



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED NO

DATE:.....6 October 2022.....

SIGNATURE:.....

**Case No. 17554/2021**

**In the matter between:**

**SOUTH DURBAN COMMUNITY ENVIRONMENTAL  
ALLIANCE**

**First Applicant**

**THE TRUSTEES OF THE GROUNDWORK TRUST**

**Second Applicant**

**And**

**MINISTER OF FORESTRY, FISHERIES AND THE  
ENVIRONMENT**

**First Respondent**

**CHIEF DIRECTOR: INTERGRATED ENVIRONMENTAL  
AUTHORISATIONS, DEPARTMENT OF  
ENVIRONMENTAL AFFAIRS**

**Second Respondent**

**ESKOM HOLDINGS SOC LTD**

**Third Respondent**

Coram: Millar J

Heard on: 2 August 2022

Delivered: 6 October 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 6 October 2022.

Summary: Application for review and setting aside an environmental authorisation for the construction of a mid-merit combined gas cycle power plant in Richards Bay – applicant entitled to apply for a specific type of facility without applying for the construction of renewable energy power plant in the alternative – upstream greenhouse gas emissions not comprehensively considered at initial first application – authorisation granted not final and subject to conditions which make the efficacy of the entire project subject to additional linked and successive applications – shortcomings in public participation process identified and to be addressed not rendering decision invalid – application for review dismissed – order granted to address

shortcomings in public participation process – award for costs in applicants favour.

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## ORDER

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### IT IS ORDERED:

1. The application for review of the granting of the EA and dismissal of the appeal in respect thereof is dismissed.
2. The respondents are ordered and directed to:
  - 2.1 Cause a copy of the EA and conditions attached thereto to be published in the isiZulu language in at least two newspapers circulating widely within the Richards Bay area of the KwaZulu Natal Province.
  - 2.2 Ensure that in respect of all subsequent linked and ancillary applications for EA's pertaining to the CCGPP, all written notices are similarly published in isiZulu as set out in 2.1 above and that in addition, translation facilities are made available at any public meetings to enable proper participation by any person who speaks isiZulu and is not conversant in the English language.
3. The respondents are ordered to pay the applicants costs of the application, jointly and severally, the one paying the others to be absolved, on the scale as between

party and party which costs are to include the costs consequent upon the employment of two counsel.

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## JUDGMENT

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### MILLAR J

1. The applicants are both non-profit and non-government organizations that advocate for environmental justice. They bring the current application and seek the reviewing and setting aside of the granting of an environmental authorization<sup>1</sup> by the second respondent in favour of the third respondents for the construction of a mid-merit<sup>2</sup> combined cycle gas power plant (CCGPP) in Richards Bay. They also seek the review of the subsequent refusal of an appeal<sup>3</sup> to the first respondent against that decision.
2. The respondents are the party who applied for the environmental authorization (EA) - the third respondent (ESKOM), the second respondent to whom the application was made and who approved it (DEFF) and the first respondent, the Minister who refused the appeal against the grant of the EA.
3. For convenience I will, in this judgment, refer to the first and second applicants collectively as SDEC and to the first and second respondents as DEFF. I will refer to the third respondent as ESKOM.

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<sup>1</sup> Granted on 23 December 2019

<sup>2</sup> Mid-merit electricity generation capacity refers to the generation of electricity which is adjusted according to the fluctuations in demand in the national grid. Conversely, baseload electricity generating capacity refers to the generation of electricity continuously for all hours of the day and night in order to satisfy the minimum demand required in the national grid.

<sup>3</sup> The appeal was refused on 13 October 2020

4. The DEFF and ESKOM oppose the application for review on the basis that none of the 7 grounds upon which it has been advanced<sup>4</sup> can be said to impugn the decision to grant the environmental authorization or the refusal of the appeal.
5. The grounds upon which the granting of the EA was appealed included a number of grounds<sup>5</sup> which are also grounds upon which the present review has been brought.

