IN THE APPEAL BEFORE THE

NKANGALA DISTRICT MUNICIPALITY APPEAL AUTHORITY

In the matter between:

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

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GROUNDWORK'S REPLYING SUBMISSIONS

INTRODUCTION

1 These submissions are filed in reply to the delayed opposing submissions made by ACWA Khanyisa Thermal Power Station (RF) Pty Ltd (ACWA), the third respondent in this appeal.

2 ACWA delivered its submissions on 10 May 2019, 18 months after groundWork (the Appellant) submitted its appeal on 13 November 2017, and 13 months after groundWork duly supplemented its appeal submissions on 10 April 2019.

3 ACWA's submissions are largely confined to questions of law. It makes no attempt to answer the bulk of the evidence presented in groundWork's provisional and supplementary appeal submissions, particularly the evidence on the poor air quality in the HPA, the harms to the environment, and harms to human health.

4 In what follows, we respond to ACWA's arguments, to the extent necessary. groundWork stands by the grounds of appeal set out more fully in its previous submissions and does not seek to repeat those submissions in detail here.

5 We address the following issues in turn:

5.1 First, the wide nature of this appeal;

5.2 Second, the failure to take into account relevant considerations;

5.3 Third, the unlawful variation of the 2015 Provisional Atmospheric Emission licence (PAEL);

5.4 Fourth, ACWA's shifting plans for the Khanyisa Project;

5.5 Fifth, breaches of the notice requirements;

5.6 Fifth, responses to individual paragraphs in ACWA's submissions; and

5.7 Finally, remedy.

6 For the sake of convenience, these submissions use the same acronyms and abbreviations used in groundWork's previous submissions.

THE NATURE OF THIS APPEAL

7 ACWA contends that this is a wide appeal. We agree. A wide appeal is "*a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information"* that is not confined to the record of the initial decision.[1]

8 This calls for a far more stringent and extensive inquiry than a review. The standard is correctness, not mere rationality, and the Appeal Authority is not confined to the record of the initial decision. This is all to groundWork's benefit as the appellant.

9 However, ACWA is wrong to claim that procedural defects, irrationality and unlawfulness in the initial decision are irrelevant to this appeal. Unless the initial decision is set aside or otherwise corrected, the procedural defects in the first

[1] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G-591A.

instance decision will render the Appeal Authority's decision unlawful and invalid and susceptible to review.[2]

10 As a result, the Appeal Authority must consider both whether the first instance decision was correct and whether it was rendered unlawful and invalid due to defects in the procedure. If the first decision was found to be incorrect or otherwise invalid, the only appropriate remedy is to set the decision aside.

FAILURE TO TAKE INTO ACCOUNT ALL RELEVANT MATTERS IN TERMS OF SECTION 44(5)

11 Section 44(1) of AQA confers a discretion to grant or refuse permission for the transfer of PAELs and AELs. A licence may only be transferred with the "*permission of a licensing authority*".

12 In exercising this discretion, section 44(5) imposes a mandatory duty on the NDM: it "*must take into account all relevant matters*".

13 As explained in groundWork's previous submissions, the "*relevant matters*" are the changed circumstances and new evidence that has emerged since the PAEL was issued in 2015. These factors were addressed in detail at paragraphs 27-28 of the provisional appeal submissions and paragraphs 36 - 40 of the supplementary appeal submissions. They include:

13.1 The DEA's own 2017 mid-term review of the Highveld Priority Area which confirms that, despite the declaration of the HPA ten (at that time) years ago, "*there has not been an appreciable improvement in ambient air quality";*[3]

13.2 The 2017 report prepared by Dr Sahu on the health impacts of the Khanyisa Project;[4] and

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[2] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) at para 76: "*Although the appeal to the Minister is an appeal in the wide sense, that is, a rehearing of, and fresh determination of the merits of the matter, it is still necessary to review the decision of the Chief Director. Irregularities committed by the Chief Director are relevant to the extent that they have not been overtaken by or cured in the appeal proceedings.*" See also *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T) at paras 80-81.

[3] Provisional Appeal Submissions p 3 para 7.

[4] Provisional Appeal Submissions p 15 - 16 para 27.8; Annexure G pp 51 – 62.

13.3 The *Thabametsi* judgment of 2017, which confirms the need for a full climate change impact assessment for proposed coal-fired power stations.[5]

14 A further "relevant matter" is ACWA's shifting and uncertain plan for the Khanyisa Project. It was initially conceived as a 450 MW plant; ACWA then applied for and obtained an amendment to its environmental authorisation for a 600 MW plant. Now, according to ACWA, it only intends to build a 306 MW plant.[6] ACWA failed to disclose the amended EA or its latest intentions when it submitted its application for the transfer of the PAEL. It has still not submitted any revised plans to the NDM, nor has it disclosed precisely how the altered plans will impact on emissions from the plant and associated environmental harms. We address ACWA's failure to disclose this critical information in greater detail below. At this stage, we simply make the point that this relevant information was not taken into account.

