BEFORE THE APPEAL AUTHORITY

NKANGALA DISTRICT MUNICIPALITY

In the matter between:

GROUNDWORK	Appellant
and	
MUNICIPAL MANAGER: NKANGALA DISTRICT MUNICIPALITY	First Respondent
MPUMALANGA DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS	Second Respondent
ACWA POWER KHANYISA THERMAL POWER STATION (RF) (PTY) LTD	Third Respondent

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ACWA'S HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1 This appeal that serves before the Appeal Authority ("**the Authority**") is concerned with the transfer of a Provisional Atmospheric Emission Licence ("**PAEL**"). The PAEL was transferred from Anglo Operations (Pty) Ltd ("**Anglo**") to the Third Respondent ("**ACWA**"), and it enjoyed both parties' unequivocal support. As such, the approval of the transfer should have been a straightforward, administrative matter. Indeed, it was treated as such – correctly, in ACWA's respectful submission – in the first-instance decision, taken by the Nkangala District Municipality ("**NDM**"), against which the appellant ("**GroundWork**") now seeks to appeal.[1]

2 The transfer of the PAEL from Anglo to ACWA was made necessary by a decision of the Department of Energy ("**DoE**"). The DoE awarded ACWA Power preferred bidder status in relation to the ACWA Power Khanyisa IPP Project ("**the Project**"), under its coal baseload programme for independent power producers.[2]

3 The main objective of the DoE's coal baseload programme "*is to facilitate the participation of independent power producers in the baseload power generation capacity industry in South Africa which will provide, amongst others increased energy security and contribute towards socio-economic and sustainable growth objectives*".[3] The NDM's decision to permit the transfer is consistent with this policy. It is trite that

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[1] See annexure H to GroundWork's supplementary appeal, page 119.

[2] See annexure H to GroundWork's supplementary appeal, page 139.

[3] See "*About the Coal Baseload IPP Programme*" https://www.ipp-coal.co.za/About (accessed 10 November 2018).

the policy is presumptively valid, and that it will remain so, unless and until it is reviewed and set aside.[4]

4 The presumptive validity of government policy bears mentioning because it is the reversal of that policy that is GroundWork's true end goal. These proceedings are a sequel to what has become a barrage of attacks on the part of GroundWork to see to it that the Project is derailed. GroundWork would not busy itself with an appeal against the NDM's administrative decision for any other reason than that the frustration of the Project is its main objective.

5 GroundWork, the appellant in these proceedings, is a non-profit environmental justice service.[5] What GroundWork is not is a party to the NDM-approved transfer of the PAEL from Anglo to ACWA Power. On all of the relevant facts of the appeal, as a completely separate third party, GroundWork's appeal to the Authority is impermissible.

6 The reason why the merits of this appeal need not detain the Authority lies in the meaning and import that the courts have ascribed to section 62 of the Local Government Municipal Systems Act 32 of 2000 ("**the Systems Act**"). The parties are all agreed that the proper interpretation of section 62 of the Systems Act is dispositive of this appeal. In **Reader v Ikin**,[6] a judgment which was subsequently confirmed by the Supreme Court of Appeal ("**the *Reader* judgment**"),[7] the Court held as follows:

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[4] See, for example, *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at paragraph 101; and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paragraph 26.

[5] CER acts on GroundWork's behalf in these proceedings.

[6] *Reader v Ikin* 2008 (2) SA 582 (C).

[7] *Municipality of the City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA) at para 36.

> *"For these reasons, s 62(1) read with s 62(3) of the Systems Act does not appear to provide any viable internal remedy to an aggrieved party such as the appellant in the present dispute. The mechanism created by ss 62(1) and 62(3) of the Systems Act provides an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision. The latter group, however, has a right of access to a court to set aside such a decision. In my view, Veldhuizen J erred in holding that appellants were required to exhaust an internal remedy in terms of section 62 before approaching a court, as the section did not provide appellants an internal remedy, as envisaged in terms of s 7(2) of PAJA".*[8]
>
> (Our emphasis).

