IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 65662/16

In the matter between:

EARTHLIFE AFRICA JOHANNESBURG Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

THE MINISTER OF ENVIRONMENTAL AFFAIRS First Respondent

CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS DEPARTMENT OF ENVIRONMENTAL AFFAIRS Second Respondent

THE DIRECTOR: APPEALS AND LEGAL REVIEW DEPARTMENT OF ENVIRONMENTAL AFFAIRS Third Respondent

THABAMETSI POWER PROJECT (PTY) LTD Fourth Respondent

THABAMETSI POWER COMPANY (PTY) LTD Fifth Respondent

JUDGMENT

Murphy J

1. This application raises concerns about the environmental impacts of the decision to build a 1200MW coal-fired power station near Lephalale in the Limpopo Province.

The power station is to be built by the fifth respondent ("Thabametsi") and is intended to be in operation until at least 2061.

2. A party seeking to construct a new coal-fired power station requires, amongst other things, an environmental authorisation to be granted by the relevant decision-makers in the Department of Environmental Affairs ("DEA"). Section 24 of the National Environmental Management Act[1] ("NEMA") provides that any activities which are listed or specified by the Minister of Environmental Affairs must obtain an environmental authorisation before they may commence. The construction of a coal-fired power station is one such listed activity and the third respondent, the Chief Director of the DEA ("the Chief Director"), is designated as the competent authority to decide on environmental authorisations for these power stations. On 25 February 2015, the Chief Director granted Thabametsi an environmental authorisation for the proposed power station. The applicant, Earthlife Africa ("Earthlife"), appealed against the grant of authorisation[2] to the first respondent, the Minister of Environmental Affairs ("the Minister"), who, on 7 March 2016, upheld the decision. Earthlife now seeks to review both the decision to grant the environmental authorisation and the appeal decision of the Minister.

3. Earthlife is a non-profit organisation founded to mobilise civil society around environmental issues and is an interested and affected party ("IAP") as contemplated in section 24(4)(v)(a) of NEMA and is thus entitled to a reasonable opportunity to participate in public information and participation procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment. It also has standing in terms of section 32(1) of NEMA to bring a review application in its own interest as an IAP, in the public interest and in the interest of protecting the environment.

[1] Act 107 of 1998
[2] In terms of section 43 of NEMA

An overview of the issues

4. Earthlife maintains that the Chief Director was obliged to consider the climate change impacts of the proposed power station before granting authorisation and that he failed to do so. The government's National Climate Change Response White Paper of 20012 ("the White Paper") defines climate change as an on-going trend of changes in the earth's general weather conditions as a result of an average rise in the temperature of the earth's surface (global warming) due, primarily, to the increased concentration of greenhouse gases ("GHGs") in the atmosphere that are emitted by human activities. These gases intensify a natural phenomenon called the "greenhouse effect" by forming an insulating layer in the atmosphere that reduces the amount of the sun's heat that radiates back into space and therefore has the effect of making the earth warmer.

5. Section 24(1) of NEMA requires that the environmental impacts of a listed activity must be considered, investigated, assessed and reported on to the competent authority tasked with making a decision on environmental authorisation. Therefore, once an application for environmental authorisation has been made, an environmental impact assessment process must be undertaken. An environmental impact assessment is meant to provide competent authorities with all relevant information on the environmental impacts of the proposed activity.[3] Section 24O(1) of NEMA obliges competent authorities to take account of all relevant factors in deciding on an application for environmental authorisation, including any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused. Earthlife asserts that the climate change impacts of a proposed coal-fired power station are relevant factors and contends that at the time the Chief Director took his decision, the climate change impact of the power station had not been completely investigated or considered in any detail.

6. A climate change impact assessment in relation to the construction of a coal fire power station ordinarily would comprise an assessment of (i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime,

[3] J Glazewski (ed) *Environmental Law in South Africa* (2013) para 10.1.1.

by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied.

7. In her appeal decision, dated 7 March 2016, the Minister recognised that the climate change impacts of the proposed development were not "comprehensively assessed and/or considered" prior to the issuance of the environmental authorisation by the Chief Director. She accordingly chose to amend the authorisation, (seemingly relying on the power to vary a decision on appeal in section 43(6) of NEMA), by the insertion of an additional condition.

8. The new condition in the environmental authorisation, namely clause 10.5, provides:

> "The holder of this authorisation must undertake a climate change impact assessment prior to the commencement of the project, which is to commence no later than six months from the date of signature of the Appeal Decision. The climate change impact assessment must thereafter be lodged with the Department for review and the recommendations contained therein must be considered by the Department."

9. Despite the Minister finding that a fuller assessment was required, she upheld the environmental authorisation, subject to the added condition. Earthlife contends that in so doing the Minister acted unlawfully and undermined the purpose of the climate change impact assessment and the environmental authorisation process, because in the event of the envisaged climate change impact assessment indicating that environmental authorisation ought not to have been granted in the first place, the Chief Director and the Minister would have no power to withdraw the environmental authorisation on this basis.

10. Earthlife contends therefore that it was unlawful, irrational and unreasonable for the Chief Director and the Minister to grant the environmental authorisation in the

absence of a proper climate change impact assessment and hence that the decision should be set aside in terms of section 8 of the Promotion of Administrative Justice Act[4] ("PAJA"). It is not disputed that decisions granting environmental authorisation constitute administrative action in terms of the PAJA.[5]

11. Earthlife relies on various grounds of review. First, it claims that there was material non-compliance with the mandatory preconditions of section 24O(1) of NEMA which requires the consideration of all relevant factors in reaching a decision on environmental authorisation, including the climate change impact of the proposed coal-fired station.[6] It maintains furthermore that the absence of a climate change impact assessment rendered both the impugned decisions irrational and unreasonable[7] and finally that the Minister committed material errors of law in reaching her decision.[8] Earthlife therefore prays for the matter to be remitted back to the Chief Director in terms of section 8(1)(c)(i) of PAJA for reconsideration and a fresh decision on environmental authorisation after the final climate change impact assessment report has been completed. This, it asserted, is necessary to preserve the integrity and lawfulness of the environmental authorisation process.

12. Earthlife's case centres on the proposition that section 24O(1) of NEMA, properly interpreted, requires, as a mandatory pre-requisite, a climate change impact assessment to be conducted and considered before the grant of an environmental authorisation. It infers this from the wording of section 24O(1) of NEMA, read together with various provisions of the Environmental Impact Assessment Regulations,[9] ("the Regulations") interpreted in light of South Africa's domestic environmental policies, section 24 of the Constitution, and South Africa's obligations under international climate change conventions. The application for review accordingly invites determination of whether the DEA is obliged to fully assess the climate change impacts of a proposed coal-fired power station before environmental

[4] Act 3 of 2000.

[5] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at para 38.
[6] Section 6(2)(b) and section 6(2)(e)(iii) of PAJA.
[7] Section 6(2)(h) and section 6(2)(f)(ii) of PAJA.
[8] Section 6(2)(d) of PAJA.
[9] Environmental Impact Assessment Regulations GNR543, GG 33306, 18 June 2010

authorisation is granted in terms of NEMA; the argument of Earthlife essentially being that a climate change impact assessment must be conducted before environmental authorisation is granted in order for the relevant decision-makers to determine firstly whether the construction of a coal-fired power station should be allowed at all, or, if authorised, the conditions and safeguards that should be imposed to limit and address its climate change impacts.

13. Section 24O(1) imposes peremptory requirements.[10] Decision-makers must make their decisions in compliance with NEMA and must consider all relevant factors. Section 24O(1) reads:

> "If the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority considers an application for an environmental authorisation, the Minister, Minister of Minerals and Energy, MEC or competent authority must —
> (a) comply with this Act;
> (b) take into account all relevant factors, which may include —
> (i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
> (ii) measures that may be taken —
> (aa) to protect the environment from harm as a result of the activity which is the subject of the application; and
> (bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
> (iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
> (iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;
> (v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application;
> (vi) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act to the Minister, Minister of Minerals and Energy, MEC or competent authority in connection with the application;

[10] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 12.

(vii) any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and

(viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and

(c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question."

14. Section 24O(1) of NEMA is to be read with the relevant provisions of the Regulations, which prescribe what must be contained in an environmental impact assessment report. Regulation 31(2) provides that the environmental impact assessment report must contain all information that is necessary for the competent authority to consider the application and to reach a decision. The relevant information includes a description of the environment that may be affected by the activity and the manner in which the physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity and a description of identified potential alternatives to the proposed activity with regard to the activity's advantages and disadvantages.[11] Regulation 31(2)(k) requires the report also to include a description of all environmental issues identified during the assessment process and an indication of the extent to which the issues could be addressed by the adoption of mitigation measures. The report furthermore must address each identified potentially significant impact, including: (i) cumulative impacts; (ii) the nature of the impact; (iii) the extent and duration of the impact; (iv) the probability of the impact occurring; (v) the degree to which the impact can be reversed; (vi) the degree to which the impact may cause irreplaceable loss of resources; and (vii) the degree to which the impact can be mitigated.[12] Regulation 34(2)(b) obliges the competent authority to reject the environmental impact assessment report if it does not substantially comply with the requirements in regulation 31(2).

15. These provisions signify that if a climate change impact assessment is a relevant factor as envisaged in section 24O(1)(b) of NEMA then it will follow that the information is necessary for the purposes of regulation 31(2). Where relevant

[11] Regulation 31(2)(d) and (g)
[12] Regulation 31(2)(l)

information is missing the environmental impact assessment report must be rejected under regulation 34(2)(b) and environmental authorisation should be refused.