15 ACWA does not dispute these changed circumstances and the further evidence. It also does not dispute that the NDM failed to consider these matters in approving the transfer of the PAEL.

16 Instead, ACWA merely contends that these are not "relevant matters" under section 44(5). According to ACWA, the only "relevant matters" are:

> *"19.3.1 Whether ownership of the activity for which the PAEL was issued has been transferred.*
>
> *19.3.2 Whether the prescribed fee has been paid.*
>
> *19.3.3 Whether the applicant has submitted the documentation and information that the licensing authority has required the applicant to submit.*
>
> *19.3.4 Whether the applicant is a fit and proper person."*[7]

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[5] Provisional Appeal Submissions p 8 para 26.4. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP).
[6] ACWA Submissions pp 280 – 282, paras 48 – 52.
[7] ACWA Submissions p 264 para 19.

17 ACWA's interpretation of "relevant matters" contains three critical flaws.

18 First, ACWA ignores the binding principles of interpretation applicable to environmental legislation, which require that section 44(5) be interpreted and applied in a manner that best protects environmental rights and ensures compliance with the section 2 principles under NEMA, among other key principles.

18.1 These interpretive principles were addressed in detail in the provisional appeal submissions,[8] and the supplementary appeal submissions.[9] They remain unanswered.

18.2 In addition to these requirements, section 4 of the Municipal Systems Act provides that when the NDM exercises its powers and functions, it is required to:

> *"4(2) …*
>
> *(i) promote a safe and healthy environment in the municipality; and*
>
> *(j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.*
>
> *4(3) A municipality must in the exercise of its executive and legislative authority respect the rights of citizens and those of other persons protected by the Bill of Rights"*

19 Second, ACWA incorrectly claims that the "*relevant factors*" for the purposes of the transfer of a licence must be kept entirely separate from the "*relevant factors*" for the purposes of the granting of the initial PAEL. That is an artificial distinction. The need to protect the environment, to advance section 24 of the Constitution, and to comply with the section 2 principles under NEMA remains relevant whenever a discretion is to be exercised under the AQA, particularly when

[8] Provisional Appeal Submissions pp 18 – 19, paras 27.17 – 27.18.
[9] Supplementary Appeal Submissions p 81 para 13.

material evidence and new circumstances have arisen since the initial PAEL was granted.

20 Third, ACWA misunderstands the principle of *functus officio* and misapplies it to the interpretation of section 44(5) of the AQA:

20.1 The Supreme Court of Appeal has explained this principle as follows:

> *"It is not necessary in this judgment to define the exact boundaries of the functus officio principle, save to say the following: first, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so …"*[10]

20.2 As Baxter further explains:

> *"[E]ffective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is functus officio."*[11]

20.3 This means that the NDM is only *functus* once a final decision has been taken in which ACWA has vested rights and where there is no legal authority to make a new decision.

20.4 But when ACWA applied for the transfer of the PAEL, the municipality was explicitly empowered under section 44(1) of AQA to decide whether or not to approve the transfer of the PAEL and it was further obliged to consider "*all relevant matters*" in making this decision.

20.5 Until permission was granted under section 44(1), ACWA had no right to a PAEL, let alone a vested right, and it cannot seek to claim that the

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[10] *Retail Motor Industry Organisation and Another v Minister of Water & Environmental Affairs and Another* 2014 (3) SA 251 (SCA) at para 25.
[11] Lawrence Baxter Administrative Law (1984) at 372.

municipality was somehow rendered *functus* in respect of the environmental consequences of its decision.

21 On this basis, the NDM was incorrect in ignoring the changed circumstances and the relevant evidence. These were all material considerations that demonstrate that ACWA's application for the transfer of the PAEL ought to have been refused.

THE UNLAWFUL VARIATION OF THE PAEL

22 groundWork contends that the transfer of the PAEL was *ultra vires* and unlawful as the NDM used its power to transfer a licence under section 44 to effect material amendments to the licence, which could only be done under section 46.

23 ACWA now concedes that there were variations to the PAEL, going beyond merely changing the name of the owner of the project.[12] It is also clear that ACWA did not make any formal application for these variations under section 46(1)(d).

24 Variations such as these can only be effected using the powers under section 46 of AQA. ACWA again appears to concede this point.

25 However, the fatal flaw is that the NDM did not seek to rely on those section 46 powers in issuing the revised PAEL, as it relied solely on the powers under section 44 of the Act. This is confirmed by the 2017 PAEL and the subsequent letter of 2 March 2018,[13] which both rely exclusively on section 44.

26 This falls foul of the principle in *Harris v Minister of Education*[14] that, where a decision-maker has the statutory power to do something, he or she must rely on the statutory provision that confers that power. It is unlawful to exercise that power by relying on a different statutory provision.

