APPEAL TO THE MINISTER OF ENVIRONMENTAL AFFAIRS

In the matter between:

GROUNDWORK Appellant

and

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS First Respondent

ACWA POWER KHANYISA THERMAL POWER STATION (RF) (PTY) LIMITED Second Respondent

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APPELLANT'S SUBMISSIONS TO THE MINISTER IN TERMS OF REG 60(4) OF THE 2010 EIA REGULATIONS

INTRODUCTION

1 groundWork intends to appeal to the Minister of Environmental Affairs ("Minister") against the integrated environmental authorisation issued by the Department of Environmental Affairs (and signed by Mr Ishaam Abader, the Deputy Director General: Legal, Authorisations, Compliance & Enforcement) to ACWA Power Khanyisa Thermal Power Station (RF) (Pty) Limited ("Khanyisa") on 31 October 2013, and amended on four subsequent occasions.[1]

2 groundWork only became aware of Khanyisa's environmental authorisation in June 2015, when groundWork's attorneys, the Centre for Environmental Rights (CER), were informed of Khanyisa's intention to amend its environmental authorisation for the first of four times. A copy of this email is attached marked

[1] Authorisation register number 12/12/20/2067. Subsequently amended on 28 July 2015, 25 February 2016, 2 February 2017, and 3 April 2017.

"**A**". The most recent amendment of Khanyisa's environmental authorisation – of which the CER was advised on 12 April 2017 - was on 3 April 2017.

3 The notice of appeal was filed on 29 March 2017, outside of the 20-day time limit stipulated in regulation 60(1) of the Environmental Impact Assessment Regulations, 2010 of GN R543, GG 33306 ("2010 EIA Regulations") under the National Environmental Management Act, 1998 ("NEMA"). A copy of the notice is attached marked "**B**".

4 In these submissions we demonstrate why there is good cause to extend the period for filing a notice of appeal, in terms of regulation 60(4) of the 2010 EIA Regulations.

5 groundWork seeks this extension on the basis of the landmark judgment in ***Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others*** ("the *Thabametsi* judgment") which was handed down on 8 March 2017.[2]

5.1 The *Thabametsi* judgment confirms - for the first time in our case law - that a comprehensive climate change impact assessment must be conducted and considered before granting environmental authorisation to a new coal-fired power station.

5.2 In light of this judgment, Khanyisa's environmental authorisation is unlawful and invalid as it was granted in the absence of a comprehensive climate change impact assessment.

[2] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] JOL 37526 (GP) (8 March 2017).

5.3 groundWork filed its notice of appeal on 29 March 2017, within 20 days of the *Thabametsi* judgment.

6 If the Minister grants this extension, the appeal will afford the Minister the opportunity to cure the unlawful environmental authorisation, in line with the guidance offered in the *Thabametsi* judgment.

7 In what follows, we show that there is good cause to extend the deadline under regulation 60(4) by addressing the following points in turn:

7.1 First, we provide background to Khanyisa's environmental authorisation;

7.2 Second, we explain the significance of the *Thabametsi* judgment for groundWork's appeal against Khanyisa's environmental authorisation;

7.3 Third, we briefly outline the further submissions that groundWork intends to make on appeal; and

7.4 Fourth, we address the meaning of "good cause" under regulation 60(4) and demonstrate why this requirement has been satisfied.

BACKGROUND

8 The Khanyisa power station is a proposed 600MW independent power station that is intended to be built in the Mpumalanga Province, near eMalahleni. Khanyisa has submitted a bid to be appointed as an independent power producer (IPP) under the Coal Baseload Independent Power Producer Procurement Programme (CBIPPPP).