16. The DEA (the first, second and third respondents) argued that Earthlife's interpretation of the governing legislation is unsustainable. In their submission, there is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change assessment must be conducted before the grant of an environmental authorisation. Likewise, no such provision exists as part of South Africa's obligations under international law. South Africa's international obligations to reduce GHG emissions are broadly framed and do not prescribe particular measures that the government must implement to reduce emissions. Such measures, in its opinion, fall within the government's discretion. In the exercise of its discretion, the government is taking steps to address the issue of climate change and is in the process of developing a complex set of mitigation measures.

17. The DEA pointed out that it has committed to developing policies and measures to be formulated at a national level for application at a sectoral and company level to be reviewed and adjusted in light of the latest available science. The approach envisages that the DEA will intervene periodically to change the conditions imposed on GHG emitters in environmental authorisations.

18. The mitigation measures and sectoral plans are aimed at balancing South Africa's development needs with its climate change imperatives. The country is facing acute energy challenges that hamper economic development and is currently heavily dependent on coal and reliant on a significant proportion of its liquid fuels being generated from coal. In the short-term (up to 2025), South Africa faces significant rigidity in its economy and any policy driven transition to a low carbon and climate resilient society must take into account and emphasise its over-riding priority to address poverty and inequality.

19. The DEA, in view of these considerations, and while conceding that coal-fired power stations are heavy GHG emitters, argued that Earthlife's submissions lose sight of the broader developmental context and rest on its general opposition to the use of coal-generated power. Its stance fails to recognise that South Africa is facing an energy crisis and that the government is given scope within the domestic and

international environmental law regime to make adjustments to address that crisis. Some measure of coal-generated energy is necessary to meet South Africa's current and medium-term energy needs. It is against this background, the DEA contended, that the Minister's decision must be assessed.

20. The Minister in her answering affidavit averred that the Chief Director had adequately considered the climate change effects, but had not conducted a comprehensive assessment, and she imposed condition 10.5 requiring a fuller climate change impact assessment for that reason. She reasoned that condition 10.5 would serve a dual purpose. First, it would enable the gathering of emissions data to be used, *inter alia,* for monitoring and reporting purposes. Secondly, it would enable the DEA to determine if it was necessary to amend or supplement the conditions of the environmental authorisation to introduce additional mitigation measures, for instance where it was found that the emissions were significantly higher than provided in its carbon budget, or posed an unexpected and unacceptable health risk to surrounding communities. In the context of the prevailing regulatory regime and socio-economic context, she submitted, her decision cannot be impugned as irrational, unreasonable, or unlawful.

21. Thabametsi aligned with the DEA and advanced similar arguments, though emphasising different aspects. It submitted that the review should not succeed for two principal reasons - which echo those relied on by the DEA. Firstly, in its view, Earthlife's challenge to the outcome of the internal appeal is based on a fundamental misreading of the Minister's decision. The decision did not concede that a relevant factor had not been considered. The Minister accepted that climate change had been adequately considered by the Chief Director for the purposes of the environmental authorisation, but called for a climate change impact assessment to be undertaken for future use. Her decision and approach were reasonable, rational and lawful. Secondly, while climate change is a relevant factor for the DEA to consider, the regulatory regime does not require the conduct of a climate change impact assessment as a mandatory prerequisite to the grant of an environmental authorisation. There is no statutory or other basis for reading such an obligation into the regime.

22. Thabametsi went somewhat further and advanced other grounds for dismissal of the application on the basis of an allegation that Earthlife has brought the review in pursuit of its political or strategic objectives. Besides seeking to introduce a requirement of a comprehensive climate change impact assessment as a jurisdictional prerequisite to the grant of an environmental authorisation, Earthlife, it alleged, seeks to prevent Thabametsi from ever being permitted to construct and operate its proposed power station. This, Thabametsi maintains, is apparent from Earthlife's public statements recording its absolute opposition to the establishment of any new coal-fired power stations in South Africa and its admitted use of litigation as part of a broader strategy to halt the construction of any coal-fired power stations.

23. Earthlife understandably considers coal-fired power stations an inappropriate means to generate electricity since other forms of power generation are more sustainable and less damaging to the environment. In its opinion, a climate change impact assessment is necessary not only to ascertain what conditions and safeguards should be imposed to limit the power station's climate change impact, but also to determine whether a proposed coal-fired power station should be permitted at all. It is motivated by a vision that all coal-fired power stations should not be permitted because they contribute to CO_2 emissions globally. The review undeniably (but not in my opinion illegitimately) is directed at derailing the establishment of the Thabametsi power station by depriving Thabametsi of the environmental authorisation it requires to be appointed as an independent power producer.

24. Thabametsi, however, developed two preliminary arguments, (going beyond the issues of the rationality, reasonableness and legality of the two impugned decisions), which supposedly flow from the alleged strategic positioning by Earthlife. It argued that the objectives pursued by Earthlife cannot be competently achieved through these review proceedings. Earthlife's attempt to introduce a mandatory assessment, if it is to succeed, requires a challenge to the legislative regime governing environmental impact assessments. And any attempt to prohibit coal fired power stations entirely, obliged Earthlife to attack the Minister of Energy's determination that 2500 MW of baseload energy must be generated from coal.[13] The review must fail, moreover, in Thabametsi's view, because it is, in truth, a challenge to a

[13] Made on 19 December 2012 in terms of section 34(1) of the Electricity Regulation Act 4 of 2006

regulatory framework which Earthlife failed to challenge when it was promulgated and cannot indirectly and belatedly challenge in the present proceedings. For reasons which will appear later, I do not accept this argument. The review sought by Earthlife is premised on a narrower basis aimed at the decision of the competent authorities and is within the scope of PAJA. Thabametsi additionally accused Earthlife of blowing hot and cold in relation to the Minister's decision: it has engaged extensively in the climate impact assessment process required by the Minister's decision and in so doing has used the decision, which it contends is invalid, to seek to impose substantial additional obligations on Thabametsi. Consequently, it argued that the review is incompatible with the election that Earthlife made in deciding to engage with the climate impact assessment process that flowed from the Minister's decision.

Government's climate change and energy policies

25. South Africa is significant contributor to global GHG emissions as a result of the significance of mining and minerals processing in the economy and our coal-intensive energy system. Coal is an emissions-intensive energy carrier and coal-fired power stations emit significant volumes of GHGs, which cause climate change. Coal-fired power stations are the single largest national source of GHG emissions in South Africa. South Africa is therefore particularly vulnerable to the effects of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events will be consequential for society as a whole. South Africa is moreover a water-stressed country facing future drying trends and weather variability with cycles of droughts and sudden excessive rains. Coal-fired power stations thus not only contribute to climate change but are also at risk from the consequences of climate change. As water scarcity increases due to climate change, this will place electricity generation at risk, as it is a highly water intensive industry.

26. Be that as it may, coal-fired power stations are an essential feature of government medium-term electricity generation plans. The clearest expressions of government policy are contained in the White Paper, the Integrated Resource Plan for Electricity 2010-2030 ("the IRP") and the Department of Energy's binding

determination ('the Determination") on the mix of electricity generation technologies, adopted in terms of the Electricity Regulation Act.

27. The White Paper sets out South Africa's vision for an effective climate change response and the long-term, just transition to a climate-resilient and low-carbon economy and society. It proposes that climate change be addressed through interventions that build and sustain its social, economic and environmental resilience and making a fair contribution to the global effort to stabilise GHG concentrations in the atmosphere. The DEA has confirmed, in its answering affidavit, that it has taken steps to give effect to the policy objectives identified in the White Paper, including the development and implementation of a National Climate Change Response Adaptation Strategy; the development and implementation of a GHG emission reduction system; and the adoption of a national GHG mitigation framework. But the White Paper expressly recognises that South Africa's reliance on coal for electricity generation will continue to be a significant contributor to GHG emissions. A shift to low-carbon electricity generation options will only be possible in the medium term, and not immediately. Consequently, South Africa's GHG emissions are expected to increase and peak in the short term, before plateauing and declining over time.

28. The steps being taken by the DEA mentioned earlier include developing a set of mitigation measures, *inter alia* identifying desired sectoral mitigation contributions. This entails defining desired emission reduction outcomes for each sector and sub-sector of the economy, based on in-depth assessment of the mitigation potential, best available mitigation options, science, evidence and a full assessment of the costs and benefits. Where appropriate, these desired emission reduction outcomes will flow down to the individual company or entity level.

29. The policy also aims at defining company-level carbon budgets for significant GHG emitting sectors. This involves drawing up carbon budgets for significant GHG emitting sectors and sub-sectors. The carbon budget for each sector or sub-sector will then be translated into company-level desired emission reduction outcomes. Mitigation plans will be sought from companies and economic sectors for whom desired emission outcomes have been established.

30. As stated earlier, these measures are still under development and must be formulated at a national level and then applied at a sectoral and company level. In order to develop and implement these measures, the DEA requires detailed, complete, accurate and up-to-date emissions data. Two essential elements for the definition of desired emission reduction outcomes and the development of carbon budgets are (i) emission data and (ii) data to monitor the outcome of specific mitigation actions. The data gathered in the climate change impact assessment for the Thabametsi power station will contribute toward a pool of baseline data that can be used for monitoring purposes. The mitigation system is intended to be dynamic and flexible. The prescribed measures will be regularly reviewed and adjusted in light of the latest available science, the success of this mix of mitigation policies and measures, new accessible and affordable technology, increased capability and emerging mitigation opportunities. This approach envisages that the Department will intervene periodically to change the conditions imposed on GHG emitters. For example, the Department may amend the conditions of an emitter's environmental authorisation to impose a reduced carbon budget or new mitigation requirements.