26.1 In *Harris*, the Minister of Education created binding rules governing the minimum age requirements for admission to independent schools. The Minister did so by relying on a statutory power that only conferred policy-

[12] ACWA Submissions p 270 para 23.
[13] March 2018 letter, Annexure H p 91.
[14] *Minister of Education v Harris* 2001 (4) SA 1297 (CC).

making powers. The Minister was empowered to create such rules under a different statutory provision, but the Minister did not rely on that provision.

26.2 The Constitutional Court held that this was invalid and that the Minister could not belatedly rely on the correct legal provision to validate an invalid act.[15]

26.3 For the same reasons, in this case it was unlawful for the NDM to effect amendments to the PAEL using the wrong power. Section 44 is a power of transfer, not a power of amendment.

27 ACWA argues that the NDM was empowered to make the variations because of section 46(1)(e), which provides that the NDM may vary a PAEL *"if it is transferred to another person in terms of section 44*". But this does not assist its case for two reasons:

27.1 First, the NDM did not purport to rely on this provision in effecting the amendments. That is fatal on the *Harris* principle.

27.2 Second, and in any event, the type of variations contemplated by section 46(1)(e) could not apply to material variations to the substance of the PAEL, for which a formal application and public participation process are required.

28 In this case the variations were indeed material, particularly the variation of the size and extent of the physical location of the site.

28.1 As stated in paragraph 26.15-26.18 of the provisional appeal submissions and paragraph 35 of the supplementary appeal submissions, there were increases in portions of land occupied by the site: more than 150ha of land was added to the 2017 PAEL, namely Portion 332 Klippan and also portions 145 and 167 of Klipfontein.

28.2 This is clear in comparing paragraphs 3 of the 2015 PAEL and the 2017 PAEL, attached as Annexures 1 and 2 respectively.

[15] Ibid at para 18.

28.2.1 In the 2015 PAEL, under the heading "Physical Location and Extent of the Plant", the following properties are listed:

"The Remaining Portion (Extent) Of The Farm Groenfontein 331 JS And The Remainder Of Portion 1 Of The Farm Klipfontein 322 JS, Mpumalanga Province"

28.2.2 In the 2017 PAEL, this description of the properties was amended to state the following:

"For the Project Site:

- *Remaining Extent of Portion 1 of the Farm Klipfontein No. 322 JS;*
- *Remaining Extent of Portion 145 of the Farm Klipfontein No. 322 JS;*
- *Portion 167 of the Farm Klipfontein No. 322 JS; and*
- *Remaining Extent of the Farm Groenfontein No. 331 .*

For the Ash Disposal Site:

- *Remaining Extent of the Farm Groenfontein No. 331 ;*
- *Remaining Extent of Portion 2 of the Farm Groenfontein No. 331 ;*
- *Remaining Extent of the Farm Klippan No. 332;*
- *Portion 2 of the Farm Klippan No. 332;*
- *Portion 7 of the Farm Klippan No. 332; and*
- *Portion 11 (a portion of Portion 5) of the Farm Klippan No. 332, Mpumalanga Province*

28.3 Attached hereto is a map marked as Annexure 3 taken from ACWA's 400KV substation EA application, indicating the additional portions to which reference is made. Klipfontein and Klippan Farms are the portions highlighted in orange and brown respectively, and which were previously not reflected in the 2015 PAEL, nor anywhere else in the PAEL.

28.4 The extent of the expanded portions contained in the Zoning Certificates, is attached as Annexure 4 and Annexure 5. Annexure 4 of the Zoning

certificates indicates that the addition of Klipfontein 145 and 146 adds approximately 25ha. Annexure 5 indicates that Klippan farm adds approximately 153ha. Both properties have now been converted from agricultural to special zoning, indicating that they are to be used in the project.

28.5 This expansion of the land on which the PAEL activity is to take place is an important and far-reaching component of the AEL, as the scope, the location and capacity will have different impact on the health and well-being of the local communities nearby and on the environment. This was outlined in full in paragraphs 26—26.9 of the provisional appeal submissions.

28.6 ACWA contends that the physical size of the project has not changed, and that all that has changed is the description of the properties. It attaches two illegible maps to its submissions, which are annexed to both the 2015 and 2017 PAEL. However, neither of these maps reflects which properties will be used, nor do they account for the inclusion of the new properties in the 2017 PAEL. They only serve to add to the confusion over ACWA's plans.

28.7 ACWA further suggests that the GPS coordinates remain the same. But the GPS coordinates of the centre of the site give no indication of changes to its size and scale.

29 In terms of section 46(4)(3) of the AQA, ACWA ought to have formally applied for such material variations to the size and extent of the project and its application ought to have been subjected to a proper public participation process. Section 46(4)(3) provides:

> *"(4)(3) If a licensing authority receives a request from the holder of a licence in terms of subsection (1)(d), the licensing authority must require the holder of the licence to take appropriate steps to bring the request to the attention of relevant organs of state, interested persons and the public if—*

(a) the variation of the licence will authorise an increase in the environmental impact regulated by the licence;

(b) the variation of the licence will authorise an increase in atmospheric emissions; and

(c) the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation."