9 Khanyisa obtained its integrated environmental authorisation on 31 October 2013. This environmental authorisation has since been amended on four occasions:

9.1 On 28 July 2015, the authorisation was amended to increase the capacity of the power station from 450MW to 600MW and to make provision for road realignment;

9.2 On 25 February 2016, the environmental authorisation was again amended to make provision for road realignment;

9.3 On 2 February 2017, an amendment was approved to change the name of the applicant and the name of the property on which the power station will be constructed; and

9.4 Most recently, on 3 April 2017, the environmental authorisation was again amended to postpone the date by which kinetic leach testing for the plant must be conducted.

10 Khanyisa has also been issued with further separate environmental authorisations, relating to the power station project. On 5 May 2016, Khanyisa was issued with an environmental authorisation for a proposed bulk water supply pipeline which would connect the eMalahleni Water Reclamation Plant with Khanyisa power station; and on 13 May 2016, Khanyisa was issued with an environmental authorisation for a 400kV substation and power line for the Khanyisa power station.

11 On 10 October 2016, Khanyisa was announced as one of two "preferred bidders" under the CBIPPPP. The other preferred bidder is the Thabametsi power station ("Thabametsi"), which was the subject of the recent *Thabametsi* judgment.

12 Khanyisa is yet to reach “financial and commercial close” under the CBIPPPP, which is required before it can commence operating as an IPP under the CBIPPPP. It is still in the process of applying for various licences and outstanding environmental approvals, including its integrated water use licence (IWUL); and a licence to generate electricity from the National Energy Regulator of South Africa (NERSA). Furthermore, the validity of the provisional atmospheric emission licence (PAEL) issued for Khanyisa in 2015 is in dispute and groundWork have objected to the transfer of the PAEL to Khanyisa.

13 As a consequence, Khanyisa has not yet commenced construction of the coal-fired power station and will not be in a position to do so until it has received all the necessary licences and approvals and has the necessary funding.

THE SIGNIFICANCE OF THE *THABAMETSI* JUDGMENT FOR THIS APPEAL

14 In its appeal submissions, groundWork will contend that the *Thabametsi* judgment shows that Khanyisa’s environmental authorisation was improper and unlawful as there was no adequate assessment of climate change impacts.

The key findings in the judgment

15 The *Thabametsi* judgment reviewed and set aside the Minister's decision to uphold an environmental authorisation for the Thabametsi power station.[3] The High Court remitted the matter back to the Minister for a fresh decision on receiving Thabametsi's final climate change impact assessment report, and public comment thereon.

16 This judgment lays down several legal principles that had not previously been addressed by our courts and which were, until now, accordingly not being followed by the Department of Environmental Affairs ("the Department") in dealing with environmental authorisations. Four principles are most relevant for the appeal against Khanyisa's environmental authorisation.

17 First, the judgment confirms that section 24O(1) of NEMA imposes a duty on competent authorities to do a thorough assessment of the climate change impacts of a coal-fired power station before taking a decision on environmental authorisation:

> *"[A] plain reading of Section 24O (1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change."*[4]

18 Second, the judgment finds that a climate change impact assessment must, at the very minimum, consider the following factors:

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[3] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58 (8 March 2017).
[4] Ibid at para 88.

> *"(i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its [Greenhouse gas] emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied."*[5]

19 Third, the judgment confirms that these climate change impacts are best assessed by means of a "*professionally researched climate change impact report*":

> *"[T]he legislative and policy scheme and framework overwhelming (sic) support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation."*[6]

20 Fourth, the High Court found that it is not permissible for competent authorities to shirk this duty under section 24O(1) of NEMA, by leaving that assessment to other licensing authorities or to defer to government policies such as the integrated resource plan for electricity (IRP):

> *"Much time was expended in argument on the implications of [National Environmental Management: Air Quality Act (NEMAQA)] requiring consideration of climate change impacts in the AEL process. … While the NEMAQA process will involve an investigation of GHG emissions in determining whether to grant an AEL, that does not alter the peremptory statutory duty of the Chief Director and the Minister to thoroughly investigate climate change impacts in terms of section 24O of NEMA with regard to national and international consequences."*[7]

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[5] Ibid at para 6 and 94.
[6] Ibid at para 91.
[7] Ibid at para 124.