31. South Africa's electricity generation plans for the period 2010 to 2030 are set out in the IRP which records government's policy on the future use of different technologies to meet South Africa's energy requirements. The IRP was prepared by the Department of Energy in consultation with various government departments (including the DEA), and was amended pursuant to a public participation process. Concerns about the threat of climate change and the need to reduce carbon emissions were given attention. The IRP was ultimately adopted by Cabinet, and thus represents the policy of government as a whole.

32. The IRP determines that additional energy-generating capacity is required to meet South Africa's energy requirements for 2030 and that such capacity must be provided by a mix of generation technologies. When deciding on the required mix, the Department of Energy sought to achieve an appropriate balance between the expectations of different stakeholders. It carefully considered key constraints and risks, including: reducing carbon emissions; new technology uncertainties such as costs, operability and lead time to build; water usage; localisation and job creation; regional development and integration; and security of supply. Ultimately, the IRP

determined that in order to secure the continued and uninterrupted supply of energy, the following mix of generation technologies were required: a nuclear fleet of 9,6 GW; 6,3 GW of coal; 17,8 GW of renewables; and 8,9 GW of other generation sources. That entailed bringing forward anticipated coal generation projects, originally expected only after 2026, for earlier implementation and envisaged that coal-fired power plants would be established by independent power producers in order to avoid security supply concerns.

33. Section 34 of the Electricity Regulation Act[14] ("the Electricity Act") empowers the Minister of Energy, in consultation with the National Energy Regulator, *inter alia* to determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity; determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources; require that new generation capacity must be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective; and to provide for private sector participation.

34. On 19 December 2012, the Minister of Energy, in consultation with the National Energy Regulator, in terms of section 34(1) of the Electricity Act, determined that 2500 megawatts of new electricity generation capacity would be generated from coal, and that such coal-generated electricity would be produced by independent power producers ("the Determination"). The Determination gave binding effect to aspects of the electricity generation policy outlined in the IRP including those aspects of the IRP that required the construction by independent power producers of coal power stations using fluidised bed combustion technology like that proposed by Thabametsi. The government has at a general and national level had due regard to the climate change implications of such an approach in order to safeguard the security of South Africa's energy supply and to strike a balance between environmental protection and sustainable development.

35. South Africa's international obligations similarly anticipate and permit the development of new coal-fired power stations in the immediate term. South Africa

[14] Act 4 of 2006

has signed and ratified the UN Framework Convention on Climate Change, acceded to the Kyoto Protocol and signed the Paris Agreement (but not yet enacted it domestically). The UN Framework Convention and the Kyoto Protocol oblige developed countries, identified in Annex I to the Convention, to adopt measures to mitigate climate change and to limit GHGs to set emissions targets. South Africa is not an Annex I country, and is not bound to any emissions targets under these treaties. The Paris Agreement requires State parties to commit to Nationally Determined Contributions ("NDC"), which describe the targets that they seek to achieve and the climate mitigation measures that they will pursue. South Africa's NDC expressly anticipates the establishment of further coal-fired power stations and an increased carbon emission rate until 2020 and records that climate change action takes place in a context where poverty alleviation is prioritised, and South Africa's energy challenges and reliance on coal are acknowledged. South Africa has adopted a system that is reliant on new coal-generated power, but anticipates decreased reliance on coal across all emissions sources, over time.

The decision of the Chief Director to grant environmental authorisation

36. The Thabametsi Project is viewed by the Department of Energy as a critical project to meet the country's electricity demand in terms of government policy under the IRP and Determination and has been registered as a strategic infrastructure project due to its economic and social importance. Thabametsi submitted a bid to the Department of Energy to be appointed as an independent power producer (IPP) under the Department of Energy's Coal Baseload IPP Programme to construct the 1200MW coal-fired power station. The Department of Energy has now appointed Thabametsi as a preferred bidder meaning that it is on the path to approval. However, Thabametsi is still required to secure outstanding regulatory approvals as well as satisfying various commercial requirements before it can reach financial and commercial close.

37. The construction of the Thabametsi power station will occur in two phases of 600MW each. Tenders under the Coal Baseload IPP Procurement Programme are awarded following a competitive bidding process, as detailed in the Request for

Qualifications and Proposals for New Generation Capacity ("Request for Proposals"), which sets out the procedures and requirements for this bidding process. The Legal Qualification Criteria, incorporated as volume 2 in the Request for Proposals, states that in order for a bid to be considered, a project must have an environmental authorisation, issued under NEMA, together with a number of other environmental licences and approvals.

38. Thabametsi's application for environmental authorisation was made and considered under the Regulations,[15] which specify the procedure that must be followed in conducting an environmental impact assessment. In accordance with the Regulations, Thabametsi appointed an independent environmental assessment practitioner, Savannah Environmental (Pty) Limited ("Savannah"), to carry out the environmental impact assessment process. Savannah was then required to conduct a scoping and environmental impact reporting process.[16] The scoping process is designed to allow the competent authority to give direction on the environmental impacts that must be investigated and reported on, taking into account comments received from interested and affected parties. The Chief Director approved the scoping report, without imposing any requirement to consider climate change impacts. Savannah proceeded to conduct the environmental impact assessment. It then prepared draft and final environmental impact assessment reports ("the EIR") which were submitted to the Chief Director.

39. On 25 February 2015, the Chief Director granted the environmental authorisation for the Thabametsi power station, subject to several conditions. The Department of Environmental Affairs issued an amended integrated environmental authorisation on 17 March 2015. The authorisation authorises the applicant to undertake various listed activities subject to the conditions stipulated. None of the conditions relates specifically or explicitly to the question of climate change or GHG emissions. However, various listed activities are made conditional upon the applicant obtaining other environmental licences under other environmental legislation. Thus, for example, the authorisation subjects the construction of facilities or infrastructure for

[15] In 2014 the Regulations were substituted by the 2014 EIA Regulations in GG 38282. In terms of the transitional provisions in Chapter 8 the 201 Regulations continue to apply to all pending applications and appeals. As a result, the Regulations of 2010 continue to apply to Thabametsi.
[16] Regulation 20

the storage of ore or coal to the acquisition of an atmospheric emissions licence ("AEL") in terms of the National Environmental Management: Air Quality Act[17] ("NEMAQA"). Under Item 26 it is recorded that an AEL is required under NEMAQA for the release of emissions to the atmosphere and that such process will also require an environment impact assessment.

40. Annexure 1 to the authorisation is titled: "Reasons for Decision". Under the heading "key factors considered in making the decision", it is recorded that the DEA in reaching its decision took the following into consideration – a) the information in the environmental impact report of May 2014; b) the mitigation measures included in that report, and the environmental management plan; c) the comments received from the Directorate: Authorisations and Waste Disposal Management; d) comments from interested and affected parties as included in the report; and e) the objectives and requirements of relevant legislation, policies and guidelines, including section 2 of NEMA. The following conclusions are then recorded:

> "After consideration of the information and factors listed above the Department reached the following conclusions:
>
> > a) The identification and assessment of impacts are detailed in the EIR dated May 2014; and sufficient assessment of the key identified issues and impacts have been completed.
> >
> > b) The procedure followed for impact assessment is adequate for the decision-making process.
> >
> > c) The proposed mitigation of impacts identified and assessed adequately curtails the identified impacts.
> >
> > d) A sufficient public participation process was undertaken and the applicant has satisfied the minimum requirements as prescribed in the EIA regulations, 2010, for public involvement."

[17] Act 39 of 2004

41. Earthlife first became aware of the proposed power station on publication of the draft EIR in early 2014. It therefore missed the opportunity to make representations on the scoping report. It presented comments on the draft EIR in April 2014 submitting that it be rejected or at least be sent back to Savannah for amendment. Its criticism of the draft EIR was that it was superficial with insufficient detail. In addition, it took issue with the lack of information regarding the water allocation for the project and the need for the project to be assessed together with the coal mine which will be the main source of coal supply to the power station. It noted that a waste management licence ("WML"), water use licence ("WUL") and an atmospheric emissions licence ("AEL") are all required. It placed on record that it desired the opportunity to participate in all of these processes and to be kept informed of their progress. It pointed out that the sourcing of water and water treatment cannot be left to the operational phase of the project as there had to be a prior determination of availability. It raised various concerns in relation to the assessment of impacts on inter alia fauna and flora, wetlands, surface water, groundwater, air quality, noise, visual impact, traffic and biodiversity. It did not however raise the issue of climate change.

42. As indicated in Annexure 1 to the authorisation, Savannah filed its final EIR report in May 2014. It too failed to address the climate change impacts of the proposed coal-fired power station in any detail. The only reference to climate change is contained in an air quality impact assessment forming part of the final EIR and attached as Annexure AA14 to the answering affidavit. It recognised that indirect impacts associated with sulphur dioxide and nitrogen dioxide emissions relate to acidification, and those associated with carbon monoxide and carbon dioxide relate to global warming. It asserted that climate change impacts are expected to be relatively small and low. The sole observation on the matter in the final EIR stated:

> "The magnitude of indirect impacts associated with the operational scenarios relates to the relative contribution to acidification and global warming. While quantification of the relative contribution of the Thabametsi Power Station is difficult, the contribution is considered to be relatively small in the national and global context. The significance of the indirect impacts is therefore anticipated to be low for all operational scenarios.

43. The final EIR did not quantify the anticipated GHG emissions from the power station, more specifically the likely CO_2 and methane (CH_4) emissions from the coal-fired power station – the primary contributors to climate change. Instead, the report focused on emissions of SO_2, NO_2, and particulates. Earthlife believes this oversight was due to the report focusing on localised issues of air quality rather than considering broader climate change impacts.