30 As the increase in land capacity (of the power plant or the ash disposal site) impacts on the environmental footprint of the operation, ACWA was required to notify NDM and NDM was required to point out that a variation was required and that it ought to be subjected to a full public participation process. This did not occur.

31 The only way to correct this unlawful and invalid procedure is to set aside the first instance decision and to require ACWA to submit a proper variation application, subject to a proper public participation process.

THE CHANGING SCOPE OF THE KHANYISA PROJECT AND MISLEADING INFORMATION

32 In groundWork's appeal submissions, one of the central grounds of appeal is that it was not permissible to transfer the 2015 PAEL to ACWA, as the scope and plans for the project have undergone radical changes from those set out in the 2015 PAEL. These changes were not disclosed in the application for the transfer of the PAEL and they were not submitted to a proper public participation process.

33 As set out in those submissions, Anglo initially obtained the 2015 PAEL in respect of a planned 450 MW power station. In 2015, ACWA subsequently applied for and obtained an amendment to the environmental authorisation for a 600 MW power station. We have attached the Khanyisa EA which indicates that Khanyisa has indeed obtained this increase, which appears as Annexure 6.

34 The fact remains that ACWA holds an environmental authorisation for a 600 MW power station and it has given no indication that it intends to apply for a further amendment to this environmental authorisation. It failed to disclose the amended EA or its plans for the 600 MW power station in its application for the transfer of the PAEL.

35 The fact that ACWA has submitted an application to NERSA for a generation licence capacity for 306MW is irrelevant, since it could apply for additional capacity at a later stage. The fact that ACWA continues to hold an EA for a 600 MW power station is a clear indication of its future intentions. As we have previously submitted, ACWA's PAEL must be in line with the most recent EA, so that the public is aware of the final full capacity before any transfer is authorised.

36 In response to these submissions, ACWA now claims that it no longer intends to proceed with either the 450 MW power station or a 600 MW power station, as it now plans to construct a smaller 306 MW power station.

37 However, this ~~only makes matters worse~~ complicates issues for ACWA as it also failed to disclose these new plans for a 306 MW power station when it submitted its application for the transfer of the PAEL in February 2017.

38 ACWA claims that this change in its plans came about in October 2016 at the latest, when the Department of Energy appointed it as a preferred bidder under the CBIPP programme for a 306 MW power station.

39 Despite this (alleged) change in plans in 2016, ACWA made no mention of this change when it submitted its application for a transfer of the PAEL to the NDM on <u>23 February 2017</u>.

39.1 ACWA's application forms continued to represent that ACWA intended to proceed with the planned 450 MW power station.[16] On ACWA's own version, this was not true at the time.

39.2 The description of the project in the 2017 PAEL also remained unaltered, referring to a 450 MW plant.

[16] February 2017 application pp 198 – 216.

40 At best for ACWA, the failure to disclose its plans for a 600 MW power station, as reflected in the EA, or its revised plan of a 306 MW power station were material omissions. These omissions provided ample grounds for rejecting ACWA's application.

41 At worst, this was an attempt to mislead the NDM about its intentions. Section 51(1)(f) of AQA expressly outlaws such conduct, as it provides that a party commits an offence if it "*supplies false or misleading information in any application for an atmospheric emission licence, or for the transfer, variation or renewal of such a licence*"

42 ACWA appears to suggest that it did not need to disclose its change in plans, as a 306MW power station has a lower capacity than a 405 MW power station. However, without detailed and accurate descriptions of the design specifications for the 306 MW plant, it is impossible to form an accurate assessment of the potential emissions from the plant, what mitigation measures will be in place, what additional mitigation measures could be incorporated now that the plans have been revised, how the changes to the design may affect the dispersal of atmospheric emissions, the potential health impacts of these changes, and the full range of other considerations required to form a proper assessment of the environmental impacts. ACWA is invited to make full and frank disclosure of its plans for the revised 306 MW power station. As indicated below, it is also not clear whether ACWA intends to expand the power station's capacity at a later date.

43 These are all relevant matters that ought to have been disclosed to the NDM and the public when ACWA made its application for the transfer of the PAEL.

44 ACWA's inexplicable lack of candour is sufficient reason to overturn the transfer of the PAEL and to insist either on a fresh application for a new PAEL or a properly motivated application for the variation of the PAEL.