> "*…an abstract, macro-level assessment of the climate change impact of additional coal-fired power could not cast any light on the specific climate change impacts and mitigation strategies of specific coal-fired power stations located at specific sites. These relevant considerations are context specific and have to be distinctively considered*"[8]
>
> "*the respondents' assertion that the instruments constitute binding administrative decisions not to be circumvented to frustrate the establishment of authorised coal-fired power stations is unsustainable, as is the notion that their mere existence precludes the need for a climate change impact assessment in the environmental authorisation process. Policy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered*."[9]

The impact of these findings on Khanyisa's environmental authorisation

21 In light of the *Thabametsi* judgment, groundWork submits that Khanyisa's environmental authorisation was unlawful and invalid as there was no adequate assessment of the climate change impacts of this project.

22 Khanyisa's environmental impact assessment report was deficient as it did not give an adequate assessment of these impacts.

22.1 Khanyisa did not commission a thorough climate change impact assessment report prepared by experts in this field, resulting in a number of significant omissions.

22.2 While the initial environmental impact report of 2012 appears to have calculated Khanyisa's annual estimated greenhouse gas (GHG) emissions during the plant's operation, there is no evidence of a full

[8] Ibid at para 95.
[9] Ibid at para 96.

assessment of the GHG emissions from the Khanyisa power station over its life-cycle, which would also include construction and decommissioning.

22.3 There was also no comprehensive, lifecycle assessment of GHG emissions in Khanyisa's 2015 environmental impact assessment report which it submitted in support of its application to increase the approved capacity of the power station from 450MW to 600MW. Despite the proposed addition of 150MW in capacity, the 2015 report contained emissions figures that were identical to the earlier 2012 report. This suggests a clear error and omission that would have been identified had a comprehensive climate change impact assessment been conducted.

22.4 In both the 2012 and 2015 reports, no attempt was made to assess climate change resilience, which requires an assessment of how future climate change will impact on the operational viability of the plant and its resilience to these impacts over its full life-cycle, and how the power station will impact on the climate change resilience of the surrounding region, as well as the resilience of South Africa as a country, to the impacts of climate change as exacerbated by the power station.

22.5 As a consequence of these omissions, there was also no adequate assessment of how to avoid, mitigate or remedy these climate change impacts.

23 In the absence of a thorough climate change impact assessment, the decision of the Department on the environmental authorisation cannot stand. It is notable

that the Department also made no attempt to engage with the climate change impacts of this project in its reasons for granting the authorisation.

24 As a consequence of these deficiencies, the environmental authorisation is unlawful and invalid. This appeal will give the Minister the opportunity to cure this unlawfulness by taking appropriate action. In the *Thabametsi* judgment, the High Court explained that the Minister has at least two options on appeal:

24.1 The Minister may remit the matter back to the Department for reconsideration, based on a comprehensive climate change impact assessment report;

24.2 Alternatively, the Minister may use her wide powers on appeal to order Khanyisa to prepare a comprehensive climate change impact assessment report and then she may take a decision on whether to set aside or uphold the environmental authorisation after considering this report.

25 If the Minister refuses to grant this requested extension under regulation 60(4) of the 2010 EIA Regulations, then groundWork will have no option but to resort to litigation to review and set aside the environmental authorisation.

CHANGING CIRCUMSTANCES

26 In its appeal submissions, groundWork will further demonstrate that there are changed circumstances that warrant the reconsideration of the environmental authorisation on appeal.

27 Since Khanyisa's environmental authorisation was issued in 2013, the circumstances around: air quality impacts; international climate change commitments; and water impacts in the project area have changed substantially. Public interest dictates that these changed circumstances be considered on appeal, particularly in light of the fact that the Khanyisa power station will be operational for at least 40 years.

28 First, the changing air quality within the area where Khanyisa will be developed warrants closer attention in light of recent reports and studies.

