BEFORE THE APPEAL AUTHORITY

NKANGALA DISTRICTY MUNICIPALITY

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

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GROUNDWORK'S SUBMISSIONS ON SECTION 62 OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT 32 OF 2000

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INTRODUCTION

1 The Nkangala District Municipality's interpretation of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") is correct. The appellant is entitled to bring an appeal under section 62 to challenge the provisional atmospheric emission licence (PAEL) issued or transferred to the third respondent, ACWA, on 18 October 2017.

2 For almost a year, ACWA accepted the municipality's interpretation of section 62. It even advised groundWork and other interested and affected parties that they had to pursue an appeal under section 62. ACWA has now made a sudden about-turn, disavowing its previous position.

2.1 The PAEL was issued or transferred on 18 October 2017. Clause 10 specifically required ACWA to notify interested and affected parties of their rights to lodge an internal appeal under section 62 of the Systems Act. ACWA raised no objection to this direction.

2.2 On 23 October 2017, ACWA's Environmental Assessment Practitioner, Aurecon, issued a notice to groundWork and all interested and affected parties informing them that if they oppose the PAEL they must bring an internal appeal under section 62 of the Systems Act. The notice stated:

> *"You are advised that, in terms of Section 62 of the Municipal Systems Act 32 of 2000, you may appeal against the decision. An appeal must be lodged with the Municipal Manager of Nkangala District Municipality within 21 days of the date of receiving the notification, i.e. 13 November 2017."*

2.3 In reliance on this notice, groundWork duly filed its appeal submissions with the Nkangala District Municipality on 13 November 2017. ACWA raised no objection to jurisdiction.

2.4 groundWork lodged its supplementary appeal submissions on 10 April 2018. Again, ACWA raised no objection.

2.5 ACWA then waited until 4 October 2018, almost a year after the initial decision, to raise its objection to jurisdiction for the very first time.

2.6 ACWA now claims that section 62 appeals are only available to disgruntled licence applicants, precluding any appeal by interested and affected parties, such as groundWork.

3 ACWA's belated interpretation of section 62 of the Systems Act is incorrect. These submissions will demonstrate the error by addressing three points in turn:

3.1 First, the legal framework governing the rights of interested and affected persons to participate in and appeal decisions on environmental approvals and licences.

3.2 Second, why the *Reader* judgment, on which ACWA relies, is no obstacle to this appeal.

3.3 Third, why ACWA has no "accrued right" under section 62(3) of the Systems Act that would preclude an effective appeal.

LEGAL FRAMEWORK

4 The restrictive interpretation of section 62 of the Systems Act advanced by ACWA is inconsistent with the broader scheme of environmental legislation and the Constitution.

5 Under this scheme, interested and affected parties, such as groundWork, are afforded extensive rights to participate in and to appeal decisions affecting the environment. Section 62 must be interpreted in this broader context.

6 These rights are reflected in the **National Environmental Management Act 107 of 1998 (NEMA)**, which provides the legal framework and principles which govern all decisions affecting the environment.

6.1 Sections 2(4)(f) and 2(4)(g) of NEMA expressly recognise the rights of interested and affected parties to participate in decisions:

> *"(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.*
>
> *(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge."*

6.2 Section 2(1)(c) of NEMA provides that these legal principles "*serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment*" (section 2(1)(c)).

6.3 In ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga*** **2007 (6) SA 4 (CC) at para 67**, the Constitutional Court confirmed that these section 2 principles are legally binding considerations that must be taken into account.[1]

7 In line with these principles, the **National Environmental Management: Air Quality Act (NEM: AQA)** makes specific and detailed provision for interested and affected parties to participate in and to make submissions on all applications to issue, transfer, renew or vary atmospheric emission licences.[2]

8 In addition, the **National Framework for Air Quality Management, 2012** ("the framework"), enacted in terms of section 7 of NEM:AQA is the framework under which all air quality management is to be guided.