44. Nor did the EIR address the impact that climate change may have on water scarcity in the region and how this will impact on the power station. The power station will require 1,500,000m^3 of water each year in a highly water stressed region and hence is likely to aggravate the impact of climate change in the region by contributing to water scarcity, raising in turn questions about the viability of the power station over its lifetime. Climate change thus poses risks to the Thabametsi coal-fired power station over its lifetime.

45. Subsequent to the Minister's appeal decision imposing condition 10.5 in the environmental authorisation, Savannah prepared a climate change impact assessment report ("the climate change report") and made it accessible for public review on 27 January 2017. This prompted Earthlife to file a supplementary affidavit dealing with some aspects of this report. The respondents collectively objected to the admissibility and relevance of this evidence. I am satisfied that the climate change report is admissible and that the filing of the supplementary affidavit should be permitted. Admittedly, the climate change report was not before the decision-makers when they made their decisions. It cannot be said that they acted unreasonably by ignoring a report that did not exist. But the climate change report does not introduce new facts that should have been dealt with in the founding papers. It speaks directly to the question in issue: were the impacts of climate change properly considered before authorisation was granted? The climate change report contradicts certain of the allegations made in the decisions under review and in the answering affidavits, and casts doubt upon the reasons and conclusions contained in Annexure 1 to the authorisation. It is relevant to the sufficiency of the consideration given by the Chief Director to the impact of climate change at the time he granted the environmental authorisation.

46. The climate change report addresses climate change in two parts. Appendix D comprises a detailed assessment of the likely GHG emissions from the Thabametsi power station over the period of its construction, operation and decommissioning ("the GHG emissions report"). Appendix F is a climate change resilience assessment ("the resilience report") dealing with how climate change will impact the power station over its lifetime.

47. The GHG emissions report estimates that the power station will generate over 8.2 million tonnes of carbon dioxide per year and over 246 million tonnes of carbon dioxide over its lifetime**.** The report characterises these emissions as very large by international standards based on a GHG magnitude scale drawn from standards set by various international lender organisations such as the International Finance Corporation, the European Bank for Reconstruction and Development. The expected emissions could constitute 1,9% to 3,9% of South Africa's total GHGs - the larger percentage hopefully reflecting a higher ratio of a declining emissions rate after 2025 when other coal fired power stations are decommissioned. The GHG emissions report compares the project favourably with the existing fleet of power stations run by Eskom, South Africa's sole producer of electricity. It states:

> "The Project has relatively high emissions intensity…compared to coal-fired plants, and a similar emissions intensity to that of Eskom's current fleet… and coal fired plants specifically…However, the emissions intensity of the plant represents an improvement on the three oldest Eskom coal-fired power plants that are due to be decommissioned before 2025."

48. These relatively high GHG emissions stem from the technological limitations in the design of the power station and the fact that it will not be able to make use of carbon capture and storage, an acknowledged effective emissions mitigation technique.

49. The EIR made no attempt to consider how climate change may impact on the power station itself over its lifetime and how this power station may aggravate the effects of climate change. The resilience report confirms that climate change in fact poses several "high risks" that cannot be effectively mitigated, most significant being the threat of increasing water scarcity in the Lephalale district. Increasing water scarcity in the region will affect the operation of the plant and deprive local communities of water. It expresses doubt that the Mokolo Crocodile Water

Augmentation Project (“the MCWAP” involving piping water from the Mokolo dam and the Crocodile River catchment area) will be able to provide sufficient water for the power station as climate change increases in pace. The risks of water scarcity cannot be fully mitigated.

50. The findings and conclusions of the GHG emissions report and the resilience report are accordingly undeniably at variance with the EIR that served before the Chief Director in May 2014 and upon which he relied to grant authorisation, which, unlike the detailed analysis in the GHG emissions report, contained no quantification of CO_2 emissions. The EIR made only passing mention of climate change impacts, describing these as being of “low” and “relatively small” significance, when it now seems these impacts are potentially substantial.

51. In his reasons for his decision filed in the appeal to the Minister, the Chief Director repeated the assertions on climate change contained in the EIR that while quantification of the relative contribution of the Thabametsi power station to climate change was difficult, the contribution to GHG emissions was considered to be relatively small in the national and global context and that the significance of the indirect impacts was anticipated to be low for all operational scenarios. There is no evidence convincingly supporting that conclusion, which subsequently has been demonstrated to be false by the GHG emissions report. It is for that reason that Earthlife contends the decision of the Chief Director is reviewable as irrational and unlawful in that relevant considerations were ignored and the uncritical repetition of the EIR’s claims of low impact is suggestive of a failure by the Chief Director to apply his own mind to the climate change impacts.

Earthlife’s appeal to the Minister

52. Section 43(1) of NEMA provides that any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under NEMA or a specific environmental management Act. In terms of section 43(6) of NEMA, after considering such an appeal the Minister may confirm, set aside or vary the decision or may make any other appropriate decision.

53. Earthlife lodged an appeal with the Minister in terms of section 43 of NEMA on 11 May 2015 in which it raised the question of climate change directly for the first time. The appeal requested the Minister to set aside the decision to grant the environmental authorisation on various grounds. Most relevantly for present purposes, the fourth ground of appeal alleged that the Chief Director had failed to take into account the state's international and national obligations to mitigate and take positive steps against climate change.

54. In paragraphs 89-105 of the appeal, Earthlife emphasised that climate change will continue to impact on water resources, air quality, human health, biodiversity and marine fisheries and that South Africa has an international obligation to commit to the reduction of GHG emissions as part of a global solution to a global problem. The government has confirmed its commitments in the White Paper where it has listed as one of its strategic priorities the need to prioritise "the mainstreaming of climate change considerations and responses into all relevant sector, national, provincial and local planning regimes". Earthlife thus concluded that, as part of the integrated environmental authorisation process envisaged by Chapter 5 of NEMA and the requirement in section 24O(1)(b) to consider relevant policy and information in deciding whether or not to grant an authorisation, the GHG emissions and climate change impacts of the project should have been taken into account by the Chief Director before granting the authorisation.

55. According to Earthlife, in order to meet these legislative and policy requirements, the environment impact assessment process as a matter of policy should include climate change considerations in full as part of "climate change screening". Such screening must tackle both mitigation (potential contribution to further GHG emissions) as well as adaptation measures. Every development decision must be based on its contribution to both mitigation and adaptation aimed at maximising reduction in direct and indirect GHG emissions, maximising the potential for further mitigation and optimising adaptation to impacts over the full life of the development. Earthlife submitted to the Minister that such was not considered by the Chief Director "either adequately or at all". In addition, water availability is "a severe climate change concern for South Africa". It cautioned that the access to water in the Lephalale area

is anticipated to be a problem in the future and pointed out that the authorisation process had not adequately addressed the problem. Its concerns have subsequently been taken on board and are now reflected in the discussion of the MCWAP in the resilience report of January 2017.

56. Paragraph 105 of the appeal summarises Earthlife's ultimate concern about the climate change issue in relation to the authorisation process. It reads:

> "The failure to consider climate change implications shows a lack of policy coherence with the national climate change response policy and a disregard for the provisions of NEMAQA and NEMA which require consideration of international obligations and GHG emissions as set out above. Furthermore, this shows a failure to consider the anticipated and fast-approaching impacts of climate change, in this particular instance, diminishing water resources, which will, no doubt, have a significant impact on this project, as well as other projects and people living within the area and the surrounding environment."

57. The other grounds of Earthlife's appeal ranged across a variety of issues, some touching indirectly on climate change. They alleged variously that the Chief Director and the DEA failed to apply the principles of national environmental management; failed give effect to the general objectives of integrated environmental management in relation to waste management; did not properly consider representations from IAPs; and did not consider alternatives, in particular the "no-go option", being the abandonment of the project entirely and developing renewable energy sources in the interests of effective mitigation of climate change.

58. Earthlife's second ground of appeal was that the Chief Director failed to take into account the air quality impacts of the project and in so doing contravened NEMAQA. The object of NEMAQA is to protect the environment by providing reasonable measures for the protection and enhancement of the quality of air; the prevention of air pollution and ecological degradation; securing ecologically sustainable development while promoting justifiable economic and social development; and generally to give effect to section 24(b) of the Constitution in order to enhance the

quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.[18]

59. Thus, although NEMAQA is primarily concerned with the quality of ambient air, it is secondarily concerned with other kinds of pollution and environmental degradation. Section 39(b) of NEMAQA provides that when considering an application for an AEL, the licensing authority must take into account inter alia the pollution being or likely to be caused by the carrying out of the listed activity and the effect or likely effect of that pollution on the environment, including health, social conditions, economic conditions, cultural heritage and ambient air quality. Likewise, in terms of section 39(c) of NEMAQA, the licensing authority must take into account the best practicable environmental options available to prevent, control, abate or mitigate that pollution and to protect the environment from harm as a result of that pollution. Section 1 of NEMAQA defines "pollution" as having the meaning assigned to it in section 1 of NEMA, which defines it to include any change in the environment caused by substances emitted from any activity where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future. This all-embracing definition of pollution thus encompasses the emission of GHG as a form of pollution. Emission is essentially defined to mean any emission or entrainment process that results in air pollution.