NO ADEQUATE NOTICE OF THE TRANSFER APPLICATION

45 Section 44 of AQA requires proper notice to the public of any application for the transfer of a PAEL:

> *"(4) (a) An applicant must take appropriate steps to bring the application for the transfer of an atmospheric emission licence to the attention of interested persons and the public.*
>
> *(b) Such steps must include the publication of a notice in at least two newspapers circulating in the area in which the listed activity applied for is carried out—*
>
> *(i) describing the reasons for the transfer of an atmospheric emission licence;*
>
> *(ii) giving particulars of the listed activity, including the place where it is carried out;*
>
> *(iii) stating a reasonable period within which written representations on or objections to the application may be submitted, and the address or place where representations or objections must be submitted; and*
>
> *(iv) containing such other particulars as the licensing authority may require.*

46 As addressed in paragraphs 24 and 25 of the supplementary appeal submissions, there was no proper notification of the transfer of the AEL to the public. The 24 February 2017 advertisements, in the Witbank News and Middleberg observer are attached as Annexure 7.

47 These advertisements failed to meet the section 44 requirements in that:

47.1 They do not contain the exact location of the Khanyisa project. The Khanyisa Thermal Power Station "near eMalahleni, Mpumalanga province" pertains to a vast unidentified region, and is insufficient for the public to know exactly where the project is located.

47.2 They do not specify the capacity of the project which would be relevant, nor does it give the specifics of the listed activity as required in terms of section 44(4)(a)(ii).

47.3 They also erroneously referred to section 47 of the AQA and did not provide the period (which is admitted by the Third Respondent in paragraph 53.3) for the public to object, as required in terms of section 44(iii).

47.4 The advertisement was subsequently amended to refer to section 44 of the AQA, however, this it was only published in one local newspaper (as opposed to two as required by law), and not in eMalahleni but in Middleburg. The amended advertisement also does not include the particulars of the listed activity nor where precisely the activity is to be carried out. Apart from only being published in one newspaper, it is worth noting that Middleburg is 31 km away from eMalahleni, and therefore publication in two newspapers, and in particular, eMalahleni to which the Khanyisa project is closest, was required. A copy of the amended advertisement is attached as Annexure 8.

47.5 These advertisements were also defective as the public was not informed of the proposed amendment to include the Klippan and Klipfontein properties.

48 These were all breaches of mandatory and material requirements contained in section 44 of the Act. These breaches meant that the purpose of this provision was not adequately fulfilled, as the public would have been left in the dark as to the exact details of the Khanyisa project and whether they would be affected. The absence of any specific location or address was particularly material, especially given that such specificity was provided in the licence application itself and in paragraph 3 of the 2017 PAEL

49 Again, this defective procedure can only be corrected by setting aside the transfer to allow a proper application process to be conducted. The failure to set it aside would mean that the Appeal Authority’s decision would be vulnerable to review.

RESPONSES TO INDIVIDUAL PARAGRAPHS IN THE ANSWERING SUBMISSIONS

50 We now address the further allegations made in ACWA's submissions, *ad seriatim*, to the extent necessary. Any allegations which are not addressed and which are inconsistent with what is set out above or in groundWork's previous submissions must be taken to be denied.

Ad paragraph 2: Validity of the Provisional and Supplementary Appeal

51 ACWA submits that the supplementary appeal submissions should be ignored, on the basis that section 62 of the Systems Act does not specifically provide for the right to supplement an appeal.

52 ACWA ignores the fact that section 62 must be read in compliance with section 33(2) of the Constitution and section 5 of PAJA, which both confer express rights to adequate reasons.[17] This right exists to enable affected persons to understand why the decision went against them and to decide whether or not to challenge the decision.[18]

53 A right of internal appeal is meaningless unless a party has access to the reasons for the decision and the underlying documents.[19] It is equally meaningless if a party has no opportunity to formulate or supplement its grounds of appeal after having had sight of the reasons. Accordingly, ACWA's arguments are unsustainable.

54 After being notified of its right to appeal, on 13 November 2017, groundWork submitted its provisional appeal submissions. At paragraphs 29-30 of those submissions, it reserved its right to supplement its papers upon receiving full reasons.

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[17] *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) at para 60.
[18] *Gavric v Refugee Status Determination Officer, Cape Town and Others* 2019 (1) SA 21 (CC) at paras 67 – 69.
[19] *Koyabe* ibid at paras 56 – 70 (The principle established in this case is that in determining whether an internal remedy is available, accessible and effective for the purposes of section 7(2) of PAJA, a key consideration is whether the applicants have been afforded adequate reasons to allow them to make effective use of the internal remedy).

55 To date, the groundWork has not received the full reasons for the NDM's decision to transfer the PAEL. However, some information was provided during March 2018. Accordingly, the appeal was supplemented on 10 April 2018. It was reiterated in paragraphs 3-10 of the supplementary appeal submissions that groundWork was entitled in terms of PAJA to seek adequate reasons and to present and dispute information which was submitted to the NDM.