8.1 In terms of sections 7(3)(a) and 7(4) of NEM:AQA, the framework is legally binding on all organs of state.

8.2 One of the "cross cutting principles" which must be applied to all air quality issues is public participation. This is reflected in the following passage of the framework:

> *"5.9.1.1 Government plays a crucial role in achieving and maintaining clean air in South Africa, but it cannot reach this goal alone. Active participation and contributions from individual citizens and citizen groups is of utmost importance in developing, implementing and enforcing air quality management decisions within the context of the AQA. The potential benefits of public participation are numerous. If well-planned and managed, public participation can bring new and important knowledge to the table, mediate between conflicting*

[1] See also WWF South Africa v Minister of Agriculture, Forestry and Fisheries [2018] ZAWHC 127 (26 September 2018) at para 83.
[2] See NEM: AQA sections 38(3), section 39(h), 44(4), 46(3) – (4), s 47.

> *perspectives early in the process and facilitate more efficient air quality governance. Equally important, public participation in air quality management plays a vital role in strengthening and deepening democracy in South Africa and in giving effect to the constitutional right to an environment which is conducive to health and well-being."*

9 Where interested and affected parties are afforded rights to participate in decisions affecting the environment, environmental legislation affords a corresponding right to bring internal appeals against adverse decisions.

10 All other statutory provisions governing environmental authorisations and licences confer rights of internal appeal on interested and affected parties, through the legislation itself, or through NEMA and its regulations. For example, interested and affected parties have the right to appeal:

10.1 Environmental authorisations under NEMA;

10.2 Water use licences issued under the National Water Act 36 of 1998;

10.3 Waste management licences issued under the National Environmental Management: Waste Act 59 of 2008.

10.4 Decisions under a host of other specific environmental legislation; including the National Environmental Management: Protected Areas Act 57 of 2003, the National Environmental Management: Biodiversity Act 10 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008), and the World Heritage Convention Act, 1999 (Act No. 49 of 1999).

11 In line with this scheme, the **National Appeal Regulations (GNR 993 in Government Gazette No 38303 of 12 March 2015)** – which notably came into effect after the *Reader* judgment – specifically provide that appeals against decisions involving atmospheric emission licences must be considered in terms of section 62 of the Systems Act. Regulation 3(3) provides that:

> "*(3) An appeal against a decision by an official or municipal manager acting under delegated authority from a metropolitan, district or local municipality must be submitted, processed and considered in terms of section 62 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).*"

12 ACWA's interpretation of section 62, as precluding groundWork from any right to bring an appeal, is inconsistent with this broader statutory scheme.

13 In addition, a restrictive interpretation of section 62 would also be inconsistent with the constitutional rights of interested and affected parties.

13.1 An internal appeal represents a speedy and cost-effective way to protect section 24 environmental rights, the section 33 rights to just administrative action, and the section 34 right of access to independent and impartial tribunals and forums for the resolution of disputes.

13.2 In **Koyabe v Minister for Home Affairs 2010 (4) SA 327 (CC) at para 35**, the Constitutional Court explained the importance of internal remedies as follows:

> *"Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."*

13.3 **Baxter, Administrative Law 1984, p 255** further emphasises that internal appeals are an important safeguard against faulty decision-making:

> *"It provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgment Detached from the 'dust of the arena', as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and, in particular, to evaluate facts"*

14 Section 39(2) of the Constitution requires all tribunals and forums, including the appeal authority, to interpret legislation in a manner that is consistent with the Bill of Rights and best promotes those rights.

14.1 In **Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC) at para 87-89**, the Constitutional Court has affirmed 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.[3]

14.2 This is a mandatory duty, as confirmed in **Phumelela Gaming and Leisure v Grundlingh 2007 (6) SA 350 (CC) at para 27**.

15 On this basis, section 62 of the Systems Act must be interpreted in a manner that better promotes the rights of interested and affected parties by preserving their rights to lodge an effective internal appeal.

[3] See further Saidi v Minister of Home Affairs 2018 (4) SA 333 (CC) at para 38.

ACWA'S INTERPRETATION OF *READER* IS INCORRECT

16 ACWA relies on the Supreme Court of Appeal's judgment in **City of Cape Town v Reader 2009 (1) SA 555 (SCA)** to advance the argument that section 62 appeals are only available to a party that has "*failed to secure the permission sought in an application to the Municipality*". It goes as far as to claim that this is the "*final judicial word*" on section 62.