28.1 Khanyisa would fall within the declared Highveld Air Quality Priority Area (HPA). This was declared a priority area nearly ten years ago by the then Minister in terms of section 18 of NEMAQA, due to the concern that the health-based ambient air quality standards were being exceeded or may be exceeded and that a situation exists in which is causing or may cause a significant negative impact on air quality in the area.[10]

28.2 An air quality management plan (AQMP) (published in March 2012) was adopted in order to bring the air quality within compliance with the National Ambient Air Quality Standards (NAAQS). However, at present, both air quality modelling and monitoring stations show that pollution levels, especially of sulphur dioxide (SO2) and particulate matter (PM), regularly exceed the NAAQS that are supposed to help protect public health.

[10] GN 1123, GG 30518 of 23 November 2007. Available at https://www.environment.gov.za/sites/default/files/gazetted_notices/nema_highvelddeclaration_g30518gon1123.pdf.

28.3 In February 2017, the Department's own mid-term evaluation of the AQMP ("the draft mid-term review") confirmed that "*there has not been an appreciable improvement in ambient air quality*" since the AQMP was put into place.[11] In short, virtually no progress has been made towards improving air quality in the eMalahleni area in the nearly ten years since the HPA designation.

28.4 In light of the Department's draft mid-term review and growing research (which will be referenced and attached to the appeal), which shows the significant health impacts that coal-fired power stations within the HPA are having on communities living in the area, it would be unlawful to allow Khanyisa to continue relying on the authorisation of 2013, without adequate consideration being given to the significant and worsening health impacts within the HPA and the unacceptable contribution that Khanyisa will make to the poor air quality within the HPA.

29 A further changed circumstance since the granting of Khanyisa's environmental authorisation pertains to the adoption of the Paris Agreement on climate change in December 2015. South Africa signed and then ratified the Paris Agreement in November 2016, committing to, *inter alia*:

29.1 pursue efforts to ensure temperature increase remains below 1.5°C;

[11] Department of Environmental Affairs, The Medium-Term Review of the 2011 Highveld Priority Area (HPA): Air Quality Management Plan (Dec. 2015) at 52. While the Medium-Term Review document states that it is "A Publication of December 2015," the document was posted for public comment on 20 February 2017. See http://www.saaqis.org.za/ReadNews.aspx (visited 23 February 2017)

29.2 emissions in a range between 398Mt and 614Mt CO2-eq (carbon dioxide equivalent) between 2025 to 2030;[12]

29.3 decline emissions in absolute terms from the year 2035;

29.4 near zero emissions of CO2 and other long-lived GHGs in the second half of the century, which is needed to avoid even greater impacts that are beyond adaptation capability;[13] and

29.5 prepare, communicate, and maintain successive nationally-determined contributions (NDCs) every 5 years,[14] which must represent a progression beyond the current NDC and reflect South Africa's highest possible ambition.[15]

30 These commitments are binding on the Republic and must be adhered to.[16] Yet, our current commitments as reflected in our NDC already fall short of the Paris Agreement goal of limiting temperature increases to 1.5 °C.[17] Furthermore, Khanyisa will have a lifespan of at least 40 years, meaning that it will be operating into the year 2060. This directly contradicts South Africa's commitment to reduce emissions from 2035 and to ensure near zero emissions in the second half of the century in order to avoid impacts beyond adaptation capability. South Africa's commitments under the Paris Agreement are therefore a further relevant

[12] Page 6, NDC.
[13] Page 1, NDC.
[14] Article 4(9), the Paris Agreement.
[15] Article 4(3).
[16] Section 231(2) of the Constitution.
[17] According to Climate Action Tracker, "if most other countries were to follow South Africa's approach, global warming would exceed 3–4°C." See http://climateactiontracker.org/countries/southafrica.html.

consideration and changed circumstance, which would warrant the reconsideration of the environmental authorisation.