### THE STATUTORY SCHEME

6. The application brought by the third respondent for an EA for the construction of the CCGP was brought in terms of the National Environmental Management Act<sup>6</sup> (NEMA). NEMA provides a framework within which such development is to take place. It recognizes the present economic and climatic circumstances of the population as well as the consequences of addressing those circumstances for future generations. It seeks to provide a balance for both<sup>7</sup>.

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<sup>4</sup> The applicants originally made out a case for 9 grounds of review in their founding papers but by the time that the application was heard they had pared this down to 7 and it is these upon which the determination of the application was decided.

<sup>5</sup> The grounds upon which the appeal was brought included that (i) there was a failure to consider alternatives to the proposed project, (ii) that a combined gas cycle power plant was neither necessary nor desirable, (iii) there had been a failure to adequately consider climate change impacts on the project, (iv) there had been a failure to consider the cumulative impacts of the project, (v) the authorization had been granted in the absence of material information, and (vi) that the issue of the authorization was in contravention of both NEMA and PAJA.

<sup>6</sup> Act 107 of 1998

<sup>7</sup> The preamble to NEMA states inter alia that "*...the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities; inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices; sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations; everyone has the right to have the environment protected, for the benefit of present and future generations*"

7. NEMA provides a statutory framework for the minimum conditions attendant upon the granting of EA's as well as the relevant criteria to be considered. These are set out in sections 24E and 24O respectively. It is through the lens of these two

sections that the application by ESKOM and the granting of the EA with attendant conditions and subsequent appeal and refusal thereof is to be considered.

### **THE DECISION AND THE APPEAL**

8. The decision to grant the EA on 23 December 2019 was not an unqualified one. There are 57 separate conditions attached to the EA which qualify and inform the development for which it was granted.
9. The conditions fall into three broad categories and provide *inter alia* for a recordal of statutory obligations (notification to interested and affected parties and appeal procedures), limitations on the EA (both in terms of scope and validity), reporting and notification, management, operation and site closure and decommissioning. There are 23 special conditions some of which are relevant to the specific grounds of review and I will deal with these where apposite below.

### **THE REVIEW**

10. The present application for review is brought on the basis that the decisions taken, both the initial one to grant the EA and the subsequent dismissal of the applicants' appeal are administrative action. This is not in issue between the parties or that the present review is to be considered in terms of the Promotion of Administrative Justice Act<sup>8</sup> (PAJA).

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<sup>8</sup> No 3 of 2000

11. The seven grounds of review upon which the applicants seek to impugn the initial decision and refusal of the appeal are predicated upon a consideration of the grounds set out in sections 6(2)(b)<sup>9</sup>,6(2)(c)<sup>10</sup>,6(2)(e)(iii)<sup>11</sup> and 6(2)(f)(ii)(cc)<sup>12</sup>.
12. The seven grounds of review are:
  - 12.1. Inadequate climate change impact assessment
  - 12.2. Inadequate consideration of need and desirability
  - 12.3. Failure to consider renewable alternatives
  - 12.4. Failure to consider cumulative environmental impacts.
  - 12.5. Inadequate public participation
  - 12.6. Inadequate water resources assessment
  - 12.7. Inappropriate wetland offset
13. The seven grounds fall into three categories. The first is that there was a failure to consider alternative renewable sources of power generation and the climate change impacts of gas (the first, second and third grounds), the second is

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<sup>9</sup> in terms whereof a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

<sup>10</sup> in terms whereof the action was procedurally unfair.

<sup>11</sup> in terms whereof the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.

<sup>12</sup> in terms whereof the action itself was not rationally connected to the information before the administrator.

noncompliance with the provisions of NEMA and the regulations and shortcomings in the environmental impact report (EIR) and other reports submitted with the application (the fourth, sixth and seventh) and the third is the inadequate public participation in the entirety of the process (the fifth ground).

14. Although there is in some instances an overlap of grounds, broadly speaking the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> grounds of review fall within section 6(2)(b). The 5<sup>th</sup> and 7<sup>th</sup> grounds fall within section 6(2)(c) and the 7<sup>th</sup> also within section 6(2)(e)(iii). It was argued that the cumulative effect were all the grounds of review be to be upheld, but also in the event that one or more only were upheld was that in terms of section 6(2)(f)(ii)(cc), the decision to grant the EA should be set aside.
15. For convenience I do not intend to deal with each of the grounds of review under a separate heading but will do so in the respective categories in which they fall.