60. In paragraph 93, dealing with the issue of climate change under its fourth ground of appeal, Earthlife referred to section 43(1) of NEMAQA, to reinforce the point that national legislation recognises the need to curb GHG emissions and address climate change in that NEMAQA requires that an AEL must specify GHG measurements and reporting requirements. Likewise, the National Framework for Air Quality Management[19] ("the 2012 National Framework") acknowledges that "specialist air quality impact assessments must consider greenhouse gas emissions as well". Section 43(1) of NEMAQA requires an AEL to specify inter alia: i) the maximum allowed amount, volume, emission rate or concentration of pollutants that may be

[18] Section 2 of NEMAQA.
[19] GN 919 GG 37078 of 29 November 2013

discharged in the atmosphere over the life of the listed activity;[20] ii) point source (a single identifiable source and fixed location of atmospheric emission) emission measurement and reporting requirements;[21] iii) any other operating requirements relating to atmospheric discharges, including non-point source or fugitive emissions;[22] and iv) greenhouse gas emission measurement and reporting requirements.[23]

61. Earthlife disputed the claim in the EIR that air quality impacts had been adequately considered in the environmental authorisation process and complained that it had not had proper notice of the process. However, it emerged in argument before me that the AEL process is still to be finalised and Earthlife is participating in that process. The implications of that has become a matter of importance and debate.

The Minister's appeal decision

62. On 7 March 2016, the Minister handed down her decision on the appeal. The decision deals *ad seriatim* and thoroughly with all the grounds of appeal. In response to the appeal grounds that the DEA had contravened the principles of NEMA and the existing environmental policies the Minister made significant relevant observations and findings. Thus she noted Earthlife's contention that a detailed climate impact study needed to be conducted to assess the impacts of climate change, in particular for water resources estimated to be available for the project, as well as the impacts of the project on GHG emissions and adaptation to a changed climate, and that the IAPs should have been granted an opportunity to make submissions in relation to such studies and that the DEA should have considered these studies and the comments received before making any decision in relation to the environmental authorisation. She noted also Thabametsi's contention that the impacts of GHG emissions and climate change were considered in the air quality assessment and the risk assessment study. She stated:

[20] Section 43(1)(g) of NEMAQA
[21] Section 43(1)(i) of NEMAQA
[22] Section 43(1)(h) of NEMAQA
[23] Section 43(1)(l) of NEMAQA

> "In evaluating this ground of appeal..I note furthermore that the Atmospheric Impact Report, which will form part of the AEL application process, will provide details of the facility's impact on human health and the receiving environment. Since this application was not submitted as an integrated application, information in this regard will consequently be required during the AEL application process."

63. Earthlife's third ground of appeal alleged that the Chief Director failed to take into account the cumulative impacts of the project. The impacts it addressed included biodiversity, habitat destruction and the associated loss of species, and importantly the cumulative impact of the project on the water supply and hence the resilience issue, in that the water supply from the MCWAP might prove insufficient. The Minister in her decision did not address this concern with much specificity. She merely stated that the EIR had taken note of the significant cumulative impacts and concluded with the following general observation:

> "I note furthermore that a project of this nature will have certain impacts which will not be comprehensively mitigated or prevented, but that these concerns must be weighed against the interests of the project, as well as the social and economic benefits derived from the project. Certain negative impacts are consequently unavoidable in a development of this nature, but I am satisfied that these impacts were identified and adequately assessed, and that mitigation measures were put in place, having considered all relevant specialist recommendations."

64. The failure of the Minister to specifically address the water supply issue when discussing the question of "cumulative impacts" is ameliorated to some extent by her ultimate decision to compel a fuller climate change assessment, where the matter could and subsequently has been investigated.

65. In dealing with the fourth ground of appeal, the Minister clearly accepted that a climate change assessment was a relevant factor in deciding whether to grant the authorisation. She evidently accepted Earthlife's contention that as part of the integrated environmental process envisaged by chapter 5 of NEMA and the requirement of section 24O(1)(b) of NEMA the Chief Director was required to take into account the GHG emissions and climate change impacts of the project. She noted Earthlife's contention that "these factors were not considered, either adequately or at all". Her finding and ruling on the issue reads as follows:

> "In evaluating this ground of appeal, I am aware that climate change issues were

> addressed, to some extent, in the air quality assessment and impact study, and the Department considered these factors prior to the issuance of the EA.
>
> I must emphasise that in order for the country to meet its long-term electricity demand, a mix of power generation technologies must be pursued, which includes coal-fired power stations. I must stress furthermore that the Department's commitment to identifying cleaner power technologies in the medium and longer term.
>
> However, I concur with the appellant in that climate change impacts of the proposed development were not comprehensively assessed and/or considered prior to the issuance of the EA.
>
> In view of the above, the EA is accordingly amended by the insertion of condition 10.5 of the EA".

66. The new condition obliged Thabametsi to undertake a climate change impact assessment prior to the commencement of the project to be lodged with the DEA for review and consideration of the recommendations. This assessment, as discussed, is underway. A draft climate change report has been published and is the subject of an on-going process in which Earthlife is an active participant.

67. Despite agreeing with Earthlife that the climate change impact had not been properly assessed, the Minister went on to uphold the environmental authorisation, such according to Earthlife amounting to a reviewable irregularity.

Events subsequent to the appeal to the Minister

67. Subsequent to the Minister's decision various extensions of time were granted for submitting the climate change report. There was also some uncertainty about the nature and scope of the Minister's decision, leading to correspondence and further engagement between the parties.

68. On 23 March 2016, the third respondent, the Director: Appeals and Legal Review of the DEA ("the Appeals Director"), wrote to Earthlife and stated that the instruction by the Minister that Thabametsi undertake a climate change assessment did not constitute an acknowledgement by the Minister that the

decision to issue the environmental authorisation was unlawful and further that the directive made it clear that Thabametsi could not commence with the project until such time as the assessment had been concluded and submitted to the DEA for consideration.

69. At a meeting with the Appeals Director on 13 April 2016, the legal representatives of Earthlife were advised that the DEA may decide to amend or revoke the environmental authorisation, depending on the findings of the assessment. There was debate in subsequent correspondence about whether the revocation of the authorisation at a later date would be legally feasible.

70. The draft scope of work report for the climate change impact assessment was made available for comment by IAPs on 22 April 2016. On 25 May 2016 Earthlife submitted comments and detailed recommendations on what the climate change impact assessment should consider. These recommendations included submissions that: i) the boundary definition take cognisance of activities giving rise to indirect emissions, namely mining and the transportation of coal; ii) the baseline study must not be limited only to the project's GHG emissions but must consider the baseline environment; iii) the assessment must include consideration of the project's cumulative and life cycle emissions and the external costs associated with climate change impacts - being changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services; iv) the basis of the assessment of impacts on the built environment be broadened to adopt the protocols of the Sabin Centre for Climate Change Law for consideration of relevant factors using multiple scenarios including the most severe climate change projections; and v) the use of recognised global standards on how to measure, manage and report on GHG emissions.

71. After further dispute about Earthlife's opportunity to influence the report, the final scope of work report was made available to the IAPs for comment on 9 October 2016, with comments due on 10 November 2016. It appears that the DEA took on board some of Earthlife's recommendations and proposed that: i) the full life cycle of the project be considered; ii) the carbon footprint of the project be calculated for construction and decommissioning; and iii) the resilience to the

impacts of climate change be addressed. Earthlife would prefer other of its recommendations to be taken into account, such as cumulative emissions, the social cost of the emissions associated with the project and the specific impact on the Waterberg region in Limpopo. It also emphasised that all these tasks should have been completed before the environmental authorisation was granted by the Chief Director.

72. Earthlife thus has participated in and sought to influence the outcome of the climate change impact assessment currently being conducted in terms of the condition imposed by the Minister on appeal. Its participation has put Thabametsi to further expense of approximately R1 million to date to accommodate the additional concerns that it has raised in its response to the draft scope of works report.

73. Thabametsi, as mentioned earlier, contends that Earthlife's participation in the process conducted pursuant to the dismissal of the appeal is fundamentally at odds with its decision to bring the review. The former is premised on the finding that the environmental authorisation is valid, while the latter seeks to set the authorisation aside. Thabametsi argues that Earthlife should not be permitted to blow hot and cold by participating in both of these mutually exclusive processes. A party cannot approbate and reprobate by asserting that an adjudicator's decision is valid, entitling it to participate in the scoping process and at the same time seek to challenge the validity of the decision. By taking a benefit under an adjudicator's decision, the party will generally be taken to have elected a particular course and will be precluded from challenging the adjudicator's decision.[24]

74. Earthlife in its replying affidavit rejected this contention, claiming that it has made it clear throughout that its participation in the climate change impact assessment process does not constitute a waiver of its rights to bring the review. In paragraph 5 of its comments on the draft scope of work report its legal representatives stated:

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[24] *PT Building Services Ltd v ROK Build Limited* [2008] EWHC 3434 (TCC) para 26; *Chamber of Mines of South Africa v National Union of Mineworkers and Another* 1987 (1) SA 668 (A) at 690D–G; and *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) para 54.

> "Our client's rights to take the Minister's appeal decision on review remain fully reserved. The following submissions are made without prejudice to those rights. Nonetheless, our client recognises the need for the CCIA to be conducted properly, irrespective of the outcome of any potential litigation."

I see no basis upon which Earthlife should be denied its reservation. The election rule is not an absolute bar. There has been no prejudice to the other parties through its participation. While Thabametsi has incurred additional expense by reason of the scope of works report, the ultimate reason for that is because the DEA accepted the objective merit of the proposals. Earthlife added in its replying affidavit that no matter what the outcome of the litigation, the climate change impact assessment will need to be completed and it must be done properly and will need to be considered in taking a fresh decision. That proposition is true and will have a bearing upon the remedy for any proven irregularity.

