In the matter between:

GROUNDWORK Appellant

and

MUNICIPAL MANAGER:
NKANGALA DISTRICT MUNICIPALITY First Respondent

MPUMALANGA DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENT AFFAIRS (MDARDLEA) Second Respondent

and

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

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SUPPLEMENTARY APPEAL IN TERMS OF SECTION 62 OF THE LOCAL GOVERNMENT MUNICIPAL SYSTEMS ACT 32 OF 2000

INTRODUCTION

1. The current appeal forms part of the provisional appeal lodged on 13 November 2017 (the "2017 appeal") in terms of section 62 of the Local Government: Municipal Systems Act, 2000 (MSA) in respect of the purported transfer of the provisional atmospheric emission licence (PAEL) 17/4/AEL/MP312/14/20 from Anglo Operations (Pty) Ltd ("Anglo") to ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd ("ACWA") for the proposed Khanyisa Project.

2. The PAEL issued by the Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (MDARDLEA) in 2015 differs from the transferred PAEL issued by the Nkangala District Municipality (NDM) in 2017; therefore these licences will be referred to as "the 2015 PAEL" and "the 2017 PAEL", respectively.

3. The 2017 appeal was lodged timeously within the prescribed period, with NDM and MDARDLEA, on 13 November 2017. Extensive and detailed grounds of appeal were provided, and the appellant reiterates those grounds. This appeal supplements and supports the 2017 appeal and therefore should be read in conjunction with the 2017 appeal.

4. On 6 November 2017, correspondence was sent to the NDM requesting the full reasons for its decision, and the appellant reserved its right to supplement the 2017 appeal once the full reasons for the transfer were received from NDM. The appellant's rights were also reserved in the same manner in paragraphs 29-30 of the 2017 appeal.

5. After numerous follow-up correspondence, and more than 4 months having passed since the lodging of the 2017 appeal, on 9 March 2018, the Centre for Environmental Rights (CER) received a letter from NDM dated 2 March 2018, by courier. The correspondence and the annexures are attached as Annexure H.

6. The NDM's 2 March 2018 correspondence recommended against the appellant's appeal, and provided responses to some of the queries addressed in CER's correspondence of 6 November 2017. The March 2018 correspondence however, failed to provide full reasons for NDM's decision; which, amongst others, would and should include:

   6.1. the list of the full record of documents and information NDM considered in reaching its decision;

   6.2. the applicable laws NDM relied on to reach its decision;

   6.3. the main considerations taken into account in processing the 2017 PAEL application; and

   6.4. NDM's finding and decision, and why it reached its conclusion that a transfer application should be granted.

7. On 16 March 2018, the CER sent an email to NDM seeking clarity on whether the March 2018 correspondence was intended and considered to be a response to CER's request for reasons. CER also requested confirmation on whether the LA had forwarded the 2017 appeal to the appeal authority as required by section 62(2) of the MSA. CER again reserved the appellant's right to supplement its appeal upon receipt of reasons. A copy of this correspondence is attached as Annexure I.

8. On 20 March 2018, the NDM directed correspondence to CER by email (Annexure J), confirming: that NDM's March 2018 correspondence constitutes full reasons for its decision, that it had not forwarded the 2017 appeal to the appeal authority, and that it granted 14 days for the appellant to submit its supplementary appeal.

9. On 29 March 2018, CER sent a further reply to the NDM (Annexure K) confirming that the appellant intended to supplement the 2017 appeal within 21 days of the receipt of NDM's confirmation, as allowed in terms of section 62 of the MSA.

10. Whilst the NDM's 2 March 2018 correspondence did not provide the full reasons as requested from (and still owed by) NDM, it did, however, provide some clarity as to the delegation of powers, and NDM's views in the status of the 2017 PAEL application as a transfer or variation. This supplementary appeal will therefore address this new information that has come to light since the 2017 appeal. First, a brief summary of the grounds for the 2017 appeal will be set out below.

SUMMARY OF THE 2017 APPEAL

11. The 2015 PAEL was incapable of transfer as it did not reflect the proposed Khanyisa Project as currently authorised. Accordingly, the 2017 PAEL is invalid, as it does not reflect the currently proposed and authorised Khanyisa Project; for instance: the design changes and the increased air pollution and increased pollution as a result of increase in coal ash due to increase in the capacity of the plant from 450MW to 600MW, as mentioned in Khanyisa's 2015 Environmental Impact Report, the various Environmental Authorisation (EA) amendment and the 2015 PAEL.