#### **THE FAILURE TO CONSIDER RENEWABLE SOURCES OF POWER GENERATION AND THE CLIMATE CHANGE IMPACTS OF A COMBINED CYCLE GAS POWER PLANT**

16. In considering Eskom's application, the DEFF was required to consider in terms of section 24O(1)(b)(i) "*any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused.*"
17. It was argued by the Applicants that the climate change impact assessment was inadequate because:
  - 17.1 Firstly, it did not consider the use of renewable energy plants as an alternative to the proposed CCGPP<sup>13</sup>.
  - 17.2 Secondly, it failed to assess the full life-cycle greenhouse gas emissions which will be caused by the CCGPP in consequence of a failure to assess

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<sup>13</sup> Section 24O(1)(iv)



the emissions associated with the extraction of gas and its transport to the CCGPP in Richards Bay<sup>14</sup>.

17.3 Thirdly, the assessment of the climate change mitigation measures was inadequate<sup>15</sup> and;

17.4 Fourthly, it failed to assess the resilience of the Power Plant to climate change<sup>16</sup>.

18. It is not disputed that Eskom, in regard to the EA sought for the CCGPP at Richards Bay did not in this specific instance consider the use of other renewable energy sources at the particular site. It was submitted on behalf of DEFF and Eskom that the decision to apply for an EA for a CCGPP was at a particular site, a matter eminently within the discretion of the party applying for such authorization.

19. It was disputed that other sources and in particular renewables such as solar or wind were desirable within the greater context of transitioning the Republic from a fossil fuel-based energy generation system to a sustainable renewable system. However, it was argued that this did not mean that each and every application should be predicated entirely upon the basis that only renewables should be considered. It was argued that the CCGPP was a bespoke type of power generation source in that, firstly it would be fueled by natural gas sourced, at least in anticipation, from the recently discovered gas fields off the coast of Mozambique and secondly, that it was not designed to nor would it run for more than a specified number of hours. The whole purpose of the CCGPP was to provide emergency power generation for relatively short periods of time as and when required. On a practical level, none of the renewable sources were considered simply because

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<sup>14</sup> Section 24(1)(b)(ii)(bb) & (iv)

<sup>15</sup> Section 24(1)(b)(ii)(aa) & (bb)

<sup>16</sup> *ibid*

these would not fulfil the emergency generation role and function that the CCGPP was intended for. It is for this reason that the present application for the EA was made specifically for a CCGPP.

20. The argument is buttressed when regard is had to section 24O(1)(b) which requires the decision maker to take into account “*all relevant factors, which may include....*” [my emphasis]. The section confers upon the decision maker a discretion as to what may or may not be taken into consideration and this discretion must be exercised having regard to the specific application for which the EA is made.
21. It was argued by the DEFF that the approach of the Applicants disregarded the specific role that the CCGPP will play in the electricity generation of the country. It is specifically earmarked, and so approved, as a mid-merit facility to produce electricity as and when needed. Furthermore, it was acknowledged that as coal as an energy source is being phased out, natural gas is intended to act as a bridge before renewable alternatives are fully implemented.
22. It was argued, that too hasty a transition to renewable energy may have cataclysmic consequences. By way of example, I was referred to the failure of renewable energy resources that it was stated led to a complete blackout in South Australia during 2016 and in Texas in the United States of America, during September 2021 and February 2022.
23. It is readily apparent that in considering the matter, the DEFF considered the reasons why the application had been made for the specific EA and hence imposed 2 specific conditions in granting the EA as follows:

“33. *Proof of the availability of liquid natural gas to supply Richards Bay Combined Cycle Power Plant must be submitted to the Department, the Chief Directorate:*

