



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

### Honourable Mohlopi Philemon Mapulane

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Our ref: CER 12.4/RH/NL  
16 February 2018

Dear Sirs

### MINISTER'S DECISION TO UPHOLD THE ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED THABAMETSI COAL-FIRED POWER STATION

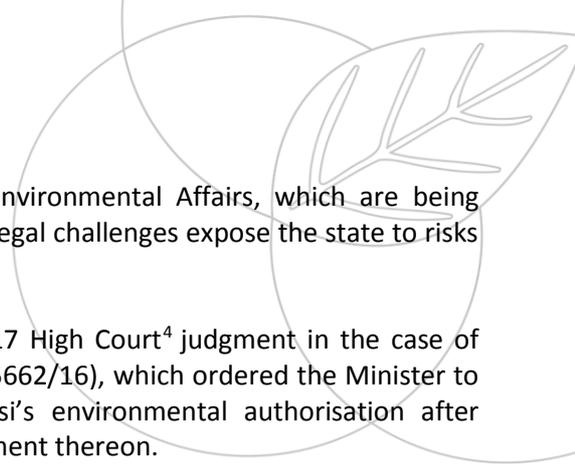
1. We address you on behalf of our clients [Earthlife Africa \(Earthlife\)](#)<sup>1</sup> and [groundWork \(gW\)](#).<sup>2</sup>
2. Given the committee's previous concerns regarding the legal fees incurred by the Minister in relation to the Thabametsi case,<sup>3</sup> and the briefing held on 10 October 2017, we write to notify you of the [Minister of Environmental Affairs' decision of 30 January 2018](#) (attached hereto) to uphold and confirm the environmental authorisation granted to the proposed independent power producer (IPP) Thabametsi coal-fired power station ("Thabametsi").
3. We wish to:
  - 3.1. emphasise that we regard this decision as unreasonable and unlawful, for the reasons set out below;
  - 3.2. advise you that we have been instructed to challenge the Minister's decision in terms of the Promotion of Administrative Justice Act, 2000 (PAJA) in the High Court; and

<sup>1</sup> Earthlife Africa is a non-profit organisation that seeks: a better life for all people without exploiting other people or degrading their environment; and to encourage and support individuals, businesses and industries to reduce pollution, minimise waste and protect our natural resources. See <http://earthlife.org.za/>.

<sup>2</sup> groundWork is a non-profit environmental justice service and developmental organisation which works on environmental justice and human rights issues, focusing on coal, climate and energy justice, waste and environmental health. It works with South and Southern African communities, including our community groups based in Mpumalanga namely the Highveld Environmental Justice Network. See <http://www.groundwork.org.za>.

<sup>3</sup> *Earthlife Africa Johannesburg v the Minister of Environmental Affairs & Others*. See <https://cer.org.za/programmes/pollution-climate-change/litigation/the-proposed-thabametsi-ipp-earthlife-africa-johannesburg-v-department-of-environmental-affairs-thabametsi-power-project-pty-ltd-and-others> for further information.

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- 3.3. point out the growing volume of decisions of the Minister of Environmental Affairs, which are being challenged in the High Court (as you will no doubt be aware, these legal challenges expose the state to risks of liability for legal costs).
4. The Minister's decision of 30 January 2018 followed the 8 March 2017 High Court<sup>4</sup> judgment in the case of *Earthlife v the Minister of Environmental Affairs and Others* (Case no 65662/16), which ordered the Minister to reconsider the climate change ground of the appeal of Thabametsi's environmental authorisation after considering a climate change impact assessment (CCIA) and public comment thereon.
5. You will recall that in the Minister's first decision on our client, Earthlife's, appeal, the Minister stated that Thabametsi's climate change impacts had not been comprehensively assessed and she amended the environmental authorisation conditions to require Thabametsi to conduct a CCIA. However, she allowed the authorisation to remain in place and did not set it aside pending the outcome of the CCIA. This decision, and the decision to authorise the power station, were taken on review by our client Earthlife – with a focus on the need for a CCIA as part of an environmental impact assessment (EIA). The court papers can be accessed [here](#).<sup>5</sup>
6. Judge Murphy, in his March 2017 [judgment](#)<sup>6</sup> on the review confirmed the need for a comprehensive assessment of climate impacts as part of an EIA, stating that the assessment of climate impacts in Thabametsi's EIA “*was wholly insufficient*”. Judge Murphy also held that the mere existence of policy calling for new coal-based electricity (namely the Integrated Resource Plan for Electricity (IRP)) does not exempt the decision-maker from exercising its **independent discretion on the assessment of the impacts**, stating that the “*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*”<sup>7</sup> (emphasis added).
7. In July 2017, Thabametsi's final CCIA was published for comment, along with a revised Environmental Management Programme (EMPr). The final CCIA – which consists of a [summary report](#) and annexures which include: a greenhouse gas (GHG) [assessment](#) (appendix D); [climate resilience assessment](#) (appendix E), and a [water resource report](#) (appendix E1) - finds, *inter alia* and in summary, that:<sup>8</sup>
- 7.1. the Thabametsi plant's GHG emissions were categorised as “*very high when benchmarking against a project-wide emission magnitude scale based on various international lender standards, as is expected for a coal-fired power plant. The emissions intensity (t CO2 per MWh) is also relatively high when benchmarked against other plants.*”<sup>9</sup>
- 7.2. water scarcity was outlined as a high risk; and
- 7.3. yet the additional studies (the CCIA and palaeontological impact assessment) do not alter the conclusion from Thabametsi's original environmental impact report (EIR) that the impacts are expected to be of