31 Furthermore, recent research demonstrates that Khanyisa will have a substantial negative impact on water quality in the region.

31.1 Khanyisa and its coal ash disposal site would be located in Upper Olifants River sub-catchment, which forms part of the greater Olifants River catchment.[18] The Olifants serves vital ecosystem benefits, yet is facing a water quality crisis, largely due to acid mine drainage from decanting coal mines.[19] The Association for Water and Rural Development explains that: "*The Olifants and its contributing waterways are critical for supporting life in the area, yet unchecked pollution, inappropriate land and resource use, weak and poorly enforced policies and regulations, and poor protection of habitats and biodiversity are degrading the Olifants at an alarming rate*.[20] A recent media report has highlighted the severe "*crisis*" presently faced by the Olifants River, which, as a result of significant pollution and systematic failures of governance, is "*in danger of collapse*".[21]

31.2 Furthermore, a recent report and analysis from a coal ash expert in the United States, highlights the significant risks that would be posed by Khanyisa's ash dump for groundwater and the Olifants River, as well as

[18] FEIR, Appendix L, Surface Water Assessment, p. 10.
[19] *Ibid*., Appendix L, Surface Water Assessment, p. 10.
[20] Association for Water and Rural Development, Olifants River Basin, http://award.org.za/resilim-o/olifants-river-basin/. *See also*, Final Environmental Impact Review, Appendix L, Surface Water Assessment, p. 10.
[21] See https://mg.co.za/article/2017-04-13-00-a-river-of-shit-chemicals-metals-flows-through-our-land.

the concerning gaps in the environmental impact report, which does not adequately consider these risks. This report will be made available on appeal, should condonation be granted. We submit that this information must be taken into account in considering whether to reject or uphold the environmental authorisation.

THERE IS "GOOD CAUSE" UNDER REG 60(4)

32 As indicated above, regulation 60(1) of the 2010 EIA Regulations requires notices of appeal to be filed within 20 days of a decision under the regulations. This is subject to regulation 60(4), which empowers the Minister to extend this deadline on good cause shown. This provision provides:

> *"(4) The Minister, MEC or designated organ of state, may, as the case may be, in writing, on good cause extend the period within which a notice of intention to appeal must be submitted."*

33 In this section, we demonstrate that there is good cause to grant an extension under regulation 60(4), starting with a brief analysis of the meaning of "good cause".

The requirement of "good cause"

34 The requirement of "*good cause*" is used in different contexts in our law. It indicates the need for a value judgment that "*consider[s] each case on its merits*

in order to achieve a just and equitable result in the particular circumstances."[22]

This is an inherently flexible enquiry.[23]

35 In ***Madinda v Minister of Safety and Security***,[24] the Supreme Court of Appeal identified some of the considerations that are relevant in assessing "good cause" for the extension of a statutory deadline:

> "*Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many of such possible factors become relevant. <u>These may include prospects of success in the proposed action, the reason for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore</u>.*"[25] (Emphasis added)

36 Most recently, in ***City of Cape Town v Aurecon***,[26] the Constitutional Court summarised the considerations that are relevant in assessing whether to condone a delay in launching judicial review proceedings:

> *"Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."*[27]

37 While these judgments deal with extensions and condonation in different contexts, we submit that these considerations are just as relevant under

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[22] *South African Forestry Co v York Timbers Ltd* 2003 (1) SA 331 SCA para 14.
[23] *Cohen Brothers v Samuels* 1906 TS 221 at 224; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300H - 301A; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 AD at 352H.
[24] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA).
[25] Ibid para 10.
[26] City of Cape Town v Aurecon South Africa (Pty) Ltd [2017] ZACC 5 (28 February 2017).
[27] Ibid para 46.

regulation 60(4). The courts have stressed that these considerations should be approached in a balanced and holistic way:

> *"The relevant circumstances must be assessed in a balanced fashion. The fact that the applicant is strong in certain respects and weak in others will be borne in mind in the evaluation of whether the standard of good cause has been achieved."*[28]

38 This requirement of "good cause" must also be interpreted in a manner that promotes the section 24 constitutional right to have the environment protected for the benefit of present and future generations.[29]

39 We now turn to address each of the five considerations that are relevant to this application for an extension.

The nature and importance of the issues

40 There can be no dispute that climate change poses a substantial threat to South Africa. As stated in the *Thabametsi* judgment, "*[c]limate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks*".[30] Coal-fired power stations are also South Africa's single largest source of GHG emissions, and contributor to climate change.

