, South Africa is currently heavily dependent on coal…*
>
> *Therefore, in the short-term (up to 2025), South Africa faces significant rigidity in its economy and any policy-driven transition to a low carbon and climate resilient society must take into account and emphasise its overriding priority to address poverty and inequality. South Africa's INDC should be understood in the context of these and other national circumstances.*"[50]

43. The NDC thus records that climate change action takes place in a context where poverty alleviation is prioritised, and South Africa's energy challenges and reliance on coal are acknowledged.[51] South Africa has adopted a carefully calibrated system that is reliant on new coal-generated power, but anticipates decreased reliance on coal across all emissions sources, over time. (In this regard, we note that there is no significance to the fact that the Thabametsi power station is

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47 Included in the record as annexure PL25 pp 423-433.

48 NDC, PL25 pp 428-429; Thabametsi AA p 629 para 68; not disputed: RA 948 para 134-135

49 NDC, PL25 p 424

50 NDC, PL25 p 424

51 See DEA AA p 546 para 35

intended to operate until 2061. If its emissions are not curtailed over time, then other source of emissions will have to be managed to reduce South Africa's overall GHG emissions rate.)

44. Striking the balance in the manner that it has, is consistent with its constitutional and statutory obligation to protect the environment and to promote sustainable development. As the Constitutional Court has explained:

> *"NEMA requires that environmental authorities place people and their needs at the forefront of their concern so that environmental management can serve their developmental, cultural and social interests. The continued existence of development is essential to the needs of the population, whose needs a development must serve. This can be achieved if a development is sustainable. The collapse of a development may have an adverse impact on socio-economic interests such as the loss of employment. The very idea of sustainability implies continuity."*[52]

Implications for this case

45. At both the national and international level, South Africa regards the development of new coal-fired power stations as an integral part of its drive to secure its energy needs and its socio-economic development. The establishment and operation of these power stations is consistent with, and catered for in, the State's climate change commitments.

46. This fact has important implications for the present case.

    46.1. First, the Minister of Energy took the decision to include new coal-fired power stations in the State's energy generation technology mix in 2012, when the Determination was made. The Determination is a binding administrative decision that demanded the development of new coal-fired

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[52] *Fuel Retailers* para 75

power stations, including privately procured power stations using fluid bed combustion technology like the Thabametsi power station. If Earthlife objected to the introduction of further coal-based electricity generating capacity (as it in fact does),[53] it was required to challenge the Determination on review within a reasonable time. It did not do so, and is now time-barred from bringing such review. It should not be permitted, by this Court, to invalidate or frustrate the Determination through the present proceedings.

46.2. Put differently, Earthlife is not permitted, through the present review application, to wholly preclude the establishment of the Thabametsi power station. It is a misuse of the court process for it to seek to secure that end.

46.3. Second, the DEA was obliged to have regard to, and give effect to, the government's strategy of permitting new coal-fired power stations.[54] It could not, through the environmental authorisation process, seek to undermine or frustrate government's position on the development of further coal-generated energy. That is not to suggest that the DEA was relieved of its obligation to consider all relevant factors – including climate change – in assessing the authorisation application. But it had to do so in a manner that promoted and gave effect to government policy. That obligation flows from s 40 of the Constitution, which recognises that all spheres of government are "*interdependent and interrelated"*, because

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53 See, in particular, RA p 908 para 24, where Earthlife candidly admits its view that the Plan and the Determination did not give adequate consideration to climate change since, if they had, they would not have made such a large allocation for coal in the planned technology mix.

54 That it did is clear from the Minister's appeal ruling which emphasized that many of the objections of Earthlife were objections to all coal fired power stations (see p 360) and that South Africa had committed itself to a mix of power generation technologies which included coal (p 364).