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<sup>4</sup> The North Gauteng High Court.

<sup>5</sup> The court papers are available on the CER website at <https://cer.org.za/programmes/pollution-climate-change/litigation/the-proposed-thabametsi-ipp-earthlife-africa-johannesburg-v-department-of-environmental-affairs-thabametsi-power-project-pty-ltd-and-others>.

<sup>6</sup> Available at <https://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf>.

<sup>7</sup> See paras 95 – 96, Thabametsi judgment.

<sup>8</sup> The relevant CCIA reports can be accessed at <https://cer.org.za/programmes/pollution-climate-change/key-correspondence>. There were other documents that were made available for comment as part of the CCIA, PIA and EMPr – please advise if you would like access to these.

<sup>9</sup> P19, Summary Report, CCIA.

medium to low significance with the implementation of appropriate mitigation measures, and that no environmental fatal flaws were identified.

8. Our comments on the final CCIA, of 31 July 2017,<sup>10</sup> highlighted some of the following concerns with the climate impacts of the Thabametsi project in general:
- 8.1. the technology proposed for the Thabametsi plant means that South Africa will be bringing online a new coal plant which will emit the same amount or even more climate-changing GHGs than Eskom's old coal plants. Thabametsi's GHG emissions will be similar to, if not worse than, Eskom's five oldest and soon-to-be decommissioned plants. This means that Thabametsi is clearly not going to be newer and better than South Africa's existing coal fleet; but, in fact, from a GHG emissions perspective, it is going to be worse;
  - 8.2. there are no means to substantially mitigate Thabametsi's GHG emissions and the measures proposed in the CCIA are wholly inadequate. Short of implementing carbon capture and storage – which is neither technically nor financially feasible - it is not possible meaningfully to mitigate the GHG emissions of a coal plant. The CCIA also has no means of ensuring that the water availability risks to the power station are avoided – this is beyond Thabametsi's control. Because the significant climate impacts cannot be avoided, the assessment fails to recommend – as it should – that the power station cannot go ahead;
  - 8.3. there can be no basis for justifying such a harmful and risky project. Even if it could be justified (which it cannot), there is no need for the Thabametsi power station. In this respect we refer to:
    - 8.3.1. the fact that the IRP 2010 is outdated and can no longer be relied upon to reflect South Africa's current electricity needs, and an update of the IRP is still in the process of being finalised (see below for further detail);
    - 8.3.2. the Thabametsi judgment made clear that the existence of the IRP does not do away with the need for the impacts of individual projects to be assessed independently; and
    - 8.3.3. it is not clear why, nor is it correct that additional coal is needed to replace Eskom's power stations. This can be done more efficiently and more cost-effectively (quite apart from the other benefits) with renewable energy. The arguments that coal is needed to provide baseload electricity are outdated and incorrect.<sup>11</sup> The GHG report, as indicated above, states that all coal plants will have a high significance rating, which means that Thabametsi, as a proposed coal-fired power station, will have unavoidably high impacts.<sup>12</sup> This however, is not the case for other sources of electricity generation;
  - 8.4. the impacts of climate change on Thabametsi, such as increased temperatures and water scarcity, are likely to impact on Thabametsi's ability to operate efficiently throughout its anticipated lifespan; and
  - 8.5. if Thabametsi is permitted and enabled to emit GHGs as anticipated up until 2050, this will take South Africa beyond the 'peak plateau decline' (PPD) trajectory as set out in South Africa's nationally determined contribution (NDC), as emissions are required to decline from 2035. If Thabametsi is allowed to proceed, at a time when South Africa is committed and legally obliged to meaningfully and timeously reduce its emissions, the Department of Environmental Affairs (DEA) would be authorising what will be

<sup>10</sup> The comments can be accessed here <https://cer.org.za/wp-content/uploads/2016/07/ELA-Comments-on-Final-Thabametsi-CCIA-PIA-31-7-17.pdf>.