7 The *dictum* above is dispositive of this appeal. Here, GroundWork stands in precisely the same position as the "*third party*" in *Reader v Ikin* above. As such, on the clear authority of the *Reader* judgment, GroundWork's purported appeal before this Authority is stillborn, and must be dismissed.

8 It is on this issue that the NDM has called for written submissions. On 23 October 2018, the NDM required GroundWork and ACWA to file written submissions in answer to the question of "*whether … Nkangala District Municipality ha[s] jurisdiction to hear the appeal*".[9] The problem is not so much the NDM's jurisdiction, but GroundWork's standing. GroundWork seeks an appeal as a third party to the transfer in circumstances where the *Reader* judgment demonstrates that it has no standing to do so. Its appeal must therefore be dismissed.

9 In these written submissions, ACWA respectfully submits that this outcome would be the appropriate course. On 2 November 2018, GroundWork advanced nuanced and complex legal reasons as to why it disagrees. Below, we shall expand upon the

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[8] Ibid at para 25.

[9] Para 6.

reasons why the appeal should be dismissed, despite GroundWork's contentions to the contrary.

10 The remainder of these submissions will be structured in accordance with the Table of Contents, further above. Broadly speaking, we shall organise these submissions as follows:

10.1 First, we shall explain why the *Reader* judgment leads inevitably to the dismissal of GroundWork's appeal. With reference to further SCA authority, we shall demonstrate that there are at least two reasons for this:

10.1.1 As a third party, GroundWork has no standing to bring such an appeal; and

10.1.2 To permit GroundWork to do so would fly in the face of the protections afforded to ACWA under section 62(3) of the Systems Act, as interpreted by the SCA.

10.2 We shall secondly summarise why GroundWork's contentions to the contrary are either incorrect, or alternatively do not lead to the conclusion contended for.

11 We shall summarise ACWA's conclusion and prayer in the final section of these Heads of Argument. In summary, we shall submit that this appeal must be dismissed.

THE SCA'S INTERPRETATION OF SECTION 62 OF THE SYSTEMS ACT IN THE *READER* JUDGMENT IS DISPOSITIVE OF THIS APPEAL

(a) The import of the *Reader* judgment

12 Section 62(1) of the Systems Act provides as follows:

> *"A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."*
>
> (Our emphasis).

13 The *Reader* judgment is the SCA's most comprehensive statement on how section 62 of the Systems Act must be interpreted. The relevant facts of the case may be summarised as follows:

13.1 The applicants and the third respondent were owners of adjoining municipal properties;[10]

13.2 The third respondent decided to build a second storey to her house, which required prior municipal approval, and the third respondent sought and obtained this approval, and proceeded to build her second storey;[11]

13.3 The applicant felt aggrieved at the building that was taking place, as she claimed that her own vested rights were prejudiced by the fact that the building "*obliterate[d] [her] view of the sea*"; "*compromise[d] the privacy of her*

[10] *Reader* judgment at para 6.

[11] Ibid at paras 5 to 7.

home"; and "*reduced the value of her property by the amount of R350 000*".[12]

13.4 The applicant instituted review proceedings challenging the validity of the approval of the building.[13] In response, she was met with an argument that she ought to have followed the appeal process provided for under section 62 of the Systems Act. The court of first instance upheld this argument. The applicant then proceeded to appeal the judgment to the Full Court, which reversed the first-instance decision, in its judgment in *Reader v Ikin*.

14 In *Reader v Ikin*, the question of the proper interpretation of section 62 of the Systems Act was thus squarely raised. The Full Court, as we have already mentioned, held that the appeal process provided for under that provision did not avail third parties in the position of the applicant, notwithstanding the applicant's asserted prejudice. We repeat the relevant *dictum* here for convenience:

> "*For these reasons, s 62(1) read with s 62(3) of the Systems Act does not appear to provide any viable internal remedy to an aggrieved party such as the appellant in the present dispute. The mechanism created by ss 62(1) and 62(3) of the Systems Act provides an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision.* The latter group, however, has a right of access to a court to set aside such a decision. *In my view, Veldhuizen J erred in holding that appellants were required to exhaust an internal remedy in terms of section 62 before approaching a court, as the section did not provide appellants an internal remedy, as envisaged in terms of s 7(2) of PAJA".*[14]
>
> (Our emphasis).