75. As discussed earlier, Savannah in fulfilment of condition 10.5 of the authorisation introduced by the Minister on appeal has now finalised the climate change report and made it accessible for public review on 27 January 2017. The report and its annexures run to more than 400 pages. The report states that it "is made available for public review for a commenting period of 30 days, beginning 27 January 2017, and ending 27 February 2017".

The review of the decision of the Chief Director

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,[25] 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.

77. The position taken by the Minister in relation to the decision of the Chief Director is somewhat ambiguous. Her decision to vary the conditions of the authorisation suggests that she regarded the decision as irregular. However, in the answering affidavit the Minister averred that she considered the decision of the Chief Director to

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

be valid and rejected the fourth ground of appeal accordingly. As will appear more clearly later, the alleged failure of the Chief Director to properly exercise his discretion, if proven, could only have been cured on appeal had the Minister substituted her own decision on the authorisation after receiving and taking into consideration the relevant information purportedly ignored.[26] She did not do that. Nor did she set aside the Chief Director's decision and remit it. She upheld it and varied the conditions of the authorisation. It is still necessary therefore to decide whether the administrative action of the Chief Director was tainted by irregularity.

78. The answer depends partly on whether climate change impacts had to be considered in granting Thabametsi environmental authorisation. A plain reading of section 24O(1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project's climate change impact and measures to avoid, reduce or remedy them.

79. Section 24O(1)(b) of NEMA expressly requires the competent authority considering an application for an environmental authorisation to take into account all relevant factors including: i) any pollution, environmental impacts or environmental degradation likely to be caused; ii) measures that may be taken to protect the environment from harm as a result of the activity and to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation; iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted; iv) any feasible and reasonable alternatives to the activity and any feasible and reasonable modifications or changes to the activity that may minimise harm to

[26] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) at paras 80-81

the environment; and v) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application. These requirements, as mentioned earlier, are peremptory. The Regulations also require that the environmental impact assessment report to contain all information that is necessary for the competent authority to consider the application and to reach a decision including an assessment of each identified potentially significant impact.

80. NEMA, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation.[27] Section 2 of NEMA sets out binding directive principles that must inform all decisions taken under the Act, including decisions on environmental authorisations. The directive principles serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. They guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment. Competent authorities must take into account the directive principles when considering applications for environmental authorisation.[28] The directive principles promote sustainable development and the mitigation principle that environmental harms must be avoided, minimised and remedied. The environmental impact assessment process is a key means of promoting sustainable development, by ensuring that the need for development is sufficiently balanced with full consideration of the environmental impacts of a project with environmental impacts. The directive principles caution decision-makers to adopt a risk-averse and careful approach especially in the face of incomplete information.

81. As a matter of general principle, the courts when interpreting legislation are duty bound by section 39(2) of the Constitution to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.[29] The

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[27] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.
[28] Sections 23 and 24 of NEMA

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

approach mandated by section 39(2) is activated when the provision being interpreted implicates or affects rights in the Bill of Rights, including the fundamental justiciable environmental right in section 24 of the Constitution. Section 24 reads:

> "Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

82. Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[30] Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.

83. NEMA must also be interpreted consistently with international law. Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

[30] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

international law. Therefore, the various international agreements on climate change are relevant to the proper interpretation of section 24O(1)(b) of NEMA. Article 3(3) of the UN Framework Convention enacts a precautionary principle requiring all states parties to take precautionary measures to anticipate, prevent or minimise causes of climate change. Article 4(1)(f) of the UN Framework Convention imposes an obligation on all states parties to take climate change considerations into account in their relevant environmental policies and actions, and to employ appropriate methods to minimise adverse effects on public health and on the environment.

84. As explained earlier, the DEA argued that there is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change impact assessment must be conducted before the grant of an environmental authorisation and no such express provision exists as part of South Africa's obligations under international law to reduce GHG emissions, which are broadly framed and do not prescribe particular measures. Thabametsi similarly disputed whether section 24O of NEMA and regulation 31 of the Regulations will better advance policy if interpreted to require such an assessment.

85. They emphasised that the absence of a legislated framework and prescribed limits for GHG emissions rates means there is no standard to which the DEA could hold Thabametsi for the grant of an environmental authorisation. Thabametsi in particular argued that it is anathema to the rule of law to hold a party to requirements or constraints that have not been so enacted. The rule of law, enshrined in section 1 of the Constitution, requires that rules must be enacted and publicised in a clear and accessible manner, to enable people to regularise their affairs with reference to them. Substantive requirements of the kind pressed for by Earthlife should not be read in to the legislative regime, particularly so where the DEA has deliberately refrained from adopting regulations that require a GHG emission assessment and pollution prevention plan.

86. Thabametsi argued further that if Earthlife considers section 24 of the Constitution to require a detailed climate change impact assessment to be conducted for the environmental authorisation of coal-fired power stations, then it must challenge NEMA and/or the EIA regulations as unconstitutional for the failure to adopt such a requirement. It cannot disregard the absence of the requirement from

the relevant legislation, and seek to invoke the constitutional right directly to read it in. Doing so violates the principle of subsidiarity.

87. These arguments, to my mind, are something of a mischaracterisation of what Earthlife seeks to achieve with this review. Admittedly though, Earthlife in its heads of argument and founding papers did take the position that the decisions were unlawful because the absence of a climate change impact assessment constituted material non-compliance with the mandatory requirements of section 24O(1) of NEMA read with the 2010 EIA Regulations. On this basis, the impugned decisions would be reviewable for want of jurisdiction in terms of the constitutional principle of legality, section 6(2)(b) of PAJA (which permits review for non-compliance with a mandatory procedure or condition), and perhaps in terms of sections 6(2)(f)(i) and 6(2)(i) of PAJA on the ground that the decision contravened a law or was not authorised by the empowering provision or was otherwise unconstitutional or unlawful. In argument, however, Mr Budlender, who appeared for Earthlife, retreated from this position and confined his criticism of the Chief Director's decision to the assertion that in granting the environmental authorisation without having sight of a climate change impact assessment report he overlooked relevant considerations. The decision accordingly falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA.

88. The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. Allowing for the respondents' argument that no empowering provision in NEMA or the Regulations explicitly prescribes a mandatory procedure or condition to conduct a formal climate change assessment, the climate change impacts are undoubtedly a relevant consideration as contemplated by section 240 of NEMA for the reasons already discussed. A formal expert report on climate change impacts will be the best evidentiary means of establishing that this relevant factor in its multifaceted dimensions was indeed considered, while the absence of one will be symptomatic of the fact that it was not.

89. The respondents' complaint that without explicit guidance in the law on climate change impact assessments, Thabametsi could not be required to conduct a climate

change impact assessment, as there is no clarity on what is required, is unconvincing. As Earthlife correctly pointed out, an environmental impact assessment process is inherently open-ended and context specific. The scoping process that precedes an environmental impact assessment provides opportunity for delineating the exercise and guidance on the nature of the climate change impacts that must be assessed and considered.

90. The respondents further argued that the power station project is consistent with South Africa's NDC under the Paris Agreement, which envisages that South Africa's emissions will peak between 2020 and 2025. Again I agree with Earthlife that this contention misses the point. The argument is not whether new coal-fired power stations are permitted under the Paris Agreement and the NDC. The narrow question is whether a climate change impact assessment is required before authorising new coal-fired power stations. A climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NDC and its commitment to build cleaner and more efficient than existing power stations.

91 In conclusion, therefore, the legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation.

92. I turn now to consider whether the Chief Director did in fact consider or ignore the relevant climate change impacts.

93. In its founding affidavit, Earthlife proceeded from the supposition that the Minister in the appeal had found that the Chief Director had failed to consider the relevant factors of climate change impacts as evidenced by her decision to impose the new condition in the authorisation. As it saw the situation, there was no information before

the Chief Director dealing with the direct GHG emissions of the power station, the cumulative emissions from all the activities associated with the power station, the problem of water scarcity or any analysis on how climate change will impact on the efficiency and continued operation of the power station over its expected lifetime.

94. There is no denying, when regard is had to the scope of work report and the climate change report issued after the Minister's appeal decision that when the Chief Director made his decision he was possessed of scant climate change information consisting of the single paragraph in the EIR, which in comparison to that in the scope of work report and the climate change report was wholly insufficient. As explained, the EIR did not deal with the project's full life-cycle emissions, the carbon footprint of the project calculated for construction and decommissioning, the activities associated with the project – mining and coal transportation, and the project's resilience. The Minister and the DEA fully appreciated this, as is reflected in the Minister's decision and the constructive approach followed subsequently by the DEA in relation to the scope of the works report. Additionally, the air quality assessments do not meaningfully attempt to quantify the GHG emissions from the power stations, though it must be kept in mind that the AEL process under NEMAQA is still underway.

95. The DEA and Thabametsi sought to rely on the IRP and the Determination to support their submission that the relevant climate change considerations had been considered by the Chief Director. There is no evidence to support the assertion that the IRP and the Determination gave adequate consideration to climate change. But in any event, as Mr Budlender correctly submitted on behalf of Earthlife, an abstract, macro-level assessment of the climate change impact of additional coal-fired power could not cast any light on the specific climate change impacts and mitigation strategies of specific coal-fired power stations located at specific sites. These relevant considerations are context specific and have to be distinctively considered.

96. The policy instruments naturally will inform a competent authority assessing the environmental impact of a proposed coal-fired power station. But the respondents' assertion that the instruments constitute binding administrative decisions not to be circumvented to frustrate the establishment of authorised coal-fired power stations is

unsustainable, as is the notion that their mere existence precludes the need for a climate change impact assessment in the environmental authorisation process. Policy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered.