South Africa is one sovereign, democratic state.[55] A department that refuses to give effect to government policy and the binding determinations of another government department violates the principle of cooperative government.[56]

46.4. Finally, in assessing the DEA's obligations under NEMA and the EIA Regulations, this Court must give due weight to government's policy and administrative determinations in respect of future energy supply. They must be seen as consistent with, and as giving effect to, the cautionary principles contained in section 2 of NEMA. The Constitutional Court has found that:

> *"Seen in the context of the Management Act as a whole the principles [in section 2 of NEMA] are directed to the formulation of environmental policies by the relevant organs of state, and the drafting and adopting of their environmental implementation and management plans, rather than to controlling the manner in which organs of state use their property. The section does not make provision for rights and obligations; instead it sets out principles expressed at times in abstract rather than concrete terms. These principles must be taken into account by the relevant departments of state and the provincial governments in the preparation of their environmental implementation plans; by municipalities in the preparation of their policies including integrated development plans and the setting of land development objectives; by conciliators in resolving differences between the Committee for Environmental Co-ordination and Departments of State; and in the preparation of environmental impact reports required for the granting of permission for certain prescribed activities that may not be undertaken in terms of the Management Act without the sanction of a Minister or an MEC. They must be balanced against other relevant considerations including the state's obligation to fulfil its constitutional obligations in respect of social and economic rights."*[57]

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55 See in this regard *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC); 1999 (4) BCLR 383 (CC) para 50

56 See *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 26.

57 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) para 69

46.5. It means that the government's policy decisions must inform this Court's assessment of how NEMA is properly interpreted and applied in the context of this case. The Court cannot ignore or substitute the government's multi-faceted, polycentric determinations on energy procurement with its own view (or that of Earthlife) as to the appropriateness of coal-based electricity generation.

47. For present purposes, we submit that the application is brought for the impermissible purpose of precluding the establishment of Thabametsi's coal-fired power station. It should be dismissed on this basis alone.

NO REQUIREMENT FOR A CLIMATE CHANGE IMPACT ASSESSMENT

48. In these proceedings, Earthlife contends that:

48.1. climate change is a relevant factor that must, in terms of section 24O(1) of NEMA, be taken into account by the DEA in considering an application for an environmental authorisation in respect of a coal-fired power station;

48.2. a climate change impact assessment is consequently necessary under regulation 31(2) of the 2010 EIA regulations, and must conform to its requirements; and

48.3. that, in turn, requires an assessment of the nature, extent, duration of the impact, its cumulative impacts and the degree to which it can be reversed or mitigated.[58]

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[58] See, in particular, Earthlife heads pp 33-35 paras 78-81

49. It advances this contention in the face of the fact that none of the provisions of NEMA, the 2010 regulations, the 2014 EIA regulations that replaced them,[59] or the qualification criteria of the IPP Coal Programme[60] require a climate change impact assessment to be conducted.

Earthlife's premise does not logically lead to its conclusion

50. Earthlife devotes a significant proportion of its heads to establishing that climate change is a relevant consideration that ought to be taken into account by the DEA in considering an application for the environmental authorisation of a coal-fired power station.

51. But that proposition misses the point. Climate change was, in fact, considered in this case, as we will show below. Earthlife's real complaint is not that climate change was not considered, but that it was not considered in as much detail as Earthlife would have wanted it to be considered.

52. Earthlife contends that the only way in which climate change can be "*properly"* assessed is through an impact assessment devoted solely to the issue of climate change.

53. There is, with respect, no basis for that contention. None of the provisions of NEMA or the EIA regulations require a self-standing climate change impact assessment to be conducted. Climate change is merely one of a number of factors that the DEA must take into account in assessing the environmental authorisation

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59 Published in GNR 982 in Government Gazette 38282 of 4 December 2014. Although the 2010 regulations have now been replaced by the 2014 regulations, it is common cause that the present case is governed by the 2010 regulations.

60 Attached to the FA as annexure PL6 pp 81-118. The environmental consent criteria appear on pp 111-114 para 4.1.

application. It has a discretion, and the necessary expertise, to determine how that factor is appropriately assessed and weighed. This Court – and, indeed, Earthlife – must afford it a proper opportunity and due deference to exercise that discretion.[61] The DEA, in turn, must exercise its discretion in a manner that gives effect to (rather than undermines) government's requirement that coal-fired power stations must be established, notwithstanding their high GHG emission rate.

54. Earthlife suggests that the lack of legislative provisions requiring a climate change impact assessment is no barrier to its claim. It contends that section 24O of NEMA and regulation 31 of the 2010 EIA regulations are "*better interpreted*" to require such an assessment, and that its scope can be determined through the scoping report process. But such approach is impermissible:

54.1. There is, at present, no legislated framework for the conduct or assessment of a climate change impact assessment.[62] There are, in particular, no prescribed limits for GHG emissions rates. It follows that there is no standard to which the DEA could presently purport to hold Thabametsi, were it to require a climate change impact assessment to be conducted as a prerequisite to the grant of an environmental authorisation.