17 ACWA's interpretation of *Reader* is mistaken for three reasons.

18 First, *Reader* was confined to the narrow question whether a disgruntled neighbour, finding his sea view blocked, could bring an appeal against a building planning approval. The SCA did not purport to decide the fate of all section 62 appeals, let alone appeals against atmospheric emission licences issued under NEM:AQA.

18.1 The SCA itself made it clear that its interpretation of section 62 was confined to appeals against building planning permissions. As appears at footnote 8, it left open the question whether this judgment applied to other types of municipal decisions, such as municipal tenders.

18.2 The SCA's later judgment in **Groenewald NO v M5 Developments (Cape) (Pty) Ltd 2010 (5) SA 82 (SCA) at paras 19 and 21** confirms that *Reader* was confined to building permissions and did not purport to determine the scope of all section 62 appeals. In that application, the SCA had no difficulty in finding that disgruntled tenderers could bring section 62 appeals.

19 Second, the primary leg of the SCA's reasoning in *Reader* is that an internal appeal under section 62 is only available to a party to the initial application process. That reasoning supports groundWork's section 62 appeal.

19.1 In *Reader*, the disgruntled neighbour had no legal right to participate in the initial planning permission process. On that basis, the SCA held as follows at para 30:

> *"Although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that his or her property rights are in some way diminished) may appeal, that cannot be. How can a person not party to the application procedure itself appeal against the decision that results? And the Constitutional Court held in Walele, to which Jafta JA refers (para 19 of his judgment), that neighbours in the position of the applicants (although they may later challenge the lawfulness and regularity of the permission accorded) have no entitlement to be party to the approval process itself"* (own emphasis).

19.2 This case is entirely different. groundWork has a statutory right under NEM:AQA to participate in the PAEL application and transfer process and it exercised that right by making detailed submissions opposing ACWA's application for the transfer of the PAEL. It was also notified of an appeal within 21 days, unlike the appellants in the Reader judgment.

19.3 Therefore, on the SCA's own reasoning, groundWork has a right to appeal under section 62 of the Systems Act.

20 Third, the SCA found support for its interpretation in section 62(3) of the Systems Act, which limits the powers of an appeal authority where rights have already accrued. As will now be demonstrated, section 62(3) in fact supports

groundWork's case as ACWA has not obtained any accrued rights that are immune from appeal.

ACWA HAS NO ACCRUED RIGHT UNDER SECTION 62(3)

21 Section 62(3) provides that an appeal authority may not vary or revoke a right if doing so would detract from an accrued right arising from the impugned decision. It provides that:

> *"(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."*

22 ACWA's reliance on *Reader* could only succeed if the PAEL issued on 18 October 2017 somehow conferred an accrued right, that could not be revoked or varied by the appeal authority under section 62(3) of the Systems Act without detracting from that right.

23 In *Reader*, the SCA did not interrogate the meaning of "accrued right" in any detail. This was because there was no dispute that a right had indeed accrued. The applicant for planning permission had already completed construction of the house, in reliance on the planning approval, before the matter was decided.

24 This case could not be more different from *Reader*. ACWA is still far from being able to commence the construction and operation of its coal-fired power station, as it lacks the other approvals and licences required for this activity and/or such approvals are the subject of legal challenge. As will now be demonstrated, the

PAEL licence is not an "accrued right", but merely a conditional, inchoate right in the absence of the other approvals and licences.

25 ACWA appears to insist that as soon as it was issued with a PAEL it obtained an "accrued right". If that interpretation of section 62(3) were accepted, this would effectively immunise licensing decisions under NEM:AQA from any rights of internal appeal. No interested or affected party would ever be able to use the speedy and cost-effective internal appeals process. That cannot be correct.

26 Section 62(3) and the meaning of "accrued right" must be interpreted purposively, taking into account the text and context of the provision.[4] As indicated above, this interpretation must also best promote constitutional rights.

27 Several considerations support the Nkangala District Municipality's reading of section 62(3) as preserving groundWork's rights to an effective internal remedy.

28 First, at a purely textual level, the phrase "*accrued rights*" requires, at minimum, that the right must not be hypothetical, conditional or abstract.