15 It was in these circumstances that the SCA granted special leave to appeal. It did so *inter alia* because it recognised the importance of the issue, and the fact that the

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[12] Ibid at para 7.

[13] Ibid at para 8.

[14] *Reader v Ikin* (*supra*) at para 25.

outcome of a decision from the SCA would have "*immense implications for local governance in this country*". In the result, the outcome reached by the Full Court in *Reader v Ikin* was unanimously confirmed by the SCA. For the purposes of the proper interpretation of section 62(1) of the Systems Act, there are two findings of the SCA in the *Reader* judgment that dispose of this appeal:

15.1 The "*plain … purpose of s 62 as a whole is to give the dissatisfied applicant for permission – and to no one else – an opportunity for the matter to be reheard by a higher authority within the municipality*";[15] and

15.2 "*It is only the aggrieved applicant, who has failed to secure the permission sought in his or her application, who is afforded a right of appeal under s 62*".[16]

16 When applied to the present facts, the *ratio* of the *Reader* decision of the SCA may be summarised as follows:

16.1 The only party to this appeal who would have been entitled to appeal against the NDM's decision would have been ACWA, if the decision had gone against it;

16.2 In respect of the transfer of the PAEL, GroundWork is not a directly affected party, because it is an uninvolved and separate third party to that transaction (and it bears mentioning in this regard that the applicant in the *Reader* judgment stood to lose far more than GroundWork does in this appeal, including *inter alia* a considerable reduction in the value of her home, and yet

[15] Ibid at para 31 (our emphasis).

[16] Ibid.

she was still held not to be a directly affected party);[17]

16.3 GroundWork cannot claim to be the "*aggrieved applicant*" in relation to the PAEL, and the *Reader* judgment grants the right of appeal under section 62 of the Systems Act to only to the aggrieved applicant "*and to no one else*".

17 There are yet further aspects of the *Reader* judgment, concerning section 62(3) of the Systems Act, that support the same outcome. We shall return to them shortly. However, in the light of the above, the SCA's interpretation of section 62(1) of the Systems Act is sufficient on its own for GroundWork's appeal to be dismissed.

18 In its written submissions, GroundWork appears to suggest that the SCA's subsequent judgment in *Groenewald* somehow stands in the way of this conclusion. But that is not correct. Before addressing section 62(3) of the Systems Act, we shall explain why it does not.

(b) <u>The *Groenewald* judgment is plainly distinguishable from the facts that apply to GroundWork in this appeal</u>

19 In the *Groenewald* judgment, the SCA had occasion to consider the *Reader* judgment in a different context. The question to be answered there was whether there was an exception to the principle established in the *Reader* judgment, which would permit <u>disgruntled tenderers</u> to utilise the appeal provisions provided for under section 62 of the Systems Act.

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[17] In its written submissions, GroundWork attempts to overcome this hurdle, and to cite the *Reader* judgment as purported support for its position, on the basis of an argument that it received notification of the impugned decision in its capacity as a registered interested and affected party in terms of the National Environment Management: Air Quality Act 34 of 2009 ("**NEM:AQA**"). However, the fact that GroundWork has registered as such does not mean that GroundWork thereby becomes "*directly affected*" for the purposes of the Systems Act. We address this argument in more detail further below.

20 In relevant part, the SCA held unanimously that –

20.1 "*awards of tender in the public sector are a fruitful source of litigation*" for disgruntled tenderers;[18]

20.2 this has "*led to the courts being swamped with cases concerning complaints about the award of contracts*";[19]

20.3 disgruntled tenderers met the requirement that their rights must be "*directly affected*" (as established in the *Reader* judgment), because "*the unsuccessful tenderers … were all parties to the tender approval process*".

21 On this basis, the SCA 'carved out' a narrow exception to the general principle established in the *Reader* judgment. However, on the facts of the present appeal, this narrow exception does not assist GroundWork. Applied to the present facts, the only party who might arguably be entitled to raise an appeal under section 62 of the Systems Act would be Anglo, as the transferor of the PAEL. GroundWork itself would remain an indirect third party.