54.2. The rule of law requires that rules must be enacted and publicised in a clear and accessible manner, to enable people to regularise their affairs with reference to them.[63] It is anathema to the rule of law to hold a party to requirements or constraints that have not been so enacted. Holding

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61 See, in this regard, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 46, cautioning courts against undue interference in an administrator's areas of expertise.

62 DEA AA p 554 para 47.1

63 *Affordable Medicines Trust and Others v Minister of Health and Another 2006 (3) SA 247 (CC) paras 34, 108; Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47

Thabametsi to a climate change impact assessment requirement or GHG limit that has not been enacted in the environmental regime would violate the rule of law and be unconstitutional. Substantive requirements of the kind pressed for by Earthlife cannot simply be "read in" to the legislative regime.

54.3. That is particularly so where:

54.3.1. The DEA has expressly considered adopting regulations that require a GHG emission assessment and pollution prevention plan, and has refrained from doing so;[64] and

54.3.2. The DEA has confirmed that the regulatory regime does not require a climate change impact assessment to be conducted as a prerequisite to the grant of an environmental authorisation, and has expressly declined to require other independent power producers to conduct such an assessment.[65]

54.4. It would be manifestly unfair to hold Thabametsi to the conduct of a climate change impact assessment as a jurisdictional prerequisite to the grant of its environmental authorisation. To do so would be to impose an obligation that has been deliberately withheld from the regulatory regime. It would also serve to bind Thabametsi to more onerous obligations than have been applied to its (potential) competitors.

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64 The Minister has twice published notice of her intention to adopt a GHG inventory and to require the approval of a pollution prevention plan for activities that involve GHG emissions but ultimately did not do so: Thabametsi AA pp 623-624 para 53; not disputed: RA pp 945-946 paras 129-130

65 Thabametsi AA pp 624-625 para 54-55

54.5. Moreover, it would trespass on the separation of powers between executive and judiciary for the Courts, in the absence of any specific provision relating to climate change in the legislative regime, to determine what particular approach the Minister should adopt if and when s/he has regard to climate change as a factor relevant in the environmental authorisation process.

55. We accordingly submit that the environmental regulatory regime cannot be interpreted to incorporate a substantive climate change impact assessment requirement, and GHG emissions limits. Those requirements have not been enacted into the legislative regime, and cannot be imposed by this Court.

56. Furthermore, if Earthlife considers section 24 of the Constitution to require a detailed climate change impact assessment to be conducted for the environmental authorisation of coal-fired power stations, then it must challenge NEMA and/or the EIA regulations as unconstitutional for the failure to adopt such a requirement. It cannot disregard the absence of the requirement from the relevant legislation, and seek to invoke the constitutional right directly to read it in. Doing so violates the principle of subsidiarity.[66]

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[66] See *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51; *Chirwa v Transnet* 2008 (4) SA 367 (CC) para 123; *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 24 (CC) para 248; *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 73; *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) paras 37 and 38; *PFE International v Industrial Development Corporation of SA* 2013 (1) SA 1 (CC) para 4; *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 27; *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 (1) BCLR 1 (CC) para 53. In *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 161, a majority of the Court confirmed that the essence of the principle of subsidiarity is that

> "*where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.*"

THE MINISTER'S DECISION

57. Earthlife argues that, properly understood, the Minister's decision accepted that a climate change impact assessment was necessary to an environmental authorisation, and that the climate change impacts of the Thabametsi power station had not been sufficiently considered.[67] It contends that it was irrational for the Minister to uphold the grant of the environmental authorisation in the face of her finding that the climate change impact had not been properly assessed.[68]

58. But Earthlife's interpretation is based on a selective reading of the Minister's decision. It focuses solely on the portion of the decision dealing with the DEA's alleged failure to take South Africa's national and international climate change obligations into account.[69]

59. Read holistically, the Minister's decision is simply not capable of an interpretation that Earthlife seeks to impose on it. The Minister did not find that Thabametsi was required to conduct a climate change impact assessment in order to procure an environmental authorisation, nor did she find that the climate impacts of the project had been inadequately assessed. To the contrary:

    59.1. The Minister considered, at length, whether the DEA had, in granting the environmental authorisation, failed to give effect to section 24 of the Constitution and the provisions of NEMA.[70] She found that it had acted properly and in accordance with the legislative regime, and dismissed that ground of appeal.