12. The 2017 PAEL was not simply transferred, but materially altered during the transfer. This goes far beyond the scope of ownership transfer as envisaged in section 44 of the AQA. The licensing authority (LA) therefore acted *ultra vires* the empowering transfer provision in section 44 of the AQA. In order to be transferable to reflect the project as currently proposed in the current EA, the licence would first require a variation application to be made and succeed under section 46 of the National Environmental Management: Air Quality Act, 2004 (AQA) prior to any transfer; alternatively, a fresh licence would need to be applied for by ACWA.

13. The LA failed to take into account relevant factors as prescribed in section 44(5) of AQA in deciding to transfer the PAEL, including: section 24 of the Constitution, the section 28 duty of care under the National Environmental Management Act, 1998 (NEMA), the section 2 NEMA principles, AQA's objectives, the 2012 National Framework for Air Quality Management in the Republic of South Africa ("the Framework"), the ambient air quality standards (AAQS), sections 18-19 of AQA (dealing with priority areas), and the Highveld Priority Area (HPA) Air Quality Management Plan (AQMP).

14. Next, the appellant sets out the appeal grounds which supplement the 2017 appeal.

GROUNDS FOR THE SUPPLEMENTARY APPEAL

15. As is clear from the provisions of AQA and the provisions of the Promotion of Administrative Justice Act, 2000 (PAJA), the NDM's duty in issuing licences is not merely to rubber-stamp applications submitted to it, but to properly consider the application and all relevant factors, in order to make a lawful, rational, and reasonable decision. This includes, for example: making sure that the information submitted is accurate and complete, that it considers all the information submitted to it, that it considers all relevant factors that it ensures that the applicant complies with the legal processes, and that it provides full reasons for its decision. Failure to give due consideration and reach a rational decision will result in grounds of review, highlighted in section 6 of PAJA

16. We hereby supplement the appeal grounds of the 2017 appeal, with the following additional grounds of appeal:

The LA did not take into account that the 2015 PAEL may not be valid and thus incapable of transfer, and therefore the decision is not rationally connected to the empowering provision, the information before the NDM and/or the reasons given by NDM

17. Section 44(1) of AQA governs the transfer of a licence; however, the underlying assumption is that the licence which is transferred is valid and therefore transferable.

18. According to NDM, the atmospheric emission licensing function was delegated from NDM to MDARDLEA from 1 April 2010 until 1 July 2013,[1] and therefore MDARDLEA (the former Department of Economic Development and Tourism (MEDET)) was the designated LA during this period. From 1 July 2013 to date, according to NDM, NDM was the correct LA authorised to consider atmospheric emission licence (AEL) applications.

19. During 2014, however, instead of NDM, MDARDLEA received Anglo's PAEL application dated 2 April 2014, for its 450MW Khanyisa operations, and issued the licence on 17 September 2015.[2]

20. Administrative action taken should be within the bounds of the empowering provision, which includes proper delegation of powers; otherwise the decision would be *ultra vires* and unlawful.[3]

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[1] According to paragraph 2, 8 and 10 of 2 March 2018 NDM correspondence, read together with its accompanying annexures (the Service Level Agreement (SLA) signed between MDARDLEA and NDM in 2010; the addendum in 2012; as well as extracts of the June 2013 Council meeting),

[2] Aurecon's letter to the NDM dated 22 February 2017 (Annexure G), and 2015 PAEL.

[3] Section 1(a)(ii) and 6(2)(a) of PAJA

According to the information provided by NDM, MDARDLEA was not authorised to consider the 2015 PAEL application submitted to it in 2014, and therefore the validity of the 2015 PAEL should have been questioned. However, instead, and despite MDARDLEA not having the relevant authority to consider or issue the 2015 PAEL, the NDM nonetheless assumed the validity of the 2015 PAEL and considered the licence to be capable of transfer. Under the circumstances, NDM should have questioned the validity of the 2015 PAEL and requested ACWA to resubmit the PAEL to the correct authority, instead of proceeding to transfer the questionable 2015 PAEL.