(c) The SCA's interpretation of section 62(3) of the Systems Act provides further confirmation that this appeal should be dismissed

22 Our submissions above, we respectfully submit, demonstrate clearly that GroundWork's appeal should be summarily dismissed. Even so, the SCA's interpretation of section 62(3) of the Systems Act lends this conclusion further support.

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[18] *Groenewald* judgment at para 1.

[19] Ibid, citing *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010] ZASCA 13 at para 1.

In all appeals that are brought in terms of section 62(3) of the Systems Act, the terms of section 62(3) grant the beneficiary of the decision of first instance (in this case, the decision of the NDM to approve the transfer) the following protection:

> *"(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision".*

(Our emphasis).

23 The SCA's explanation as to how section 62(3) must be interpreted is addressed in the *Reader* judgment. Having concluded that an appeal in terms of section 62 of the Systems Act was "*only*" available to a "*dissatisfied applicant*" and "*to no one else*",[20] the majority of the Court then found support for this conclusion in the words of section 62(3) that we have underlined above. The Court held as follows:

23.1 In order to conform to section 62(3) of the Systems Act, "*the decision made by the municipality or its delegee in the case of the application itself may be appealed against … only if the outcome of the appeal does not detract from the rights of the successful applicant*";[21]

23.2 The question of whether the party that is the beneficiary of the decision at first instance has acted in accordance with the entitlement in the interim "*is not … relevant*";[22] and

23.3 The approval of the third respondent's building approvals alone was sufficient for the third respondent to have "*acquired a right from the municipality*", and

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[20] *Reader* judgment at para 31.

[21] Ibid at para 32.

[22] Ibid at para 33.

the progress of the actual building works were of "*no consequence*" to this question.

24 For these reasons, the SCA held that the "*very wording*" of section 62(3) of the Systems Act precludes the permission of a third-party appeal:

> *"A successful appeal against the grant of planning permission by the municipality under section 62(1) would necessarily entail the outcome that the decision would be revoked or varied – contrary to s 62(3)….."*.[23]
> (Our emphasis).

25 Section 62(3) of the Systems Act, as interpreted by the SCA, therefore stands as a further obstacle to GroundWork's appeal.

(d) Summation

26 This appeal falls to be determined in terms of the provisions of section 62 of the Systems Act. None of the parties to this appeal disputes this. In the light of the *Reader* judgment, on a proper interpretation of section 62 of the Systems Act, the appeal should be dismissed for three reasons:

26.1 First, on the interpretation of section 62(1) of the Systems Act in the *Reader* judgment, it is only ACWA, as a "*dissatisfied applicant*", that would be entitled to appeal the decision of the NDM, and "*no one else*" would be entitled to do so;

26.2 Secondly, although the *Groenewald* judgment establishes a narrow exception to the general rule established in the *Reader* judgment, this exception was

[23] Ibid at paras 33 and 34.

limited to disgruntled tenderers on the express basis that those tenderers' rights were directly affected by their involvement, and failure, in the prior tender process. In the present appeal, GroundWork falls well outside of the parameters of this 'carve-out'; and

26.3 Thirdly, in the *Reader* judgment, the SCA held that the wording of section 62(3) of the Systems Act "*precludes*" an appeal brought by a party in GroundWork's position because, if GroundWork were successful in its appeal, this "*would necessarily entail the outcome that the decision would be revoked or varied – contrary to s[ection] 62(3)*".

27 These three grounds, we submit, dispose of the appeal in its entirety. Below, we nevertheless address GroundWork's grounds for appeal more specifically, out of caution.

GROUNDWORK'S CONTENTIONS TO THE CONTRARY ARE EITHER IRRELEVANT OR INCORRECT

(a) GroundWork's true agenda in this appeal

28 Further to the above, ACWA submitted that the transfer already approved by the NDM, which is the subject matter of the present appeal, concerns an administrative matter, and that its resolution ought to be straightforward. In its written submissions, even GroundWork appears, in places, to accept this (albeit that GroundWork erroneously cites this as a factor to be considered as supporting its position in this

appeal).[24] If this is right, it begs the question why GroundWork appears to mount such vigorous opposition.