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67 Earthlife heads p 21 para 54

68 Earthlife heads p 22 para 55

69 See internal appeal decision, PL16 pp 362-364 para 6.4

70 Internal appeal decision, PL16 pp 343-353.

59.2. The Minister also assessed whether the cumulative impacts of the proposed power station (particularly its impact on water supply) had been adequately taken into account.[71] She noted that while projects of this nature inevitably "*have certain impacts which will not be comprehensively mitigated or prevented"*, its cumulative impacts had been properly assessed and were acceptable given the socio-economic benefits derived from the project.[72] The Minister was clearly alive to the competing considerations at play in the appeal, and duly weighed them.

60. The Minister was thus satisfied that the DEA had considered and applied the provisions of NEMA and the regulations thereto. Earthlife has not impugned her findings in this regard.

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71 Internal appeal decision, PL16 pp 358-362.

72 Internal appeal decision, PL16 p 362. See also PL p 350, where she states:

> *"In evaluating this ground of appeal, I note that many of the appellant's contentions relate, in general, to coal-fired power stations and the impacts thereof. I note furthermore, that the Atmospheric Impact Report, which will form part of the AEL application process, will provide details of the facility's impact on human health and the receiving environment.*
>
> *…*
>
> *Distinction must also be made between the impact of the proposed facility and cumulative impacts in the area. The facility's impact is expected to be low due to the abatement technology proposed, as well as management measures that will be put into place to address emissions from all sources within the facility. However, as far as cumulative impacts are concerned, it must be pointed out that the Waterberg-Bojanala Priority Area Air Quality Management Plan (AQMP) will set out goals and objectives that will seek to reduce air pollution from existing facilities and ensure that future facilities comply with the minimum emission standards."*

And PL16 p 351, which records:

> *"I am of the view that there will be an unavoidable cumulative impact with dust generated during construction and decommissioning of the Power Station, as well as during normal operations of the proposed coal stockpile and ash dump at the Power Station."*

61. It was only in dealing with Earthlife's complaint that the DEA had failed to take adequate account of South Africa's national and international climate change obligations that the Minister stated:

> "*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 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 that the Department's commitment to identifying cleaner power technologies in the medium and longer term.*
>
> *However, I concur with the appellant in that climate change impacts 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 the insertion of condition 10.5 of the EA".*[73]

62. The Minister then imposed a new condition in the environmental authorisation, namely clause 10.5 which states:

> "*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."*[74]

63. Contrary to Earthlife's claim, the Minister's did not find that climate change had been inadequately assessed for the purposes of the grant of the environmental authorisation, still less that a climate change impact assessment was a

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73 Internal appeal decision, PL16 p 364

74 Internal appeal decision, PL16 p 364

prerequisite to the grant of the environmental authorisation. That reading of her decision cannot be reconciled with her findings in the appeal or her Determination to dismiss it. It was also expressly disavowed by the DEA in correspondence exchanged with Earthlife where it recorded that the Minister's instructions to Thabametsi to undertake a climate change impact assessment "*in no way constitutes an acknowledgement by the Minister that the decision to issue the EA was unlawful"*.[75]

64. On its terms, the decision finds that climate change was considered:

64.1. in determining that a mix of power generation technologies had to be pursued, which included coal-fired power stations; and

64.2. by the DEA in evaluating the air quality assessment and impact study,

but that more comprehensive information could be obtained and used by the DEA. That is why condition 10.5, requiring a further climate change impact assessment, was imposed.

65. Both Thabametsi and the DEA understand clause 10.5 as operating prospectively only. It cannot serve retrospectively to deprive Thabametsi of the environmental authorisation it has been granted.[76]

66. But that does not mean that the climate change impact assessment is an exercise in futility. As the DEA explains, it serves two distinct functions:

66.1. First, it allows the DEA to gather detailed information on its current and anticipated future GHG emission rates. That is necessary for it to

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75 FA p 27 para 68.1, quoting the letter, PL19 p 382

76 DEA AA p 549 paras 40-41; Thabametsi AA p 635 para 81

formulate and update, among others, its carbon budget and to ensure compliance with the NDC.[77]

66.2. Second, it enables the DEA to monitor and assess the climate change impact of the Thabametsi power station, and potentially to amend or supplement the conditions attached to its environmental authorisation, in future, to require additional abatement or mitigation measures.[78]

67. Significantly, based on its independent reading of the Minister's decision, Thabametsi also understood the climate change impact assessment as designed to gather information on South Africa's GHG emissions rate and to inform the carbon budget that may be allocated to it.[79] That this is the obvious implication of her decision.