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[28] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 13.
[29] Section 39(2) of the Constitution imposes a duty both on courts and on administrative tribunals to interpret legislation in a manner that promotes the spirit, purport and object of the Bill of Rights. See further *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87-89.
[30] *Thabametsi* judgment para 82.

41 If the Khanyisa coal-fired power station goes ahead, it will remain in operation for at least 40 years. During this time, it will, in all likelihood, emit substantial GHG emissions. Climate change will potentially pose a substantial threat to this power station, as rising temperatures and increasing water scarcity will impact on its operation and on the surrounding region.

42 The *Thabametsi* judgment confirms that these climate change impacts must be thoroughly assessed before a new coal-fired power station is granted environmental authorisation. The High Court held that the failure to conduct this assessment has substantial prejudicial effects:

> *"[T]he decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that the permission has been granted to build a coal-fired power station which will emit substantial GHG's in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting authorisation"*[31]

43 The importance of these issues and the potential long-term impacts of the power station, over a period of more than 40 years, far outweighs any delay in launching this appeal.

The prospects of success on appeal

44 For the reasons set out above, groundWork has substantial prospects of success in its appeal. The *Thabametsi* judgment puts it beyond doubt that a thorough climate change impact assessment is required before a coal-fired power station in granted environmental authorisation. There has not yet been a thorough and

[31] *Thabametsi judgment* para 119.

comprehensive assessment of the climate change impacts of the Khanyisa power station. As a result, Khanyisa's environmental authorisation is currently unlawful and invalid.

The explanation for the launching an appeal now

45 groundWork acknowledges that its notice of appeal was filed outside of the 20-day deadline prescribed in the regulation 60(1), more than three years after the environmental authorisation was first granted. It should, however, be noted that this authorisation was subsequently amended in 2015, 2016 and twice again in 2017. We submit that these amendments must be taken into account in calculating the period of the delay.

46 The delay in filing a notice of appeal is fully justified by the fact that the *Thabametsi* judgment has, for the first time, confirmed that there is a legal requirement to conduct a climate change impact assessment.

47 The *Thabametsi* judgment now provides certainty on the duty to conduct a climate change impact assessment and requires a reassessment of Khanyisa's environmental authorisation. Prior to this judgment, the Department and the Minister maintained that there was no legal duty to conduct a climate change impact assessment.[32]

[32] See, for example, the Minister's decision on appeal against the environmental authorisations granted to the Ki Power and Colenso IPPs.

48 Thus, while as a strict matter of legal theory it may be correct that the *Thabametsi* judgment merely recognised a pre-existing legal position, as a practical matter, the judgment produced a considerable shift in the prevailing position. It made clear, for the first time and contrary to the stance of the Department, the Minister and Khanyisa, that the four principles set out above regarding climate change were part of our law regarding environmental authorisations. Practically speaking, therefore, the judgment has had a considerable effect on the rights and obligations of the Department, the Minister, Khanyisa, groundWork and members of the public.

49 As soon as groundWork became aware of the *Thabametsi* judgment, it consulted its attorneys and started work on its notice of intention to appeal. It filed this notice of intention to appeal on 29 March 2017, within 20 days of the *Thabametsi* judgment.

50 It also bears emphasis, as indicated above, that groundWork only became aware of Khanyisa's environmental authorisation in 2015 – almost two years after the authorisation had been granted.