97. The contention that the climate change impacts of additional coal-fired power stations were considered in making the IRP and the Determination, precluding any further need for this assessment of climate change impacts in the environmental impact assessment process, is also not legally sustainable by virtue of the decision of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department Of Agriculture, Conservation And Environment, Mpumalanga Province.*[31] That case concerned an environmental authorisation granted for the construction of a petrol service station. In granting the authorisation, the competent authority made a similar argument to the one advanced here, suggesting that it was unnecessary to consider the socio-economic impacts of the project, as these impacts had been fully considered by the local authority in granting zoning approval in terms of an Ordinance. The Ordinance required an assessment of the need and desirability of the proposed project. The Constitutional Court held that NEMA required more than a mere assessment of need and desirability, with the consequence that the competent authority had misunderstood the nature of the NEMA requirements. It stated:

> "The environmental authorities assumed that the duty to consider need and desirability in the context of the Ordinance imposes the same obligation as the duty to consider the social, economic and environmental impact of a proposed development as required by the provisions of NEMA. They were wrong in that assumption. They misconstrued the nature of their obligations under NEMA and as a consequence failed to apply their minds to the socio-economic impact of the proposed filling station, a matter which they were required to consider. This fact alone is sufficient to warrant the setting aside of the decision."[32]

[31] 2007 (6) SA 4 (CC).

[32] para 86.

98. In the final analysis, the respondents' reliance on the IRP and the Determination to excuse the lack of consideration of the specific climate change impacts in relation to the Thabametsi power station basically misconstrues the nature of their duties under section 24O(1) of NEMA.

99. The DEA argued that Earthlife's complaint is not that the climate change impacts of the project were not considered but rather that insufficient weight was placed on these impacts. This, it said, does not constitute a ground of review. The sufficiency or the relative weight to be accorded to a relevant consideration is properly a matter for the decision-maker. It relied in this regard upon *MEC for Environmental Affairs and Development Planning v Clairison's CC*[33] where the Supreme Court of Appeal stated:

> "It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision is that of the decision-maker. As it was stated by Baxter:
>
> > 'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'
>
> …The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere".

100. The respondents submitted that the Chief Director considered and weighed the relevant factors and made a decision in good faith and accordingly there is no basis for the court to interfere with those decisions. I do not agree. The issue we have to do with in this case is not whether the weighing of the factors was reasonable. Earthlife's case is that the Chief Director was unable to perform the weighing exercise because they did not have the relevant information to balance the climate change factors against the other relevant factors. As Mr Budlender put it, it is simply

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[33] 2013 (6) SA 235 (SCA) para 20 and para 22

impossible to strike an appropriate equilibrium where the details of one of the key factors to be balanced are not available to the decision-maker.

101. On this basis, there was indeed non-compliance with the provisions of section 24O(1) of NEMA, with the result that the impugned decisions stand to be reviewed on the grounds that the Chief Director overlooked relevant considerations. His decision accordingly would normally fall to be reviewed in terms of section 6(2)(e)(iii) of PAJA. There is also merit in the submission that the Chief Director's decision was not rationally connected to the information before him. In upholding the environmental authorisation, the Chief Director relied exclusively on the statement in the EIR that the climate change impacts of the project were relatively small and low. These assertions were not supported by any evidence in the EIR. Without a full assessment of the climate change impact of the project, there was no rational basis for the Chief Director to endorse these baseless assertions. This, as Earthlife correctly asserted, is an indication that the Chief Director failed to apply his mind. The decision is thus reviewable under section 6(2)(f)(ii) of PAJA as well.

The review of the decision of the Minister

102. Earthlife submitted that it is plain from the Minister's appeal decision that she accepted that a climate change impact assessment was relevant to the environmental authorisation and that it should have been completed and considered before taking a final decision on whether to grant the authorisation and this had not happened.

103. Earthlife, the DEA argued, proffers an incorrect reading of the Minister's decision. On a proper interpretation, it said, the Minister did not find that the climate change impact of the project had not been adequately assessed. The Minister merely stated that she concurred with Earthlife "in that the climate change impacts of the proposed development were not comprehensively assessed and/or considered prior to the issuance of the EA". Earthlife, the DEA argued, has erroneously equated the term "comprehensively" with "adequately" or "properly", thereby distorting the meaning of the Minister's statement. The true import of the Minister's decision is that

the climate change impact of the project was adequately assessed in the EIR, had been considered, “to some extent”, in the air quality assessment and the water impact study, and that the Chief Director considered these factors prior to the issuance of the authorisation.

104. The Minister, the DEA argued, was moreover fully aware of the IRP and the Determination which were discussed in the EIR and raised by Thabametsi in the internal appeal. As a consequence, the Minister decided to uphold the environmental authorisation. However, she recognised that the climate change impacts of the project had been adequately, but not comprehensively, assessed. As such, she ordered that a climate change impact assessment of the Thabametsi power station be carried out. As mentioned, the Minister saw a climate change impact assessment as being intended to collect data for use in the formulation of policy and mitigation measures, to assess and monitor the climate change impact of the Thabametsi power station and to determine whether and when it is necessary to amend or supplement the conditions in its environmental authorisation.

105. This understanding of the Minister’s reasons is contradicted by the appeal decision itself. Nowhere in the decision does the Minister state or imply that the climate change impact had been adequately addressed. If the climate change impact had been adequately addressed then there was no logical reason for ordering a full climate change impact assessment before construction of the power station. A careful reading of condition 10.5 shows that the Minister has placed the project on hold until the climate change assessment is completed. It is doubtful that the climate change impact assessment was intended exclusively as a future emissions’ monitoring exercise when condition 10.5 requires that it must be completed before any construction of the power station can commence.

106. The interpretation of the DEA is also belied by the fact that the DEA now purports to recognise that the outcome of the climate change assessment might necessitate an amendment or even ultimately a withdrawal of the environmental authorisation granted. In its founding affidavit Earthlife averred that the Chief Director and the Minister are *functus officio* and have no express powers under NEMA or the Regulations to withdraw the authorisation if they later change their mind, in light of

the final climate change impact report. While the Chief Director does have the power to amend the conditions attached to the authorisation if that is considered necessary,[34] Earthlife pointed out that a power of amendment is not a power of withdrawal. The DEA in response argued that the environmental authorisation may be amended and subsequently withdrawn if the climate change impact assessment warrants this outcome. In so arguing, the DEA in effect conceded that the purpose of condition 10.5 was to consider climate impacts for the purpose of the authorisation.

107. For that reason, I am persuaded that the Minister did find that the Chief Director had not sufficiently considered relevant considerations and sought to remedy the irregularity or defect. The Minister appreciated that climate change impacts were relevant and had not been sufficiently assessed, necessitating an investigation of these impacts. She correctly found that a climate change impact assessment needed to be conducted. But she perhaps erred in upholding the environmental authorisation. Instead of sustaining the fourth ground of appeal and remitting the matter back to the Chief Director, as she might prudently have done, she upheld the authorisation and ordered to be done that which should have been done before the authorisation was granted. The appeal under section 43 of NEMA is a wide appeal involving a determination *de novo* where the decision in question is subjected to reconsideration, if necessary on new or additional facts, with the body exercising the appeal power free to substitute its own decision for the decision under appeal.[35] The Minister therefore could have (and perhaps should have) adjourned the appeal and similarly directed Thabametsi to undertake a climate change impact assessment for consideration in the appeal process and thereafter to have substituted the Chief Director's decision with her own. This the Minister did not do.

108. The DEA's answering affidavit introduced an explanation for the Minister's decision that was not initially presented by the Minister in her decision or in the correspondence between Earthlife's legal representatives and the DEA seeking clarification of the appeal decision. At paragraphs 76 to 80 of the founding affidavit, Earthlife alleged that if the final climate change impact report warrants the withdrawal of the environmental authorisation, then the Minister's hands will be tied, as she has

[34] Regulation 43 of the Regulations.
[35] *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) at para 41

no automatic powers of withdrawal. In response, at paragraph 86 of the DEA's answering affidavit, the respondents admitted that even if the final climate change impact assessment merits it, the withdrawal of the environmental authorisation would not be permitted, but a similar result might be achieved using the powers of amendment under Regulation 43 of the Regulations, coupled with the non-compliance process under sections 31L and 31N of NEMA.

109. This begs the question of what the Minister can do legally if the climate change impact assessment ultimately concludes that the project should not go ahead on account of the climate change risks. If the Minister has the power to withdraw or revoke the authorisation on receiving an unfavourable climate change impact report then her appeal decision could conceivably be reasonable, rational and lawful. But if she lacks that power, then Earthlife and other IAPs have been denied full opportunity to influence the outcome and a decision that ought rightly not have been made in the first place will have to stand.

110. It is common cause that NEMA contains no express provision permitting revocation of an authorisation by a competent authority on the grounds that it was granted without consideration of relevant factors. In terms of regulation 43 of the Regulations, the Chief Director may amend an environmental authorisation, after providing IAPs an opportunity to make representations and allowing a right of appeal. After an amendment has been effected a compliance officer may issue a notice under section 31L of NEMA where there is non-compliance. A failure to comply with a compliance notice will permit the Minister to revoke the environmental authorisation under section 31N of NEMA. Earthlife submitted that the power of amendment cannot be used for the ulterior purpose, no matter how well intended, of engineering the ultimate revocation of Thabametsi's environmental authorisation for the initial failure to consider climate change impacts, and any attempt to do so would be reviewable. The only remedy, it submitted, is for the authorisation to be set aside by the court and the process to begin afresh.