68. Earthlife suggests that Thabametsi and the DEA have sought to "*reinvent"* the Minister's decision after the fact, and that they are precluded from doing so.[80] But there is no basis for its inference of bad faith:

68.1. As we have explained above, Thabametsi and the DEA share an understanding of the Minister's decision, which they reached independently of one another. They have applied the only logical interpretation of the Minister's decision. It is Earthlife's understanding of that decision that leads to anomalies and inconsistencies.

68.2. The explanation of the decision is not at odds with its terms or the correspondence exchanged between DEA and Earthlife immediately after

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77 DEA AA pp 549-551 para 41.1

78 DEA AA pp 551-552 para 41.2

79 Thabametsi AA pp 635-636 paras 83-84

80 Earthlife heads pp 22-26 para 57-64

that decision was made, or any other conduct by the DEA. There is simply no basis for Earthlife to accuse the DEA of "*reinterpreting"* the decision.

68.3. Indeed, Earthlife points to only one further factor in support of its claim that the Minister's decision in effect found that the power station's climate change impact had been inadequately considered. It suggests that the fact that clause 10.5 requires the climate change impact assessment to be completed before construction begins on the power plant means that the Minister understood it to be a prerequisite to the establishment of the plant.[81] The Minister has had no opportunity to explain her position in this regard because the issue was improperly raised for the first time in reply. In the circumstances, it is impermissible for Earthlife to leap to a conclusion that implies bad faith on her part. There are a range of *bona fide* reasons why the Minister may have required the completion of the impact assessment prior to construction of the plant – including that she wanted a mechanism to ensure that it was done expeditiously and comprehensively.

68.4. Finally, we point out that the Minister has filed an affidavit confirming the DEA's explanation of her decision, and the reasons underpinning the introduction of clause 10.5.[82] Earthlife has made out no basis for going behind or rejecting her evidence in this regard.

69. We accordingly submit that Earthlife's interpretation of the Minister's decision cannot be sustained. The decision correctly dismissed Earthlife's challenge to the

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81 RA p 917 para 44.1

82 Confirmatory affidavit pp 597-598

grant of the environmental authorisation, and called for a climate change impact assessment for future monitoring and evaluation purposes.

EARTHLIFE BLOWS HOT AND COLD IN RELATION TO THE MINISTER'S DECISION

70. Earthlife has determined to participate in, and influence the outcome of, the climate change impact assessment currently being conducted in terms of clause 10.5 as amended by the decision of the Minister.[83] Its participation has put Thabametsi to considerable further expense to accommodate the additional concerns that it has raised. Thabametsi has spent approximately R1 million on the climate change impact assessment to date.[84]

71. The climate change impact assessment is undertaken on the mutual understanding of Thabametsi and the DEA that its results will inform future actions only. As Earthlife accepts, the assessment's findings cannot result in Thabametsi's environmental authorisation being revoked.[85]

72. Earthlife's participation in the process conducted pursuant to the dismissal of the appeal is fundamentally at odds with its decision to bring this review. The former is premised on the finding that the environmental authorisation is valid, while the latter seeks to set the authorisation aside. As we show below, Earthlife is not permitted to participate in both of these mutually exclusive processes.

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83 SFA pp 458-460 paras 18-28; Thabametsi AA p 608 para 18.3-18.4

84 Thabametsi AA p 608 para 18.4

85 Thabametsi AA p 607 para 18.2

THABAMETSI'S POINTS IN LIMINE

Earthlife cannot Indirectly and Belatedly Challenge the Regulatory Framework Created by the Plan and the Determination

73. As we have shown above, Earthlife's review is, in effect, a challenge to the construction of all coal-fired power stations. But the construction of coal-fired power stations is required by the Plan and the Determination.

74. The Plan was published on 6 May 2011. The Determination was published on 19 December 2012 and amounted to a binding administrative act.