21. Furthermore, in the 2017 appeal, as well as during the public consultation process, the appellant argued extensively that the 2015 PAEL was incapable of transfer, as it did not reflect the proposed Khanyisa Project as currently authorised, and accordingly the 2017 PAEL transfer is invalid. The NDM states in the 2 March 2018 correspondence, that "*there were no changes to the design of the proposed project and the capacity remained at 450MW as per the applicants' request. Thus the Licensing Authority issued a licence against what was applied for and consistent with the previous PAEL*".[4] Furthermore, it states elsewhere that *"the Environmental Authorisation (EA) shows that the intended production capacity is 600MW*."[5]

22. As mentioned in the 2017 appeal, in considering a transfer application, the LA was required to consider **all** relevant information, which includes the latest EA issued and any amendments. The change in the design and capacity is evident from the EAs, the 2015 EIR, and CER's various 2017 objections to the transfer (which presumably were submitted to the LA as part of the transfer application). These all referred to the change in design and capacity of the Khanyisa project, as well as the environmental impacts associated with the 33% increase in capacity. It is clear that the LA did not give due consideration to all available information before it. Had it done so, it would have concluded that the PAEL to be transferred was not reflective of the current power station proposed and authorised in the EA, and is thus not transferable.

23. The LA states that it "*issued the PAEL based on the information provided in the application by the applicant. The Licensing Authority had no reason to believe that PAEL is deficient, as evidenced by ACWA's environmental assessment practitioner*", and it referred to Aurecon's letter in Annexure B to support its submission. However, Annexure B does not contain any support for this submission. Moreover, the LA's own statement is not consistent with its own submission in paragraph 3 of the 2 March 2018 correspondence, which indicates that the 2015 PAEL and the application are inconsistent with the EA.

[4] Paragraph 4 of the 2 March 2018 correspondence.
[5] Paragraph 3 of the 2 March 2018 correspondence.

The 2015 transfer application is defective in that the application was not advertised in accordance with the transfer procedures of the AQA.

24. The transfer application was also defective, as it was not advertised properly to notify the public as required by section 44(4) of the AQA. As evident from CER's objections lodged during the 2015 PAEL transfer application public participation process, the 24 February 2017 advertisement in the Middelberg Observer and the Witbank News are defective, since they incorrectly refer to section 47 of the AQA, pertaining to AEL renewal.

25. The NDM's 2 March 2018 letter contain the aforementioned advertisement and objections, and also attach further advertisement of the 2017 PAEL transfer on 21 April 2017 in the Middelburg Observer. The advertisement again appears to be defective, since, according to the documentation supplied by NDM, the transfer was advertised in only one local newspaper, despite section 44 of AQA requiring advertisement in two local newspapers. The advertisement also does not appear to comply with the legal requirements as the "particulars of the listed activity, including the place where it is carried out" - as required in terms of section 44(4)(b)(ii) of the AQA - are missing from the advertisement.

26. The LA was required to give due consideration as to whether or not proper process was followed in terms of the transfer application.

NDM took its decision arbitrarily

27. The LA is required to have a rational reason for its decision, relying on relevant documents and laws which support its decision-making. The NDM did not do this. According to paragraph 10 of the 2 March 2018 correspondence, NDM confirms, on one hand, that the 2015 PAEL was transferred and not varied. However, in paragraph 11, the LA seems uncertain as to what decision was taken in terms of the application and states that "*the LA is on a balance of probabilities satisfied that the application lodged and considered by it was that of a transfer not of a variation.*" It is submitted that the LA's uncertainty in this regard, and its failure to provide full reasons for its decision is capricious and arbitrary decision-making.

28. The LA also did not: confirm all the legislation it considered, all the documentation it considered, or provide reasons why it reached its decision.

The LA's decision is not rationally connected to the information which it considered.

29. In the 2017 appeal, extensive reasons were provided as to why the 2015 PAEL was incapable of transfer, as it did not reflect the proposed and intended Khanyisa Project. In this regard, the LA states that "*the licence transfer application was for 450MW power output and the licence issued was also 450MW. The Environmental Authorisation shows that the intended production capacity is 600MW but the PAEL was granted for only 450MW and also the Global Position System Coordinates are the same in the previous PAEL and the transferred PAEL. This means that **the location did not necessarily change, hence there was no anticipated impacts on the environment.***"[6] [emphasis added]

30. To merely state that the increase of 33% from 450MW to 600MW plant has no anticipated impact on the environment, as it is located at the same co-ordinates as the application, is simply incorrect and irrational. As indicated in the 2017 appeal, a 33% increase in plant capacity will result in significant impacts, not only from an air emission perspective, but also from coal ash impacts. This will add to the deterioration of ambient air quality in the HPA, and will also have an impact on negative impact on achieving AAQS. As the increase in capacity outlining the anticipated impacts on the environment was provided in CER's various objections, the 2017 appeal, as well as in Khanyisa's EA and 2015 EA application, it must be presumed that the LA did not consider the relevant documentation in reaching its decision.