<sup>11</sup> See, for example: <https://www.iche.org/chenected/2016/03/chinese-grid-officials-explode-myth-baseload-power-ceraweek>; <https://www.businesslive.co.za/bd/opinion/2017-02-24-need-for-base-load-power-is-a-pro-eskom-fabrication/>; <https://www.rmi.org/news/grid-needs-symphony-not-shouting-match/>; <https://www.nrdc.org/media/2017/170626>; and <http://reneweconomy.com.au/baseload-an-outdated-term-that-should-not-be-confused-with-reliability-34961/>.

<sup>12</sup> P54 & 62, GHG report.

one of the worst GHG emitters in the country and in the world,<sup>13</sup> and with no means of reducing these emissions. This would be a clear contravention of the Constitution and NEMA.

9. The Minister, in making her decision (attached hereto marked **A**),<sup>14</sup> states that she considered:
  - 9.1. “*relevant material information contained in the project file*”;
  - 9.2. the 8 March 2017 judgment of the North Gauteng High Court;
  - 9.3. the final CCIA; and
  - 9.4. the comments received from the appellants on the final CCIA; and
  - 9.5. the recommendations by EOH Coastal and Environmental Services (EOH) dated 14 December 2017.
10. The decision states that EOH were appointed to advise the Minister on the CCIA. The EOH peer review (attached marked **B**)<sup>15</sup> states, *inter alia*, that:
  - 10.1. “*The rationale for rating the project’s emissions as VERY LARGE is appropriate. However, the rationale for the overall GHG emissions significance rating of HIGH (NEGATIVE) based in the EAPs rating scale is unclear and seems to be somewhat subjective. It is suggested that the could be elevated to VERY HIGH (NEGATIVE) due to high probability and very large emissions, and with limited opportunities for mitigation*”;<sup>16</sup>
  - 10.2. “*Although the report suggests that the less efficient subcritical technology is better suited to small-scale units such as that proposed for the Thabametsi power station, we are aware of other projects where a more efficient 350MW super critical boiler technology is being adopted. However there may be other local factors dictating the selection of the subcritical technology for the Thabametsi power station, such as water resource limitations*” and “*the selection of the technology appears to be very much cost driven*”;<sup>17</sup>
  - 10.3. the analysis of the climate-related risks appear to be realistic and reasonable, with the following risks being rated as **high** significance: lower than normal precipitation leading to increased drought which will result in both water shortages and water quality issues; flood events causing polluted water overflows; and dry spells and drought events affecting communities and threatening the plant’s ‘social licence to operate’;<sup>18</sup> and
  - 10.4. “*... the most important risks include the: very large GHG emission levels that will contribute significantly to global GHG concentrations and global warming; and vulnerability of communities to the manifestations of a changing climate, particularly changes in precipitation patterns and resultant water scarcity*” (emphasis added).<sup>19</sup>
11. In conclusion, the EOH report recommends that following issues should be considered by DEA following from the current peer review:

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<sup>13</sup> P19, [https://www.ipcc.ch/pdf/special-reports/srren/SRREN\\_FD\\_SPM\\_final.pdf](https://www.ipcc.ch/pdf/special-reports/srren/SRREN_FD_SPM_final.pdf).

<sup>14</sup> The decision is available at <https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf>.

<sup>15</sup> The EOH review is available at <https://cer.org.za/programmes/pollution-climate-change/litigation/the-proposed-thabametsi-ipp-earthlife-africa-johannesburg-v-department-of-environmental-affairs-thabametsi-power-project-pty-ltd-and-others>.

<sup>16</sup> P4 EOH Report.

<sup>17</sup> P4 EOH Report.

<sup>18</sup> P6 EOH Report.

<sup>19</sup> P12 EOH Report.