75. The request for proposals invited proposals for coal fired power stations based on fluid bed combustion technology and was issued on 15 December 2014 with a deadline for bid submissions of 15 June 2015. [86]

76. If Earthlife's case is good, the Plan, the Determination and the request for proposals were all invalid. Yet Earthlife challenged none of them at the time that they were issued. Instead, it stood by while Thabametsi, in reliance on the Plan, the Determination and the request for proposals, spent millions of rands putting together a bid for the coal fired power station[87] based on fluid bed combustion technology that the request for proposals invited.[88]

77. The approach adopted by Earthlife is highly prejudicial to Thabametsi. It is also impermissible. Without seeking to review and set aside the Determination and the

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86 Annexure "PL6" p 81.

87 Answering Affidavit pp 641-2 para 91.

88 AA18 p 792.

request for proposals, Earthlife is bound by their validity.[89] If Earthlife were to seek to set aside the Determination and the request for proposals, its review would be long out of time under s 7(1) of the Promotion of Administrative Justice Act 3 of 2000. It cannot improve its position by seeking a result inconsistent with the Determination and the request for proposals in proceedings where there is no review and where the executive authorities responsible for the Determination and the request for proposals are not before court.

Earthlife's Review is Precluded by the Doctrine of Election

78. As we have pointed out above, Earthlife seeks to play an active part in the climate change impact assessment required by the decision of the Minister on appeal, whilst at the same time bringing this review application which alleges that the decision of the Minister was invalid. This it may not do:

> *"One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application."*[90]
>
> "*The principle of the right of election is a fundamental one in our law. . . . When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or is unfair to another.*"[91]

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89 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at paras 64 and 105; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

90 *Chamber of Mines of South Africa v National Union of Mineworkers and Another* 1987 (1) SA 668 (A) at 690D – G.

91 *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) para 54, citing *Chamber of Mines* at 681D-G with approval.

79. Having elected to take part in the climate change impact assessment process – and thereby increasing Thabametsi's expenditure in that process – Earthlife cannot now seek to invalidate the decision that gave rise to that process. Doing so amounts to an attempt to procure the benefit of each process.

80. Earthlife's response to this complaint is to state that it participated in the climate change impact assessment subject to a reservation of its rights to bring this review.[92] It also claims that a climate change impact assessment will have to be conducted "*no matter what the outcome of this litigation may be*".[93] Neither of those answers meets Thabametsi's complaint:

    80.1. Earthlife cannot reserve to itself a right that the law does not afford. Once Earthlife elected to participate in the climate change impact assessment, it was precluded from challenging the decision that gave rise to that assessment, as a matter of law. Recording its intention to pursue both avenues does not vest Earthlife with a legal entitlement to do so.

    80.2. The election made by Earthlife relates to the present climate change impact assessment. Its review proceeds from the proposition that the failure to conduct a climate change impact assessment renders the environmental authorisation invalid. If that proposition is correct, a successful review application will leave Thabametsi in a position where it will have to reapply for an environmental authorisation and will have to conduct a fresh climate change impact assessment as part of its reapplication process.

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92 See RA p 926 para 70.1

93 RA p 927 para 70.2

81. We accordingly submit that Earthlife's decision to participate in the climate change impact assessment is irreconcilable with the present review. These proceedings are consequently precluded by Earthlife's earlier election. They fall to be dismissed.

EARTHLIFE'S GROUNDS OF REVIEW ARE UNFOUNDED

The grant of the authorisation was not ultra vires or unlawful

82. Earthlife contends that the grant of the environmental authorisation was ultra vires and unlawful because:

    82.1. no climate change impact assessment was undertaken prior to its grant; and

    82.2. climate change impacts were consequently not properly taken into account.

83. We have already explained that the legislation does not demand the conduct of a climate change impact assessment. It follows that the failure to conduct one does not render the grant of the authorisation ultra vires.

84. We submit, in addition, that the climate change impact of the proposed power station *was* taken into account.

85. It was considered, at a macro level, when the Plan was adopted and the Determination was issued. Government determined, nationally, that coal-fired

power stations are permissible despite their adverse effect on climate change. Indeed, Earthlife appears to accept as much.[94]

86. Thabametsi's EIA and the DEA's assessment of it both accepted that the proposed power station would have serious climate change implications:

86.1. The DEA's formal position, recorded in the White Paper, is that coal-fired power stations are the most significant source of GHG emissions. It would accordingly have been aware of the climate change implications of the project from the outset.