31. When addressing the increase in capacity, the LA merely states, in paragraph 10.4, that *"the applicant applied for the 450MW hence the LA transferred the PAEL that was applied for. The information in respect of the capacity increase will be addressed and can be obtained from the facility*". This does not answer whether or not the LA considered the 2015 EA, the 2015 FEIR, and the CER's numerous 2017 objections which address why variation was necessary before transfer could take place. The NDM fails to make any decision related to the variation, and as indicated above, defers this issue to ACWA. The fact of the matter is that variation was required prior to the transfer to properly reflect Khanyisa's full and currently proposed project. The LA was therefore required to consider whether the licence was suitable and in accordance with the project that is **currently being proposed by ACWA** – following various amendments and changes to the proposed design (and capacity) as per the final EA, prior to the transfer process, since the LA was aware that changes were approved in the EA. This would have been evident had the LA considered the objections. It also does not provide reasons in respect of how and when the

[6] Paragraph 3 of the 2 March 2018 correspondence.

changes to the Khanyisa project will be addressed, and left this to the applicant to make this decision.

The NDM was not authorised by the empowering provision - section 44 of AQA - to materially alter the contents of the 2015 PAEL in effecting the transfer

32. The 2017 appeal provided extensive reasons as to why LA actions were *ultra vires* the AQA transfer provision, by materially altering the 2017 PAEL. According to the 2 March 2018 correspondence however, LA is still of the view that no variation took place, despite amendments being evident when comparing the 2015 and 2017 PAEL.

33. Section 44 of the AQA governs the transfer for licences, and since "transfer" is not defined in the AQA, it must be given an ordinary meaning. According to the Oxford Dictionary,[7] it means, in relation to an object, to "m*ake over the possession of (property, a right, or a responsibility) to another*". Section 44(1) states that "*If ownership of an activity for which a [PAEL] is transferred….the licence may, with the permission of a licensing authority, be transferred by the holder of the licence to the new owner of the activity*." Clearly, this section pertains to change in ownership from a licence holder to the new owner, and does not include material alteration to the licence during the transfer process. The material alteration of a licence during transfer of the licence is not authorised under this section. Any changes to the content of the PAEL would be governed, instead, by the variation provision under section 46 AQA.

34. The 2017 appeal identified various material alterations to the 2015 PAEL, which included the extension of the licensed location. In addition the 2 March 2018 correspondence indicates that "*the applicant submitted a zoning certificate application that was received from the municipality on the 8 September 2017, therefore the licence was changed to reflect the current land use*"[8], and that "*this is not a change of an AEL condition in terms of NEMAQA*."[9]

35. The zoning certificate contained in the 2 March 2018 correspondence, pertains to portion of land indicated in the 2015 PAEL, <u>as well as</u> other portions of land, which do not form part of the original 2015 PAEL, which have been included. As indicated in the 2017 appeal, Klipfontein portion 145 and 167 (which may increase the project site), and Klippan 332 (which may cater for the increase in ash disposal capacity) were previously not included in the 2015 PAEL, but have been purportedly added as a result of the transfer. The zoning certificate confirms the 2017 appeal

[7] https://en.oxforddictionaries.com/definition/transfer
[8] Paragraph 8 of the 2 March 2018 correspondence
[9] Paragraph 9 of the 2 March 2018 correspondence,

submission in that the addition of the proposed ash disposal area, Klippan 332 alone, would add approximately 150ha of land which was previously not included in the 2015 PAEL. This significant increase in surface area – and thus environmental impacts - constitutes an addition or amendment of a condition or requirement, resulting in an increase in environmental impact and atmospheric emissions, and therefore a variation was required in terms of section 46, before transfer could take place.