29 If the prior conduct of GroundWork, and of CER with which GroundWork is closely associated, is taken into account, the only answer that can reasonably be inferred is GroundWork's opposition to, and its efforts to sabotage, the DoE's policy of using coal, at the level of principle. Both CER and GroundWork have taken this position publicly, *inter alia* in articles entitled –

29.1 "*Broken Promises: The failure of South Africa's priority areas for air pollution – time for action*", in which the CER seeks to "*expos[e]… the Department of Environmental Affairs failing air pollution governance system*";[25] and also

29.2 "*Slow Poison: Air Pollution, Public Health and Failing Governance: A story of air pollution and political failure to protect South Africans from pollution*", in which GroundWork asserts that "*our history*" in relation to air pollution in South Africa "*gives little evidence that our government is about to do the right thing*".[26]

30 The DoE's coal baseload programme represents government's best effort thus far, in the exercise of its executive discretion, at balancing its constitutional duty to "*protect,*

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[24] At para 29.2 of GroundWork's Heads of Argument, GroundWork contends that the transfer of a PAEL is "*merely one piece of the legal permission that is required to lawfully construct and operate a coal-fired power station*"; at para 29.5, GroundWork characterises the PAEL as a "*hypothetical or conditional right*", "*at best*"; and at para 39.3, GroundWork asserts that, even if the transfer of the PAEL is taken into account, ACWA's "*ability to construct and operate a coal-fired power station remains speculative and uncertain*". For the avoidance of any doubt, we emphasise that ACWA denies these contentions.

[25] See https://cer.org.za/news/broken-promises-the-failure-of-south-africas-priority-areas-for-air-pollution-time-for-action, dated 2 October 2017 (accessed 10 November 2018).

[26] See http://www.groundwork.org.za/specialreports/Slow%20Poison%20(2014)%20groundWork.pdf, dated June 2014 (accessed 10 November 2018).

promote and fulfil" the rights in the Bill of Rights, including environmental rights,[27] with the progressive realisation of the values to which the Constitution aspires. The articles published by CER and GroundWork demonstrate an antipathy towards the balance that government has struck. Viewed from this perspective, GroundWork's opposition to the transfer of the PAEL is a means to a greater overall end. It is a 'battle' that forms part of a larger war.

31 GroundWork's motivations in opposing the Project place its position in this appeal in its proper context. Having now done so, we explain why GroundWork's specific grounds of appeal fall to be rejected, below.

(b) <u>GroundWork's insufficient or irrelevant contentions in this appeal</u>

32 In its written submissions, GroundWork advances various contentions that may be correct when viewed in isolation, but are ultimately irrelevant for the purposes of the issues that arise in this appeal. Three such contentions bear mention. These contentions, and the reasons why they are either insufficient for success in this appeal, or alternatively are irrelevant, may be summarised as follows:

32.1 The first such argument is GroundWork's contention that various pieces of environmental legislation (i.e. not the Systems Act) grant interested and affected parties an explicit entitlement to avail themselves of internal appeal mechanisms. Whilst this may be true –

[27] See section 7 of the Constitution.

32.1.1 it is, at best for GroundWork, irrelevant, in that the legislation at issue here is the Systems Act, and not other pieces of legislation, and the Constitutional Court has repeatedly affirmed that constitutional principle of legality demands "*the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*";[28] and

32.1.2 at worst for GroundWork, the absence of explicit provision for internal third-party appeals supports ACWA's position in these proceedings, in that, at the level of statutory interpretation, the absence of such an entitlement must be assumed to have been a deliberate legislative choice.

32.2 The second argument advanced by GroundWork that is either insufficient or irrelevant is its contention as to the import of section 39(2) of the Constitution. GroundWork contends, correctly, that the Constitutional Court has held that, where two or more interpretations of a statute are reasonably possible, a court is obliged to accept the interpretation that better promotes and protects constitutional rights.[29] GroundWork suggests that there <u>are</u> two such interpretations, and that an interpretation of section 62 of the Systems Act that is consistent "*with the constitutional rights of interested and affected parties*" should be preferred. However, GroundWork's assertion that there is another

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[28] *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) paras 56 and 58.