86.2. Thabametsi's air quality impact assessment noted that the indirect effect of the proposed power station include GHG emissions, which add to global concentrations.[95] In assessing the impact of these emissions, the report found that:

86.2.1. The indirect effects were regional and global scale issues;[96]

86.2.2. The duration of the indirect and cumulative impacts would last the full period of operation of the power station and were consequently long term;[97]

86.2.3. The magnitude of such impacts were considered to be considered to be *"high for all scenarios*";[98]

86.2.4. The probability of these impacts occurring was high;[99] and

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94 Earthlife heads p 60 para 130.1.1

95 Thabametsi AA p 632 para 75.1, quoting air quality impact assessment, AA14 p 771

96 Air quality impact assessment, AA14 p 773

97 Air quality impact assessment, AA14 p 773

98 Thabametsi AA p 632 para 75.1, quoting air quality impact assessment, AA14 p 775

86.2.5. "*Quantification of the relative contribution of the Thabametsi Power Station [to global warming] is difficult but it is considered to be relatively small in the national and global context".*[100]

86.3. The DEA considered these factors in determining to grant the environmental authorisation. Indeed, as Earthlife points out, the last factor, relating to quantification of Thabametsi's GHG contribution rate, was quoted in various of its reports.[101]

87. It follows that, contrary to Earthlife's claims, the climate change impacts of the proposed power station were considered by the DEA in granting the environmental authorisation. The Minister's decision confirmed as much.[102]

88. Faced with this fact, Earthlife has shifted its position to claim that these climate change impacts were not *adequately* considered and that this is demonstrated by the results of the climate change impact assessment recently conducted on Thabametsi's behalf. This approach cannot succeed:

88.1. The validity of the grant of the authorisation and the Minister's decision to uphold it must be evaluated with reference to the information available at the time. Earthlife cannot permissibly rely on the contents of the climate change impact assessment to impugn those earlier decisions.

88.2. But in any event, the climate change impact assessment bears out the findings of Thabametsi's EIA. It finds:

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99 Air quality impact assessment, AA14 p 775

100 Air quality impact assessment, AA14 p 775

101 See SFA pp 466-467 paras 42-45

102 Internal appeal decision, PL16 p 364

88.2.1. The proposed plant will have an emissions intensity of 1.02 t CO_2e/ MWh generated based on total estimated annual GHG emissions and total electricity generated and sent to the grid. This is lower than Eskom's average emissions intensity for coal fired plants and should be compared to an emissions intensity of 1.24, 1.18 and 1.09 t CO_2e/ MWh respectively at Eskom's older Camden, Hendrina and Arnot plants.[103] The construction of the proposed plants will facilitate the decommissioning of the Camden, Hendrina and Arnot plants before 2025.[104]

88.2.2. The magnitude of the project's GHG emissions is expected to be very large, but that this is an inevitable consequence of projects that rely on coal.[105]

88.2.3. The project is expected to contribute between 1.4% and 2.1% of South Africa's projected national GHG emissions during most of its operational lifespan, potentially increasing to 3.9% by 2050 (when other high emissions projects are expected to have been decommissioned and South Africa's overall reliance on coal-based electricity has decreased).[106] These estimates are based on an assumption that GHG emissions for the plant will remain

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103 Excerpt of climate change impact assessment, pl43 p 978; p 983. See also full report, SAA2 p 1047; Greenhouse Gas Assessment, SAA2 pp 1168, 1171.

104 Answering affidavit p 609 para 22. Excerpt of climate change impact assessment, pl43 p 978; p 983. See also full report, SAA2 p 1047; Greenhouse Gas Assessment, SAA2 pp 1168, 1171. We note that Earthlife, in its replying affidavit, disputes that such plants are due to be decommissioned, based on the contents of a media report attached as PL41 pp 956-957. Apart from the impermissibility of raising this dispute in reply, the attached news report does not support Earthlife's claim. It states that a pre-feasibility study is due to be conducted for possible "*renewal options*". Clearly no decision has been taken on whether those plants can be kept operational and, if so, on what basis.