28.1 In the context of section 15 of the Interpretation Act, the courts have interpreted the phrase "accrued right" as follows:

> *"A right 'accrues' when all the conditions for its existence in relation to the particular beneficiary are met … The section envisages a prior entitlement which was specific and not general, actual and not abstract, live and not hypothetical"* (own emphasis).[5]

[4] Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC) at para 28.
[5] Chairman, Board on Tariffs and Trade v Volkswagen Of South Africa (Pty) Ltd 2001 (2) SA 372 (SCA) at para 13.

28.2 In the context of contract law, “accrued rights” are contrasted with conditional rights. An accrued right is one that gives an immediate and enforceable legal entitlement to a remedy. A conditional right is a right that will only be legally effective if some uncertain future event occurs.[6]

28.3 These interpretations are not determinative of the meaning of “accrued” rights under section 62(3) of the Systems Act. Nevertheless, they indicate that an “accrued” right requires a right that has solidified into something concrete and legally effective.

29 In this case, no right can be said to have “accrued” to ACWA as a result of the issuing or transfer of the PAEL because any right conferred remains conditional and inchoate.

29.1 A licence confers a particular type a right. In **Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) at para 56**, the Constitutional Court described this right as “*the permission that a competent authority gives to someone to do something … that would otherwise be unlawful*."

29.2 A PAEL is merely one piece of the legal permission that is required to lawfully construct and operate a coal-fired power station. Without the other pieces, no legal permission exists and no right accrues.

[6] Walker's Fruit Farms Ltd v Sumner 1930 TPD 394 at 401; Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk 1972 (2) SA 863 (A) at 870A – H.

29.3 ACWA has not yet obtained the other licences and approvals that are required for it to have full legal permission to construct and operate a coal-fired power station.

29.3.1 ACWA has not yet obtained a generation licence from NERSA, which is a legal requirement under section 7(1) of the Electricity Regulation Act 4 of 2006, before it may proceed to construct and operate the coal-fired power station and generate electricity.

29.3.2 ACWA's water use licence (WUL) has also been suspended, pending the outcome of an appeal to the Water Tribunal. Without that licence, it would be unlawful for ACWA to proceed with construction - even at the preliminary stage - as it would impact on water resources and wetlands in the area and trigger WUL activities. ACWA has applied to uplift that suspension, but the suspension remains in force.

29.4 Therefore, ACWA's PAEL confers no "accrued" right because ACWA lacks the legal authority to begin construction or operation of its coal-fired power station.

29.5 At best, the PAEL confers a hypothetical or conditional right, subject to the outstanding approvals and licences. That right – the partial permission – could only "accrue" to ACWA when all other licences and approvals are secured and it has full legal authority to proceed with construction and operation.

29.6 For the same reasons, if the appeal authority were to eventually uphold the appeal and vary or revoke ACWA's PAEL, this would not "detract" from any accrued rights as ACWA would still be unable to commence construction of the coal-fired power station

30 Second, in assessing the possible interpretations of "accrued rights" under section 62(3), the appeal authority must favour that interpretation which better promotes and protects constitutional rights.

30.1 The interpretation of "accrued rights" just advanced better promotes and protects the sections 24, 33 and 34 rights of interested and affected parties by providing a right to an effective appeal.

30.2 Section 62(3) is reasonably capable of this interpretation. Accordingly, it must be preferred. That is a mandatory duty flowing from section 39(2) of the Constitution.

30.3 By contrast, if ACWA's interpretation were accepted, this would mean that no interested and affected party would have any right to appeal a PAEL or AEL after it has been issued. That is a rights-limiting interpretation that must be avoided, as required under section 39(2) of the Constitution.

31 Finally, groundWork's interpretation is supported by a purposive reading of section 62.

31.1 The primary purpose of section 62 is to provide effective recourse for improper first-instance decision-making. To that end, section 62(3)

imposes a duty on appeal authorities to hear appeals: they "*must consider the appeal, and confirm, vary or revoke the decision*".

31.2 This confers "wide appeal" powers, entitling an appellant to a complete rehearing on the merits, as confirmed in **Groenewald NO v M5 Developments (Cape) (Pty) Ltd 2010 (5) SA 82 (SCA) at para 22 - 23**.[7]

31.3 Section 62(3) is the one narrow exception to these wide appeal powers, as it provides that variation or revocation are unavailable only where *"a decision may detract from any rights that may have accrued as a result of the decision*."