The LA did not take into account all the relevant information before it and the empowering provisions

36. Although the appellant requested full reasons for the LA's decision, the LA failed to provide the full reasons for its decision, including the list of relevant empowering provisions it considered, as well as all the documents it considered, and the reasons for its final decision.

37. In relation to the submission that the 2015 PAEL is deficient and incapable of transfer as the PAEL fails to reflect and provide for the Khanyisa's design changes or increase in capacity, and latest environmental authorisation, the LA stated that "*section 44(3) provides that an application of a transfer of a licence must be accompanied by: a) a prescribed processing fee b) such documentation and information as may be required by the Licensing Authority. The applicant applied for the 450 MW hence the Licensing Authority have transferred the PAEL that it was applied for*."[10]

38. What the NDM seems to argue is that the only consideration required in terms of transfer application is whether the applicable fees and documentation and information required by the LA have been provided, and that the issued licence matches the original application (but not the project that is in reality currently being proposed by the applicant). It is submitted that this is tantamount to rubber-stamping and is not a rational administrative action envisaged by PAJA and section 40 of the AQA (made applicable to transfers by section 44(5)).

39. The LA therefore failed to consider all the relevant empowering provisions; which include: the Constitution, NEMA, NEM principles, AQA, AQMP, the Framework, and PAJA, among others. As per the 2017 submission, the LA should also consider the implication of issuing the licence in HPA, as well as the associated health implications. This was discussed in detail in 2017 appeal. It is worth adding that the LA should also consider the health impacts of the project, and whether it would be in the public interest to authorise the transfer of the 2015 PAEL. In this regard, the LA should consider whether or not proper economic and health impact assessments had been

[10] Paragraph 15 of the 2 March 2018 correspondence.

conducted, which analyses the direct and indirect cumulative impact from the Khanyisa project as well as the associated mine. In fact, such assessments have not been conducted.

40. The assertions made by NDM in relation to the project's design changes and capacity increase, as outlined above, demonstrate that the LA failed to consider all documentation before it, including CER's submissions, Khanyisa's 2015 final environmental impact assessment, Ron Sahu's report, and the advertisement of transfer. The LA merely compared the application to the issued documentation and issued the licence.

CONCLUSION

41. Given the numerous deficiencies pertaining to the administrative action taken by the NDM, which are unlawful and unreasonable as outlined in the current supplementary appeal, as well as the 2017 appeal, the appellant requests that the appeal authority disregard the LA's recommendation to dismiss the appeal.

42. In the circumstances, the appellant stands by its submission in the 2017 appeal and requests:

    42.1. that the appeal be granted and the Municipal Manager's decision to transfer the 2015 PAEL be set aside; and

    42.2. that ACWA be directed to apply for a fresh PAEL for the **current** proposed 600MW Khanyisa project (as per its amended EIA and EA) with a fresh public participation process. It is submitted that such application should be varied to reflect the current project with a fresh public participation process and should at least include:

        42.2.1. accurate information about the Khanisa Project, including amongst others: exact co-ordinaries, health and air quality impacts; graphical representation and maps, positions and size of the proposed plant, the size and position of the land, all the point source parameters (condition 6.4.1 of PAEL), and area and/or line source parameters (condition 6.4.2 of PAEL) - which includes fuel and ash conveyors, ash disposal facilities and emissions arising from each source for the current 600MW Khanyisa Project, the full and effective appliances and control measures with commissioning dates from the date of the plant coming into operation, among others;

    42.3. a fugitive emission management plan;

42.4. an emission reduction plan;

42.5. emission information on the disposal facilities for ash arising out of full 600 MW plant; and

42.6. full details for the estimated lifecycle GHG emissions and measures to mitigate these emissions, as part of a full CCIA required for the Khanyisa Project.

43. Alternatively, the Municipal Manager be directed to require public participation to vary the 2017 PAEL to cater for the full 600MW Khanyisa project which includes 42.2.1-6 above.

44. It is submitted that, since ACWA has not yet commenced operation, and still has not been issued with certain approvals such as a licence to generate electricity from the National Energy Regulator of South Africa, ACWA will not be unduly prejudiced if it is required to prepare a fresh PAEL or required to vary the PAEL, with public participation. In any event, any prejudice to ACWA will be wholly outweighed by the prejudice to interested and affected parties, including the appellant, and to constitutional environmental rights, should the transfer and the PAEL not be set aside.

DATED at CAPE TOWN on this the 10TH day of April 2018.

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