105 Excerpt of climate change impact assessment, pl43 pp 981, 983. See also full report, SAA2 p 1047; Greenhouse Gas Assessment, SAA2 p 1165

106 Greenhouse Gas Assessment, SAA2 p 1163 table 4.5

constant over time, although there is a real prospect that they will in fact decrease.[107]

88.3. In other words, the climate change impact assessment confirms that the Thabametsi power station will be cleaner and more efficient than existing Eskom plants based on old technology. It also confirms that whilst the duration, magnitude and probability of climate change impacts are high, these impacts *are* small in the national and global context. A project that accounts for a mere 2 to 3 % of South Africa's national emissions rate cannot be described otherwise.

89. We therefore submit that the DEA adequately considered the climate change impacts of the proposed power station. There is nothing material that a climate change impact assessment would have uncovered that would have resulted in the environmental authorisation being refused.

The grant of the authorisation was not irrational or unreasonable

90. Earthlife also contends that the Minister's decision on the internal appeal was irrational and unreasonable because it simultaneously acknowledged the need for a climate change impact assessment, whilst rendering its results irrelevant to the grant of the authorisation.

91. But as we have addressed, that attack is based on a misunderstanding of the Minister's decision. The Minister did not find that a climate change impact assessment was a prerequisite to the grant of an authorisation. Rather, she ordered it in order to gather information on the projects GHG emissions, which she

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107 Greenhouse Gas Assessment, SAA2 p 1164

intends to use inform future emissions policies and to impose additional conditions on Thabametsi, should that be necessary and lawful. It was both rational and reasonable for her to do so.

No errors of law

92. Finally, Earthlife contends that the Minister's decision was based on a series of material errors of law.

93. The first, it says, is that the Minister believed that she had the power to withdraw the environmental authorisation if the final climate change impact assessment necessitated that outcome.[108] But the Minister has confirmed that she did not believe she had such power, nor did she wish to re-assess the environmental authorisation in light of the findings in the climate change impact assessment. It follows that no error of law arose.

94. The second alleged error of law, raised by Earthlife impermissibly in reply,[109] is the Minister's and the DEA's "*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"*.[110]

95. But that purported error is again based on a misreading on the part of Earthlife. The DEA does not suggest that it would use the amendment process provided in the EIA regulations to "*engineer"* the withdrawal of the authorisation - and there is no basis to impute what would clearly be an unlawful ulterior purpose to it.

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108 Earthlife heads p 68 para 148

109 RA p 924-926 paras 64-68

110 Earthlife heads p 69 para 150

96. Rather, the DEA states that "*the environmental authorisation may be amended to require additional abatement measures or design alternations",* should the findings of the climate change impact assessment render that appropriate.[111] It then records that Thabametsi would be obliged to comply with such further or amended conditions as are lawfully imposed, or risk compliance notices and a potential revocation of its authorisation should it fail to do so.[112]

97. There is nothing controversial in the DEA's statement that Thabametsi would be required to comply with amended or additional conditions that are lawfully imposed. Nor is there any basis cynically to interpret it as an expression of ulterior purpose on the part of the DEA.

98. Finally, Earthlife claims (again in reply) that the DEA and the Minister understood that the Plan and the Determination rendered it unnecessary to consider the climate change impact of the proposed power station, and that that constituted a material error of law.[113]

99. But again, that is not what the DEA respondents claimed. They recorded that the climate change impacts of coal-powered fire stations were considered when the Plan and the Determination were adopted, and that the climate change impact of the Thabametsi power station was considered in assessing the EIA.[114] That claim is borne out by the record and, indeed, Earthlife's own assessment of the DEA's internal reports,[115] which show that climate change impacts were considered in granting the environmental authorisation.

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111 DEA AA p 552 para 41.2.3

112 DEA AA p 552 para 41.2.4

113 Earthlife heads p 69 para 150

114 DEA AA p 554 para 49

115 SFA pp 466-467 paras 42-45

100. It is both appropriate and lawful for the DEA to have considered the climate change impact of the project within the context of government's demand for new coal-fired power stations. We have addressed this point above.

101. We accordingly deny that either the grant of the environmental authorisation or the dismissal of the internal appeal were vitiated by material errors of law. The DEA and the Minister exercised their respective powers on a proper understanding and application of the law.

CONCLUSION

102. For all the reasons set out above, we submit that Earthlife has failed to make out a case for the review of either of the decisions it challenges. Its applications falls to be dismissed, with each party to bear its own costs.

M CHASKALSON SC

I GOODMAN

Chambers, Sandton
08 February 2017

TABLE OF AUTHORITIES