111. Mr Marcus SC, on behalf of the Minister, submitted that the protective nature of NEMA and the duty of the Minister to act in the environmental interest might permit a finding that the Minister has an implied power under NEMA to revoke the authorisation. Mr Budlender countered that such would be inconsistent with the

functus officio principle which dictates that a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. The result is that once such a decision has been given it is (subject to any right of appeal) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.[36]

112. The doctrine of *functus officio* is primarily intended to foster certainty, fairness and finality in the administrative process. However, in *Retail Motor Industry v Minister of Water* [37] Plasket AJA qualified the application of the principle by stating that the principle is not absolute in that certainty and fairness at times have to be balanced against the equally important and practical consideration that requires the reassessment of decisions in order to achieve efficient and effective public administration in the public interest.

113. Professor De Ville in his seminal work *Judicial Review of Administrative Action in South Africa*[38] discusses the approach to this question in German administrative law. There the revocation of a beneficial administrative decision in the absence of explicit legislative authority is permissible where, because of a subsequent change in circumstances, the organ of state would have been entitled not to have made the disposition and a failure to revoke the action would jeopardise the public interest, or secondly in order to prevent or eliminate serious harm to the public good. The principle is a salutary one. However, there is no such power provided in PAJA and I doubt that our common law has been developed to include such in our body of administrative law. The predominant view in our law remains that the *functus officio* principle will apply to final decisions where rights or benefits have been granted and when it would be unfair to deprive a person of an entitlement that has already vested.

114. That being the case, once the Minister made the decision to uphold the environmental authorisation, despite the absence of a climate change impact assessment, her decision was final and vested significant rights in Thabametsi.

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[36] DM Pretorius: *The origins of the functus officio doctrine with specific reference to its application in administrative law* (2005) 122 *SALJ* 832 at 832
[37] 2014 (3) SA 251 (SCA) at para 24
[38] At pg. 78

Although there are various powers in NEMA to amend and suspend the authorisation, if the climate change report demonstrates that the power station will cause irremediable harm to the extent that the authorisation ought not to have been given, none of these provisions can be lawfully relied upon to revoke the authorisation.

116. Accepting that the Minister and other officials have no power to withdraw the environmental authorisation if the climate change impact assessment warrants that outcome, the Minister's belief that other remedial powers might achieve a similar result was mistaken and to the extent that she took her decision on this mistaken belief then her decision was based on a material error of law. Section 6(2)(d) of PAJA permits judicial review where the action was materially influenced by an error of law affecting the ultimate outcome. Material errors of law are also grounds for review under the principle of legality. In the premises, the Minister's appeal decision is reviewable on this ground. Earthlife submitted that the decision was also irrational and unreasonable for similar reasons. There is merit in that proposition too.

Remedy

117. The court in proceedings for judicial review in terms of section 8 of PAJA may grant any order that is just and equitable including an order setting aside the administrative action and remitting it for reconsideration. In the notice of motion Earthlife seeks orders setting aside both the authorisation and the appeal decision in their entirety, remitting the application for environmental authorisation back to the Chief Director for reconsideration and directing him to consider a climate change impact assessment report, a paleontological impact assessment report, comments on these and any additional information that he may require in order to reach a decision. Such an order would basically require the environmental authorisation process to commence anew, and would be predicated upon the proposition that for obviously sound reasons the climate change impact assessment should precede the decision to authorise the project.

118. Mr Budlender referred to *Communities for a Better Environment v City of Richmond*,[39] a decision of the Court of Appeal of the State of California, to underscore the point that in environmental cases the time to consider the climate change impact is before, not after, granting approval. In that case the City of Richmond approved Chevron's application to construct an energy and hydrogen renewal project subject to a requirement that Chevron hire an independent expert to identify emissions and possible mitigation measures within a year. The Court of Appeal endorsed the view that the City had improperly deferred the formulation of greenhouse gas mitigation measures by allowing Chevron to prepare a mitigation plan up to a year after the project's approval for the obvious reason that a study conducted after approval of a project will inevitably have a diminished influence on decision-making. Mitigation measures ought to be identified and formulated during the environmental impact report process and before final approval was sought. The Court of Appeal held:

> "The solution was not to defer the specification and adoption of mitigation measures until a year after Project approval; but, rather, to defer approval of the Project until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment."[40]

119. The judgment is obviously on point by virtue of its facts being analogous to the facts in this case. I accept fully that the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation. And at first glance that may justify the environmental authorisation being reviewed and set aside, and the matter being remitted to the Chief Director for a fresh decision upon final completion of the climate change impact assessment. However, such a remedy in the circumstances of this case might be disproportionate.

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[39] 184 Cal.App.4th 70 (2010).

[40] At 497.

120. Courts are obliged to fashion just and equitable remedies aimed at the proven irregularities. Ordinarily, a remedy will be just and equitable if it aims to rectify the administrative action to the extent of its inconsistency with the law. In accordance with the principles of severance and proportionality a court, where appropriate, should not declare the whole of the administrative action in issue invalid, but only the objectionable part. Where it is possible to separate the good from the bad in administrative action, the good should be given effect.[41]

121. Although the decision of the Chief Director was irregular, the essential and most consequential defect was the Minister's treatment of Earthlife's fourth ground of appeal during the appeal process. As explained earlier, had the Minister upheld the fourth ground of appeal, as she should have, she would have had two options. Either she could have referred the matter back to the Chief Director, to whom she had delegated the function in the first place, or more appropriately, she could have adjourned the *de novo* appeal, directed Thabametsi to obtain a climate change impact report, and on the basis of the new evidence reconsidered the application for environmental authorisation afresh - something she would have been entitled to do in terms of section 43 of NEMA. Consequently, the more proportional remedy is not to set aside the authorisation, but rather to set aside the Minister's ruling on the fourth ground of appeal and to remit the matter of climate change impacts to her for reconsideration on the basis of the new evidence in the climate change report. The appeal process must be reconstituted, not the initial authorisation process. Although undoubtedly a less intrusive remedy, section 43(7) of NEMA operates to suspend the environmental authorisation pending the finalisation of the appeal.

122. None of the parties pleaded for such a remedy, nor was it, beyond an oblique reference to the possibility of curing defects by way of a wide appeal, canvassed in argument. The discretion bestowed upon courts by section 8 of PAJA to do what is just and equitable, and proportional, nonetheless permits me to grant such relief. I am minded to this result also by the fact that the initial climate change report has been completed and made available for public comment. The reconstituted appeal process can proceed with requisite speed to the advantage of all parties and will be

[41] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D

restricted to consideration of whether environmental authorisation should be granted in light of the potential climate change impacts.

123. The chosen remedy gives some recognition to the arguments advanced by Mr Chaskalson SC on behalf of Thabametsi in relation to Earthlife's participation in the process pursuant to the appeal. Although he submitted that Earthlife's decision to participate in the climate change impact assessment precluded the present review proceedings, such as to justify their dismissal, he accepted that the underlying facts equally support restraint in the grant of remedy. Earthlife's participation in the process subsequent to the appeal warrants confining its continued participation to the narrow issue in contention, namely the climate change impacts, and not opening up the authorisation process *ab initio* to reconsideration before the Chief Director and another fresh appeal before the Minister.

124. Much time was expended in argument on the implications of NEMAQA requiring consideration of climate change impacts in the AEL process. The argument was advanced by Mr Marcus SC and Mr Chaskalson SC that there was no need to remedy any failure to consider climate change impacts in the authorisation process under NEMA because they will be fully considered in the AEL process. While it is correct that GHG emissions will be dealt with in the AEL process, there is some doubt about the scope and extent of such an investigation. The power to grant or refuse an AEL does not vest in the DEA at national level. The licensing authority will be the air quality officer of the Waterberg District Municipality. While the NEMAQA process will involve an investigation of GHG emissions in determining whether to grant an AEL, that does not alter the peremptory statutory duty of the Chief Director and the Minister to thoroughly investigate climate change impacts in terms of section 24O of NEMA with regard to national and international consequences.

125. Earthlife has had success and I see no reason why it should not be awarded its costs. The complexity and national importance of the matter justified the employment of two counsel.

Orders

126. The following orders are made:

126.1 The ruling of the first respondent, forming part of her decision of 7 March 2016 in terms of section 43 of the National Environmental Management Act 107 of 1998, and dismissing the applicant's fourth ground of appeal set out in paragraphs 89 to 105 of its appeal dated 11 May 2015, is reviewed and set aside.

126.2 The applicant's fourth ground of appeal is remitted back to the first respondent for reconsideration in terms of section 43 of the National Environmental Management Act 107 of 1998.

126.3 The first respondent is directed to consider:

126.3.1 a climate change impact assessment report;

126.3.2 a paleontological impact assessment report;

126.3.3 comment on these reports from interested and affected parties;

126.3.4 any additional information that the first respondent may require in order to reach a decision on the applicant's fourth ground of appeal.

126.4 The costs of this application are to be paid, jointly and severally, by the respondents, such costs to include the costs of employing two counsel.

JR MURPHY
JUDGE OFTHE HIGH COURT

Date Heard:	2 and 3 March 2017
Date of Judgement:	8 March 2017
Counsel for Applicant:	Adv S Budlender Adv P Seseane Adv C McConnachie
Instructed by:	Centre for Environmental Rights
Counsel for the First to Third Respondents:	Adv G Marcus SC Adv M Maenetje Adv E Webber
Instructed by:	State Attorney, Pretoria
Counsel for the Fifth Respondent:	Adv M Chaskalson SC Adv I Goodman
Instructed by:	Baker & McKenzie