[29] See *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at paras 87 to 89.

reasonably plausible interpretation of section 62 has no basis. In the light of the *Reader* judgment, there is no scope for GroundWork to argue that section 62 of the Systems Act admits of two reasonably plausible interpretations. In particular, GroundWork's interpretation is unacceptable because it would have the effect of rendering the phrase "*but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision*" in section 62(3) meaningless. Section 39(2) only has application to *plausible* interpretations. We should note that, in any event, this Authority does not have the power to ignore a decision of the SCA. *Reader* is binding on the Authority and must be followed by it.

32.3 The third argument advanced is that a PAEL is "*merely one piece of the legal permission*" that is required in order to construct and operate a coal-fired power station lawfully, and that, on this basis, the right granted by the NDM pursuant to its approval of the transfer does not constitute an "*accrued right*". The fact that a PAEL is "*merely one piece of … legal permission*" may be correct, but it does not lead to the conclusion that GroundWork suggests. The grant of a PAEL, like a licence, grants an accrued right that is worthy of recognition. Given that the Constitutional Court has held that granting of a licence constitutes the "*permission that a competent authority gives to someone to do something … that would otherwise be unlawful*",[30] we submit that the PAEL approved on ACWA's behalf by the NDM cannot be anything <u>but</u> an 'accrual of rights' which is sufficient to trigger the protections of section

[30] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 2000 at para 55.

62(3) of the Systems Act. We shall explain in more detail in the next sub-section why GroundWork is incorrect to argue that the decision of the NDM to approve the transfer did not trigger an 'accrual of rights'.

(c) <u>The contentions advanced by GroundWork in this appeal that should be rejected as incorrect</u>

33 There are four further arguments advanced on GroundWork's behalf that fall to be rejected as incorrect:

33.1 The <u>first</u> incorrect argument is GroundWork's contention that the *Reader* judgment <u>supports</u> a conclusion that GroundWork holds a valid entitlement to appeal the decision of the NDM. GroundWork attempts to bootstrap itself into this advantageous position by adverting to the fact that it is already a "*registered interested and affected party*" in respect of the Project, in terms of NEM: AQA, and so the question of whether it has been "*directly affected*" in terms of the inquiry set out in the *Reader* judgment has been taken off the table. The reason why this is incorrect is that it exaggerates the legal consequences of such registration. The fact that GroundWork has registered as such under the <u>NEM: AQA</u> does <u>not</u> in any way mean that GroundWork thereby becomes "*directly affected*" for the purposes of the <u>Systems</u> Act. The two enquiries are different, and they arise under different pieces of legislation. Under the NEM:AQA, all that is required in order to register oneself as an interested and affected party is to inform the relevant Environmental Assessment Practitioner of one's desire to do so, and one is then registered, as a matter of course. Viewed in this light, GroundWork's argument requires

the Authority to interpret the *Reader* judgment in a manner that renders the enquiry into "*direct affect*" nugatory, which would be absurd. Viewed in this light, GroundWork's contention that the *Reader* judgment supports GroundWork's appeal could not be more incorrect.

33.2 The second argument that falls to be rejected as incorrect is GroundWork's summary of ACWA's position in regard to the proper interpretation of section 62(3) of the Systems Act. In its written submissions, GroundWork characterises ACWA's argument on the interpretation of section 62(3) as leading to the conclusion that all licensing decisions under NEM: AQA would be immunized from internal appeal.[31] But the right to appeal relevant to this case arises from the Systems Act, not NEM: AQA. It was open to the legislature to decide what internal appeals are available, and in what circumstances. The legislature has decided – through the mechanism of section 43 of the National Environmental Management Act 107 of 1998 ("**NEMA**") – to draw an important distinction between the types of permissible appeals. Where a power of the Minister is exercised by a delegate, an internal appeal is available. Where the power is exercised by an entity with original jurisdiction to take the decision – such as a licensing authority – no appeal lies. That is the legislature's choice. When it comes to the Systems Act, the legislature has made a further clear choice: to confer internal appeals on aggrieved applicants, but no-one else. Again, this is a legislative choice that must be respected. In none of the cases (either in respect of non-appealable decisions under NEM:AQA or the Systems Act) are parties with a legal

[31] Para 25 of GroundWork's Heads of Argument.

interest in the decision left without a remedy – they may pursue a review in the High Court.