50.1 During 2015 and 2016, groundWork and its attorneys, CER, were confronted with numerous applications for environmental authorisations and other requisite environmental licences for proposed coal-fired power stations under the CBIPPPP. At the time, there were nine proposed IPPs of which CER and groundWork were aware. It was not known, in 2015, which of the proposed IPPs intended to submit bids under the first bid

window of the CBIPPPP, and which would be appointed as preferred bidders.

50.2 In 2015, groundWork and CER, and other interested and affected parties represented by the CER, decided to direct their limited capacity and resources at three environmental authorisation processes that were still under way: the Thabametsi, KiPower, and Colenso IPPs.

50.3 At that stage, groundWork did not have the capacity nor the resources to take a risk on a condonation application and appeal against Khanyisa's environmental authorisation, which had been granted in 2013.

50.4 It was only once the *Thabametsi* judgment was handed down that it became clear that the Khanyisa environmental authorisation was unlawful and susceptible to appeal, and it was necessary and appropriate to expend the limited capacity and resources on pursuing the matter.

51 Moreover, the changing circumstances identified above could not have been addressed at an earlier stage. If condonation is granted, this will allow the Minister to consider these changing circumstances on appeal.

No material prejudice to Khanyisa

52 groundWork acknowledges that there has been a delay in launching this appeal, but this delay will not cause any material prejudice to Khanyisa.

53 As indicated above, Khanyisa is still a long way from being able to commence construction of its power station. It still requires various outstanding licences and

approvals. While it is a "preferred bidder" under the CBIPPPP, it has yet to satisfy the requirements for financial and commercial close.

54 In a letter dated 7 April 2017, Khanyisa's attorneys claimed that, since 2013, Khanyisa "*has been developing the project on the strength of a valid Environmental Authorisation at significant cost. Development work is ongoing and (Khanyisa) has entered into a material agreement in terms of which the necessary measures to commence the authorised activities have begun. Any appeal at this stage will clearly result in significant prejudice to (Khanyisa) …*"

55 It is not clear what "development work" Khanyisa has undertaken as it may not commence work while its NERSA licence and IWUL licences are still outstanding. Any expense and effort that Khanyisa has already incurred is a normal part of the process of applying for regulatory approval. It has voluntarily assumed this risk and expense and must bear the costs if its applications were invalid.

56 Finally, any minor prejudice that Khanyisa may experience is far outweighed by the importance of the issues at stake and the merits of this appeal, taking into account the fact that this power station will operate for at least 40 years.

Consistency and fair treatment

57 Finally, allowing this appeal to proceed will ensure fairness and consistency in the Department's treatment of Khanyisa and Thabametsi. Khanyisa and Thabametsi are identical in all relevant respects. Both are preferred bidders

under the CBIPPPP and neither has commenced construction, given the various outstanding licences and approvals. Most importantly, neither has conducted the required climate change impact assessment.

58 Following the *Thabametsi* judgment, the appeal against Thabametsi's environmental authorisation is now before the Minister for reconsideration, on receipt of a final climate change impact assessment.

59 This appeal against Khanyisa's environmental authorisation will allow the Minister to ensure that Khanyisa is subjected to similar conditions and requirements as Thabametsi.

60 If the Khanyisa power station is allowed to proceed without any assessment of its climate change impacts, this will not only be unlawful, but will also result in unequal and unfair differentiation between Khanyisa and Thabametsi. Therefore, this appeal will allow the Minister to promote fairness and consistency in the environmental authorisation process.

CONCLUSION

61 For the reasons set out above, we submit that there is good cause for the Minister to extend the deadline for appeal submissions. On balance, the importance of the issues at stake, the substantial prospects of success on appeal, the explanation for the delay, the absence of any real prejudice, and the importance of promoting fairness and consistency in the environmental authorisation process all indicate the need for an extension of the deadline under regulation 60(4).

DATED at **CAPE TOWN** on this the **18th** day of **APRIL 2017**

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