56 groundWork therefore reiterates its request that the NDM provide the full reasons for its decision, which should include:

56.1 the full application for the PAEL transfer as submitted by ACWA;

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

56.3 the applicable laws NDM relied on to reach its decision;

56.4 the main considerations taken into account in processing the 2017 PAEL application;

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

56.6 all communication, opinion and information regarding the delegation of powers, including but not limited to:

56.6.1 communication between Mpumalanga Department of Agriculture, Rural Development, Land and Environmental Affairs (MDARDLEA), and Department of Environmental Affairs (DEA), from November 2015 to December 2016 referred to in communication from NDM to the National Air Quality Officer (NAQO) dated 20 January 2017, and attached as Annexure 9;

56.6.2 the determination issued by DEA to NDM stating that "*whoever issued the AEL is empowered to address the question of amending/varying the AE*L", referred to in Annexure 9;

56.6.3 "DEA's legal opinion" referred to in Annexure 9;

56.6.4 the declaration of national priority projects in respect of Khanyisa as referred to in Annexure 9;

56.6.5 the memorandum and minutes of the discussion in Working group 2, as well as legal opinion or law pertaining to priority projects referred to in Annexure 9.

56.6.6 any response and communication regarding the decision about the designation and delegation of powers related to the Khanyisa project; and

56.6.7 any other legal agreement and/or proof of delegation of powers from 2013 to date.

57 Despite the outstanding documents, the NDM nonetheless claims that full reasons for the decision were provided. groundWork is hindered in its ability to prosecute its appeal without these documents. We therefore request the Appeal Authority to direct the NDM to provide the full reasons for its decision; including the missing documents identified above.

Ad paragraph 32: Ownership transfer

58 ACWA states that it is common cause that ownership of the relevant listed activity was transferred from Anglo to ACWA. This is not correct. groundWork merely stated that it was advised by Aurecon, ACWA's EAP, that ACWA had taken over the project from Anglo. groundWork has no direct knowledge whether ownership of the listed activity was in fact transferred or that it was done lawfully. ACWA is invited to disclose the full details of the transfer of ownership in its further submissions.

Ad paragraphs 31-36: Transfer ought not to have been granted

59 ACWA states that all of the requirements of section 44 of AQA were satisfied, as prescribed fees were paid and that it is a fit and proper person. This is incorrect.

59.1 At this stage, it is unclear what documents were submitted as part of the 2017 PAEL transfer application, as groundWork has not been furnished with a complete record of the decision.

59.2 However, in the documents that the NDM provided, it appears that no EA or amendments to the EA were submitted as part of the application. ACWA was required to submit its current plans with the current EA amendments during the transfer or variation to enable NDM to make an informed decision.

59.3 ACWA also failed to disclose its new plan to construct a 306 MW power station on the site, as discussed above.

59.4 In terms of s 51 of the AQA, it is an offence to provide misleading information. And if the Appeal Authority finds that ACWA submitted a misleading application, then ACWA would be unfit to hold a licence in terms of section 49. Accordingly, ACWA's submissions in paragraphs 33.1, 34.1 and 36 that it is "fit and proper" are denied.

Ad paragraphs 37-47: Khanyisa Project "as currently authorised":

60 Ad paragraph 37, ACWA claims that the Khanyisa Project is extremely important to South Africa at a time when energy security is critical to South Africa's economic stability and growth. This is incorrect.

61 The proposed Khanyisa Project is, as mentioned above, one of the two preferred bidders in the Coal Baseload Independent Power Producers Procurement Project (CBIPPP).

62 The CBIPPP is based on the outdated 2011 Integrated Resource Plan for Electricity 2010-2030 ("the 2010 IRP").

63 The IRP was intended to be a "living document" that is "expected to be continuously revised and updated as necessitated by changing circumstances. At the very least, it was expected that the IRP would be revised by the Department of Energy (DoE) every two years".[20] The 2010 IRP, however, is outdated and does not reflect the current energy needs for South Africa. The IRP is currently being revised.

[20] P7, IRP 2010.

64 The most recent draft 2018 IRP, published on 27 August 2018, confirms that the 2010 IRP is entirely outdated, and that there is no need for further coal fired power stations. It states that:

64.1 "*a number of assumptions have also changed since the promulgated IRP 2010–2030. Key assumptions that changed include electricity demand projection, Eskom's existing plant performance, as well as new technology costs. These changes necessitated the review and update of the IRP*";[21]

64.2 "*Adopting* ***no annual build limits on renewables*** *or imposing a more stringent* [greenhouse gas] *GHG emission reduction strategy* ***implies that no new coal power plants will be built in the future*** *unless affordable cleaner forms of coal to power are available*"[22] (emphasis added); and

64.3 "*there has (sic) been a number of developments and changes in the electricity sector since the promulgation of IRP 2010–2030, both domestically and in the international energy sector. These have impacted not only on the starting position of the IRP Update, but also on the expectation of future demand and supply options. These key changes can be summarised as follows:*

64.3.1 Additional generation capacity in the form of RE (REIPPP), baseload coal (Medupi and Kusile), pumped storage (Ingula) and gas peaking plants (Avon and Dedisa), has come on line.