*“While the HIGH significance risk rating for climate resilience according to the GRA is not unreasonable, it is suggested that the significant risk relating to GHG emissions could be VERY HIGH.*

*The rationale for concluding that the overall impact of the project is MEDIUM to LOW when emissions risks are VERY HIGH and water scarcity risks are HIGH, is unclear and it is suggested that the EAP should clarify their rationale.*

*The VERY HIGH GHG emissions levels associated with the project implies a high social cost. An attempt could have been made to provide an estimate of the SCC based on a range of values.*

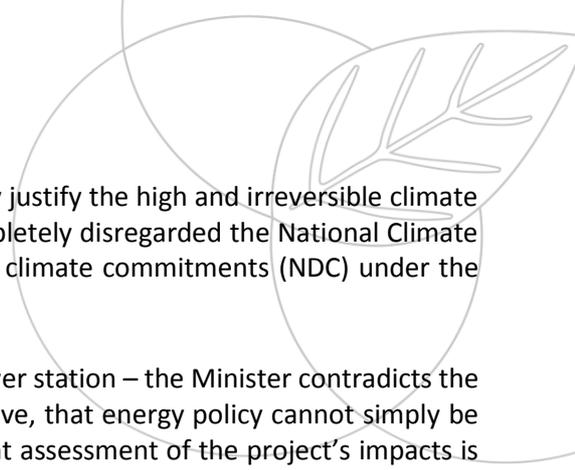
*The environmental and social costs associated with the proposed Thabametsi Coal-Fired Power Station are HIGH. However, this does not necessarily represent a “fatal flaw” provided that the benefits are justified and can be motivated. In terms of the CCSPIA, the justification for the proposed power station is substantially based on existing adopted South African energy and climate change policy. In our opinion, this is not an unreasonable approach, although it is likely to remain contentious.”*

12. The Minister provides the following main reasons for her decision:
  - 12.1. she has taken note that numerous mitigation measures and recommendations have been added to the EMPr;
  - 12.2. although both Thabametsi’s CCIA and the EOH Peer Review rate the impacts of the power station as very high, this does not necessarily represent a fatal flaw, provided the impacts can be motivated and justified;
  - 12.3. *“In addressing the justification of the benefits of the proposed project, I have taken note, as I had done when initially adjudicating on this appeal, the terms of the (IRP) 2010 – 2030 ... concerns about the threat of climate change and the need for greater reliance on renewable energy were raised in the public participation process. These considerations were taken into account by decision-makers during the development of the IRP. A number of complex factors were weighed. Ultimately the decision-makers concluded that the harms that would result from the establishment of new coal-fired facilities ... were outweighed by the benefit to the country of having the additional energy generation capacity”;*<sup>20</sup> and
  - 12.4. *“Having carefully balanced all relevant factors (including the threat of climate change), the final IRP 2010 – 2030 does not prohibit the establishment of new coal-fired power stations. Rather it permits that 6.3GW of new generation capacity may be derived from coal”.*<sup>21</sup>
13. In short, the Minister – in taking the advice of EOH that the high impacts do not necessarily represent a fatal flaw if they can be *“justified and motivated”* – has decided that the IRP 2010 serves as sufficient justification for the project (despite the high impacts), because, she says, in the IRP 2010 public participation process the decision-makers took climate impacts into account (although the NDC, the Paris Agreement and National Climate Change Response White Paper were not in existence when the IRP 2010 – 2030 was modelled) but concluded that the harms that would result were outweighed by the benefit to the country of having additional energy generation capacity.
14. As advised above, our instructions are to institute review proceedings to challenge this decision as unreasonable and unlawful in terms of PAJA.
15. While we do not wish to delve into the merits of the matter at this stage, it is worth pointing out that:

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<sup>20</sup> Paras 4.8 and 4.9.

<sup>21</sup> Para 4.10.