33.3 The third set of contentions which fall to be rejected are GroundWork's assertions that the "*primary purpose of section 62 is to provide effective recourse for improper first-instance decision-making*", and furthermore that one of the purposes of that provision of the Systems Act includes the "*protection of the rights of interested and affected parties*". However, to the extent that GroundWork refers in the latter quotation to "*interested and affected parties*" under environmental legislation, GroundWork refers to no authority in support of this proposition, and we are aware of none. The *Reader* judgment holds to the contrary. On the authority of *Reader* judgment, section 62(3) of the Systems Act does not exist for the benefit of third parties such as GroundWork who were uninvolved in the relevant transaction, but rather to protect the rights of aggrieved parties such as ACWA (or, at best for GroundWork, disgruntled tenderers who were "*directly affected*" by a given decision). To the extent that GroundWork argues for an interpretation that goes further than the *Reader* judgment, it falls to be rejected.

33.4 The fourth and final argument that falls to be rejected as incorrect is GroundWork's contention that the decision of the NDM does not give rise to "*accrued*" rights that trigger the provisions of section 62(3) of the Systems Act. This is so for the following reasons:

33.4.1 On GroundWork's argument, a licensing decision such as a PAEL will not result in rights 'accruing' to ACWA until such time as ACWA

is fully authorised to proceed with the entirety of the Project, and not a moment before. Because the PAEL constitutes just "*one piece of the legal permission*" required in order for ACWA to fully to act upon its rights, GroundWork argues that rights have not yet "*accrued*" to ACWA, and that they will only do so once all other necessary permissions for the purposes of proceeding with construction are obtained.

33.4.2 There is no basis in law or statute for this kind of all-or-nothing approach. It diverges with common sense: the fact that ACWA is yet to be granted all rights on the Project does not mean that it has not been granted some rights. GroundWork's argument on this issue overlooks the legal import of the PAEL entirely. If the PAEL had not been granted, then, pursuant to the provisions of NEMA and NEM:AQA, if ACWA were to proceed with the activities there referred to, it would be acting unlawfully. The PAEL is thus clearly a "*permission that a competent authority gives to someone to do something … that would otherwise be unlawful*",[32] as defined by the Constitutional Court. To suggest that the "*permission*" granted pursuant to the PAEL has not resulted in an accrual of rights is to ignore this reality.

33.4.3 A similar argument was raised and rejected in both *Reader v Ikin* and in the *Reader* judgment. In the latter, the Court held (as we

[32] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 2000 at para 55.

mentioned further above) that the question whether the beneficiary of the decision at first instance has acted in accordance with the entitlement in the interim "*is not … relevant*".[33] The SCA has thus already answered GroundWork's argument in this appeal, in the negative.

34 For these reasons, together with the three contentions advanced in the previous sub-section, ACWA submits that any remaining grounds for GroundWork's appeal to be considered fall to be rejected.

[33] *Reader* judgment at para 33.

CONCLUSION AND PRAYER

35 For the reasons set out above, it is plain that GroundWork has no standing to bring its purported provisional appeal. This is the result of the *Reader* judgment, even when read together with the 'carve-out' allowed to disgruntled tenderers in the *Groenewald* judgment. As such, it is submitted that GroundWork's appeal in this case should not be permitted to 'leave the gate'. ACWA submits that it should be dismissed summarily, as there is no need for the NDM to entertain its merits.

ADRIAN FRIEDMAN

MKHULULI STUBBS

Counsel for ACWA Power

Chambers, Sandton
12 November 2018

LIST OF AUTHORITIES

Judgments

1. *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 2000 (CC)

2. *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC)

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