64.3.2 Domestic electricity demand is significantly lower than the expectation in 2010 because of the reduction in energy demand and a significant reduction in electricity intensity. The expectation of future demand has had to shift to account for these changes.

64.3.3 *The cost of some technology options has followed the trends expected in 2010 (especially the learning rates assumed) while others have not, requiring an update of the outlook concerning technology costs, as well as potential for new technologies and fuel*"[23].

[21] Draft 2018 IRP, page 15.
[22] Draft 2018 IRP, pg 34
[23] Draft 2018 IRP, page 42

64.3.4 "*[w]ithout a policy intervention, all technologies included in the promulgated IRP 2010–2030 where prices have not come down like in the case of PV and wind, cease to be deployed because the least-cost option only contains PV, wind and gas*"[24]

64.3.5 "*The carbon budget GHG emission mitigation strategy and the removal of annual build limits on renewables imply that no new coal units will be commissioned up to 2040*"[25].

65 Whilst the presumed reference to the Khanyisa Project selected as a preferred bidder, to mean that the project certainty is established,[26] is incorrect. The procurement of the Khanyisa Project is far from certain and based on an outdated IRP, which no longer meets the energy needs of South Africa. The Khanyisa project under the CBIPPP is still subject to withdrawal or cancellation by the DOE, should it deem fit.

66 In May 2018, the University of Cape Town's Energy Research Centre (ERC) published a study assessing the costs of the two coal IPP's, Thabametsi and Khanyisa, in South Africa's energy future ("the ERC Report").[27] This report also confirms that no new coal is necessary for South Africa's energy mix in the future, and it has to be forced in to remain in the mix. Further, if the coal IPPs were to be built, it would cost South African consumers billions of rands in comparison to other alternatives, and would also result in death spiral of Eskom:

66.1 not only are the coal IPPs unnecessary to meet the South African energy demands in the short, medium and long term, but in any modelling scenarios, coal projects would have to be forced in the system for it to exist, as it is not as competitive compared to other alternatives such as renewables;

66.2 the completion of the two coal IPPs would burden the South African consumers with additional costs of R19.68 billion compared to other least

[24] Draft 2018 IRP, pg 37.
[25] Draft 2018 IRP, pg 49
[26] Paragraph 46 of Third Respondent's submissions.
[27] Energy Resource Centre, "An assessment of new coal plants in South Africa's electricity future The cost, emissions, and supply security implications of the coal IPP programme" (ERC IPP Study), (May 2018), https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf.

cost energy system, and of this, Khanyisa Project alone would add additional cost of R6.73 billion;[28]

66.3 the coal IPPs will increase GHG emissions by 205,7Mt carbon dioxide equivalent (CO_2eq) over the 30 (thirty) year period of the power purchase agreements, and of this, Khanyisa alone would be responsible for 75.9Mt;[29]

66.4 the two coal IPPs will frustrate South Africa's commitments under the Paris Agreement, through raising the costs of mitigation technology and requiring significant GHG emission reductions in the power and other sectors. The ERC Report finds that it would cost South Africa R27.9 billion extra to stay within the low-peak, plateau and decline (PPD) trajectory if the coal IPPs are built;

66.5 not only are the coal IPPs not required to meet demand, and not only do they raise costs, and increase emissions, but they also result in increasing pressure on Eskom. Building new coal plants in a situation of low demand means reducing the output of Eskom's fleet, potentially accelerating the 'utility death spiral' in which Eskom already finds itself and putting the electricity supply industry – and thus the South African economy – at risk;[30] and

66.6 when the coal IPPs are forced into the electricity build plan, this results in decreased use of existing coal plants (which are also cheaper than the coal IPPs), which puts raises costs overall and puts Eskom at risk.[31]

67 In short, the ERC report finds that the coal IPPs, including Khanyisa, are unnecessary to meet SA's future energy demands; are too expensive and would add unnecessary burden on the South African consumers, and would hinder South Africa's ability to meet climate change commitments. It would also place Eskom's fleet into a death spiral. Coal IPPs – such as and including Khanyisa - should be avoided. A copy of the ERC report is attached, as Annexure 10.

[28] ERC Coal IPP Report, page 4, 29.
[29] ERC Coal IPP Report, page 4, 27.
[30] ERC Report, 2018, pg
[31] ERC Report, 2018, pg 17.

68 The fact that the IRP 2010 is outdated is also confirmed by the research by the Institute for Sustainable Development and International Relations and Climate Strategies, on global coal transitions. Part of this research includes a report that specifically focuses on South Africa, titled "*Coal transitions in South Africa Understanding the implications of a 2^{o}C-compatible coal phase-out plan for South Africa*" ("Coal Transitions Report"). The Coal Transition Report considers the cost and decommissioning of Eskom's fleet, and details the cost to consumers in electricity as a result of the Khanyisa and Thabametsi Projects (ie the "coal IPPs) going ahead, and also the cost of not adequately transitioning from coal. The Coal Transition Report concludes *inter alia* that coal transitions are affordable for energy consumers because the transition away from coal is now the least-cost option for South Africa. A copy of the Coal Transitions Report is attached as Annexure 11.