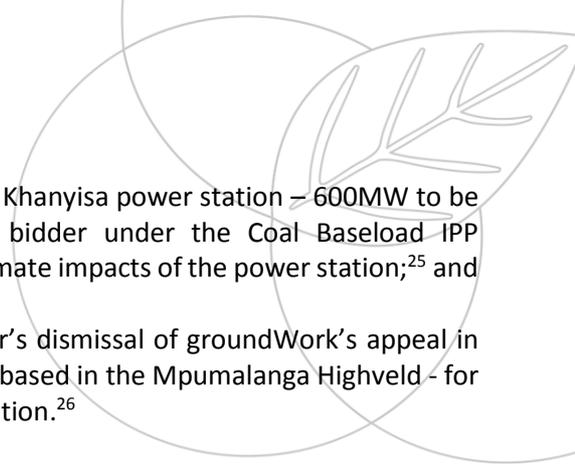
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- 15.1. the Minister has made no attempt to engage with or adequately justify the high and irreversible climate impacts of the Thabametsi project, and she seems to have completely disregarded the National Climate Change Response White Paper and South Africa's international climate commitments (NDC) under the Paris Agreement;
  - 15.2. in relying on an outdated IRP as the sole justification for the power station – the Minister contradicts the March 2017 Thabametsi judgment, which states, as set out above, that energy policy cannot simply be relied upon to justify a project in the absence of an independent assessment of the project's impacts is required;
  - 15.3. the Minister's statements around the need for Thabametsi to address energy security disregard both current realities around electricity demand – as Eskom currently has (and has for some time had) surplus capacity<sup>22</sup> - and accurate electricity costs. A report by Meridian Economics, relying on updated modelling by the Council for Scientific and Industrial Research (CSIR), finds that in a 34 year, least cost optimised, power system operation and expansion plan, **no new coal-fired power capacity is built after Kusile** (including Thabametsi and Khanyisa). It states, "**new coal and nuclear plants are simply no longer competitive. When new capacity is required, demand is met at lowest cost primarily from new solar PV and wind**" (emphasis added).<sup>23</sup> In this instance, the CSIR modelling demonstrates that demand can be met at least cost without **any** new coal, including the preferred bidders (Thabametsi and Khanyisa).
16. A letter was sent to Thabametsi's attorneys on 7 February 2018,<sup>24</sup> to place on record:
- 16.1. our instructions to institute review proceedings to challenge the Minister's decision; and
  - 16.2. that the commencement of any of the authorised activities or further developments in relation to the proposed power station would be entirely at their own risk.
17. We regard this matter as being of high importance for South Africans and we recommend that the Portfolio Committee ask the Minister and DEA:
- 17.1. on what basis the Minister regards the Thabametsi decision as justifiable and lawful;
  - 17.2. why the Minister relies on energy policy to justify a proposed power station with very high impacts, with no regard to South Africa's climate vulnerability; South Africa's international climate commitments (note that our national climate response policy and the Paris Agreement commitments were not in existence when the IRP 2010 was modelled so these considerations could not have been adequately factored into the IRP 2010 modelling); and the current circumstances around excess electricity capacity; and
  - 17.3. whether the Minister and DEA intend to oppose the upcoming review of the Minister's decision.
18. It is worth pointing out that there are other decisions by the Minister, in relation to proposed new coal-fired power stations, which are currently subject to High Court reviews; these being:

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<sup>22</sup> "Eskom currently (as at January 2017) has a surplus of 5 600MW at peak, due to improved plant performance and new additional capacity that can meet any increase in demand until 2021. See <http://www.eskom.co.za/news/Pages/Jann24.aspx>.

<sup>23</sup> P3, Executive Summary, Meridian study.

<sup>24</sup> A copy of the letter can also be accessed here <https://cer.org.za/wp-content/uploads/2018/02/CER-Letter-to-Thabametsi-Power-Company-Pty-Ltd-7-2-18.pdf>.

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- 18.1. the review of the environmental authorisation for the proposed Khanyisa power station – 600MW to be based in the Mpumalanga Highveld - (the other preferred bidder under the Coal Baseload IPP Procurement Programme) for failing to adequately assess the climate impacts of the power station;<sup>25</sup> and
  - 18.2. the review of the environmental authorisation and the Minister’s dismissal of groundWork’s appeal in relation to the proposed KiPower power station – 600MW to be based in the Mpumalanga Highveld - for failing to adequately assess the climate impacts of the power station.<sup>26</sup>
19. The Minister and DEA have not yet given any indication of an intention to oppose the above litigation.
  20. In relation to the Thabametsi case of March 2017, an amount of R381 373.11 – in legal fees is owing from the government respondents. Payment is now overdue.
  21. There is a strong likelihood that the Minister and DEA will incur further legal fees in relation to the above litigation, the institution of which was necessitated by the Minister’s unreasonable decisions in relation to these coal-fired power stations.
  22. Please notify us should you intend to host a briefing on the Minister’s Thabametsi decision of January 2018, or any related issues, particularly in respect of our questions listed at paragraph 17 above.
  23. Please also let us know if you require any further information.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**



per:

**Nicole Loser**  
**Attorney**

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<sup>25</sup> Court papers and further information can be accessed here and can be made available on request <https://cer.org.za/programmes/pollution-climate-change/litigation/groundwork-acwa-power>.

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