31.4 The purpose of this narrow exception is to strike a balance between two sets of interests: on the one hand, correct decision-making and the protection of the rights of interested and affected parties and, on the other hand, the avoidance of undue prejudice where a party has acquired rights and has already acted on those rights to its detriment.

32 The balancing exercise underpinning section 62 clearly favours hearing the appeal in this context:

32.1 ACWA would suffer no real prejudice if the section 62 appeal is allowed to proceed. This because ACWA has not commenced any construction of its coal-fired power station and there is no indication that it will be able to do so for the foreseeable future.

[7] On the nature of "wide appeals", see *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G.

32.2 In addition to the outstanding licences and approvals, ACWA has not yet reached “financial and commercial close”. This is necessary before: its tender to operate as an independent power producer is finally accepted; a power purchase agreement is concluded; and before the proposed construction and/or operation could commence. There remain substantial obstacles in ACWA’s way that cast substantial doubt on whether this project will be allowed to proceed:

32.2.1 The public comment period for the Draft Integrated Resource Plan (IRP) for Electricity just closed – on 26 October 2018. ACWA’s fate is in the balance until there is certainty on the final IRP (which is likely to be met with legal challenge if it provides for expensive, harmful, and unnecessary coal-fired capacity) and the role of coal-fired power in South Africa’s future energy mix.

32.2.2 Further, the Request for Proposal under the IPP programme, allows for cancellation of the Khanyisa project at any stage without any liability to government as a result of any loss to bidders.

32.2.3 ACWA may only reach financial and commercial close at the point where it has obtained all necessary licences and approvals and when all outstanding appeals and reviews have been resolved.[8] In addition to the outstanding licences, ACWA’s environmental authorisation is currently subject to a pending High Court review

[8] CBIPPP Request for Proposals, section 5.2.3, volume 2, part 5.

application. ACWA also needs to have its funding sources secured.

32.2.4 Finally, the signing of a power purchase agreement is also subject to further regulatory processes under the Electricity Regulation Act. These include a full assessment of whether ACWA's coal-fired power station is "value for money".[9] The outcome of that assessment is far from assured.

32.3 As a result, ACWA cannot claim to have incurred expenses or effort in reliance on the PAEL. Its ability to construct and operate a coal-fired power station remains speculative and uncertain. Any expenses it has incurred are merely aimed at securing the necessary regulatory approvals and are in anticipation of uncertain future events. This is the type of regulatory risk that any party engaging in a large-scale project of this nature faces. Therefore, it cannot be exempted it from a lawful appeal process under section 62.

32.4 By contrast, groundWork would suffer real prejudice if it were denied the right to a swift and cost-effective internal appeal under section 62 of the Systems Act. This would undermine its ability to advance environmental rights under section 24 of the Constitution, as well as diminishing its rights to just administrative action and access to impartial forums under sections 33 and 34 of the Constitution.

[9] Regulation 9(1) and (2) Electricity Regulation on New Generation Capacity, 2011.

CONCLUSION

33 For these reasons, the Nkangala District Municipality is entirely correct in convening an internal appeal process under section 62 of the Systems Act.

34 Therefore, the section 62 appeal must proceed. groundWork seeks a ruling to that effect from the appeal authority and further directions to ensure that this appeal is heard and decided without delay.

CHRIS McCONNACHIE

Appellant's counsel

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2 November 2018

List of Judgments

1 *Chairman, Board on Tariffs and Trade v Volkswagen Of South Africa (Pty) Ltd* 2001 (2) SA 372 (SCA)
2 *City of Cape Town v Reader* 2009 (1) SA 555 (SCA)
3 *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC).
4 *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A).
5 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC)
6 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Mpumalanga* 2007 (6) SA 4 (CC)
7 *Groenewald NO v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA)
8 *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC)
9 *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC)
10 *Phumelela Gaming and Leisure v Grundlingh* 2007 (6) SA 350 (CC)
11 *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC)
12 *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T)
13 *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394.