69 Sound academic studies and international studies have shown that no new coal is needed for the future South African energy supply and as such, the draft IRP is heavily and strongly contested by civil society and various organisations locally and internationally.

70 The Minister of Energy was quoted in an article on 1 October 2018, stating that consumers would pay R1.90/kWh on top of the projected electricity tariff hike of R1.19 by 2030 if the two projects presumed to comprise 'new coal capacity' were to go ahead, with a total cumulative cost of R23 billion. In addition, he stated that "*[i]n the case of the two projects, they are expected to raise approximately R40-billion to build the power plants, which will be paid for by the consumer through the tariff.*" A copy of this article is attached as Annexure 12.

71 This being so, although the Khanyisa project is a preferred bidder, there is no certainty that the project will proceed. If such an unnecessary and expensive project were to go ahead, it would cost South Africans R6.73 billion, which would no doubt have a knock-on impact on primary goods and services.

72 Ad paragraph 47, the ACWA claims that power purchase agreements will be concluded in the next 6 months. However, there is no evidence that this is the case. ACWA has made similar claims for the last two years.

Ad paragraphs 48-52: Capacity of the Project

73 ACWA claims that the Appellant's *"continued reference to a project of 600MW is designed to create deliberate confusion*". However, the confusion is entirely of ACWA's own making.

74 We have attached the Khanyisa EA which indicates that ACWA has indeed applied for and obtained an increase in capacity to 600 MW. As noted above, the fact that ACWA has not applied for an amendment of the EA to reflect its new plans for a 306 MW power station shows an intention to expand the capacity of the power station in future. The PAEL should be in line with the most recent EA, so that the public is aware of ACWA's true intentions if the transfer of the PAEL is authorised.

REMEDY AND CONCLUSION

75 In the above circumstances, we again request that the NDM be directed to submit the full reasons for its decision and the underlying documents.

76 We also continue to seek an order that the appeal be upheld and that the NDM Municipal Manager's decision to transfer the 2015 PAEL be set aside, together with the further and alternative relief sought in our previous submissions.

77 We maintain that section 62 of the Municipal Systems Act empowers the Appeal Authority to grant the relief sought above. We have advanced detailed submissions in this regard in addressing the dispute over groundWork's standing to bring this appeal:

77.1 While the Appeal Authority gave a preliminary indication of its interpretation of section 62(3) and the meaning of "vested rights" in its ruling,[32] we note that there is no binding ruling on this issue, which remains to be determined at the hearing.

77.2 Accordingly, we will advance further submissions on the Appeal Authority's remedial powers at the hearing of this matter.

[32] Appeal Authority Ruling at para 21.

78 It is submitted that, since ACWA has not yet commenced operation, and still has not been issued with certain approvals - including a licence to generate electricity from NERSA. Further, the environmental authorisation is being reviewed at the Pretoria High Court, and its WUL and AEL are undergoing an internal appeal process. ACWA will not be prejudiced if it is required to prepare a fresh PAEL application. 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 rights should the transfer and the PAEL not be set aside.

DATED at CAPE TOWN on this the 24TH day of May 2019.

CENTRE FOR ENVIRONMENTAL RIGHTS

Appellant's attorneys
2nd Floor, Springtime Studios
1 Scott Road
Observatory
Cape Town
7925
Tel: 021 447 1647
Fax: 086 730 9098
Email: rhugo@cer.org.za
mkoyama@cer.org.za
Ref:CER54.2/RH/MMK

AND TO: **NKANGALA DISTRICT MUNICIPALITY**

First Respondent
2A Walter Sisulu Street,
Middelburg
Mpumalanga
Email: skosanamm@nkangaladm.gov.za;
mahlanguml@nkangaladm.gov.za;
maphangant@nkangaladm.gov.za
mofores@nkangaladm.gov.za;
nembilwim@nkangaladm.gov.za

AND TO: **CHIEF DIRECTOR: ENVIRONMENTAL AFFIARS**
MPUMALANGA DEPARTMENT OF AGRICULTURE,
RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS
Building No. 6, 1 & 2nd Floor
Riverside Park, Extension 2
Nelspruit
By email: smaluleka@mpg..gov.za
gmamba@mpg.gov.za
nndlanya@mpg.gov.za
rmadalane@mpg.gov.za

AND TO: **ACWA POWER KHANYISA THERMAL POWER STATION RF (PTY) LTD, C/O C/O FASKEN MARTINEAU**
Attorneys for the Third Respondent
Emails: lbezuidenhoudt@fasken.com
jsweet@fasken.com
rbhoora@fasken.com
mwerner@fasken.com