*Integrated Environmental Authorizations prior to commencement of construction.*

34. *Proof of Transnet SOC Ltd taking responsibility for the construction of liquid natural gas (LNG) facility and gas pipeline must be submitted to the Department, the Chief Directorate: Integrated Environmental Authorizations prior to commencement of construction.*
24. Having regard to these 2 conditions, the entire project and the EA granted for it is entirely dependent upon compliance with these conditions. While the first is factual - it is at least at this juncture a matter which falls outside the jurisdiction of the Republic and any decision made to grant an EA. It is however subject to the second which is itself in turn dependent upon the granting of a separate EA.
25. Since the granting of an EA is not the exclusive domain for renewable energy projects, Eskom was entitled to submit its application for the CCGPP without an alternative. Having said that, the specific exigencies for a CCGPP were considered and the conditions referred to above imposed. Accordingly, this ground of review cannot succeed.
26. The applicants argued that the Environmental Impact Report which was submitted in regard to the CCGPP was required to deal with **all** the environmental impacts **associated** with the project.
27. On this interpretation, both the extraction of gas in Mozambique, the shipping of it in international waters or through the territorial waters of another or other state/s or any pipeline constructed and passing through the territory of the Republic of Mozambique would fall within the peremptory requirements of NEMA. These it was argued are the 'upstream' impacts.

28. I was referred to *Earthlife Africa Johannesburg v Minister of Environmental Affairs*<sup>17</sup> ('Earthlife') as authority for this proposition. While ordinarily I agree that this would be the case, the present matter is distinguishable by reason of the fact that Earthlife concerned the construction of a coal fired power station at Lephalale in the Limpopo Province, within the Republic and sourcing coal from within the Republic<sup>18</sup>. The present case concerns a fuel source extracted outside of and to be transported to the Republic either by sea or by pipeline, at least part of which would be through another independent state.
29. To require such a broad consideration of 'upstream effects' as a precursor to the granting of any EA would likely create an almost impossible situation – requiring the making of any decision on an EA for a project that it was anticipated would or even may source fuel from outside the Republic, dependent upon an assessment to be made, as in the present case, years before any authorization for the first step in proceeding with such a project was even granted and subject to the laws or any changes of another state. The specific source of the gas has not been identified nor can it reasonably be, so far in advance.
30. The Liquefied Natural Gas (LNG) terminal infrastructure at the port and the gas supply pipeline to the boundary fence of the Power Plant does not form part of the scope of this assessment, nor does the power line connection to the grid.
31. This Environmental authorization application focuses only on this Power Plant and associated infrastructure inside Eskom's boundary fence on site 1D of the Richards Bay IDZ. Consideration of impacts in this regard would need to be included within the separate EIA process to be undertaken for the gas supply infrastructure;
32. This interpretation is to my mind entirely consistent with a global view of climate change and the general purpose for which NEMA and similar legislation was

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<sup>17</sup> 2017 2 ALL SA 519 (GP) para 94

<sup>18</sup> It is not specifically stated in the judgment that the coal was to be sourced from within the Republic but given the proximity of Lephalale to the Republic's vast coal resources this was the likely source.

enacted. It however is not consistent with the specific purpose of NEMA which is to recognize that the context within which NEMA is to be applied must be informed by the extant needs of the South African population.

33. Accordingly, Eskom was entitled to apply for the granting of an EA for the construction of a specific type of power plant. While the extraction and delivery of the gas for the CCGPP, and the attendant GHG emissions, does not fall within the specific parameters of the project for which the EA was sought, specific conditions were nevertheless imposed relating to this particular concern as set out in paragraph 23 above.
34. For the reasons set out in paragraph 24, the DEFF was cognizant of the concerns relating to the extraction and transportation of the gas and the GHG emissions associated therewith and subjected those concerns to a separate and distinct EA application. It thus cannot be said that relevant considerations were neither brought to the attention of the DEFF nor that they ignored them or took irrelevant considerations into account in arriving at the decision they did on this aspect. The consideration of the GHG emissions, as a whole and incorporating both the pipeline as well as the CCGPP will be considered when the EA for the construction of the pipeline is sought. The EA for the CCGPP is but the first link in a chain of EA's required before any construction can commence. For this reason, this ground of review cannot succeed.
35. What of the climate change impacts for activities to be undertaken at the Richards Bay site and surrounds? A full assessment of the climate change impacts of the proposed project form part of the EIA Report.
36. The Applicants contended that there was an inadequate assessment in the climate change measures. The Climate Change Report considered the environmental and social costs of the GHG that will be emitted during

construction, operation and decommissioning of the Power Plant. The report is comprehensive and concludes as follows:

*“This study concludes that while the proposed CCPP power plant as a single source will increase the national greenhouse gas inventory, mitigation options to reduce its emissions are available. The most important aspect of the propose(d) project is that it has the potential to enable wider de-carbonization of the national grid through enabling the update of variable renewable energy technologies. As such it is suggested here that the proposed CCPP plant be load-following capability of the plant be used to maximize the update of intermittent renewable energy in the South African grid. It is the view of this report that the proposed CCPP powerplant is the best technology option and will not materially result in any direct local climate change impacts, subject to the implementation of appropriate mitigation measures.”*

37. The DEFF respondents specifically considered all the reports submitted and in particular the Climate Change Assessment Report. On appeal, and after having dealt with the concern over the way in which the report had addressed the climate change impacts, it was found that the proposed CCGPP is the best technology option, that it will not materially result in any direct local climate change however subject to the implementation of mitigating measures such as the switching to alternative biofuels and carbon capture and storage.
38. Thereafter the Minister, the functionary with the expertise in her Department at her disposal, came to the conclusion that there is no merit in this ground, and rejected the Ground of Appeal. In doing so the Minister was mindful of the

decision in *Earthlife*<sup>19</sup> having been referred to the Judgment by the Applicants in their appeal.

39. In the present case, a proper Climate Change Impact Assessment<sup>20</sup> was conducted, a comprehensive report was filed. It was considered by the Department in the first instance and thereafter by the Minister on appeal. Having regard to the full content of the report, the Minister was satisfied that the proposed project would not materially add to the greenhouse gas emissions inventory of the Republic of South Africa.
40. Are the conditions attached to the EA to address the applicants concerns regarding the upstream and other effects of GHG emissions arising from the extraction and transport of the gas of no consequence or practical effect?
41. It was argued by the applicants that *Earthlife* held that it was impermissible to issue an environmental authorization where the environmental impact assessment omitted relevant considerations, subject to a condition which purports to remedy that shortcoming.
42. It was argued firstly, that it was more appropriate to rather adjourn the application and the applicant must be directed to conduct the necessary assessment.<sup>21</sup> This so it was argued was due to the fact the once the EA was issued the decision

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<sup>19</sup> The decision in *Earthlife* is distinguishable from that taken in the present matter because in that case it was common cause that no climate change impact assessment report had in fact been submitted. (See the judgment at paragraphs [87] and [101]). see also *Pharmaceutical Manufacturers Association of SA & Another: In re ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at paras [82] – [83] and [85] – [86].

<sup>20</sup> Undertaken in accordance with NEMA and the Regulations. The assessment was, notwithstanding the absence of any nationally approved or widely adopted standards, prepared in accordance with, at least as far as the carbon footprint and GHG's is concerned, in accordance with the ISO/SANS14064-1 standard.

<sup>21</sup> *Earthlife Africa Johannesburg v Min of Environmental Affairs* 2017 2 ALL SA 519 (GP) para 107

maker was *functus officio* and cannot withdraw the authorization even if the subsequent assessments show that the authorization should not have been granted.<sup>22</sup>

43. And secondly, the condition requiring proof of the availability of gas does not require public participation in respect of the source of the gas or for the assessment of the impacts associated with the source of the gas. Essentially, so it was argued, this condition could be fulfilled by the proof of the availability of any gas irrespective of the environmental impacts associated with the use of that gas.
44. In the present matter, unlike in *Earthlife*, there was an EIR submitted with the application. The EA granted in the present instance is not a final authorization for the commencement of the CCGPP without more.
45. The sourcing and delivery of gas to the Richards Bay site is a *sine qua non* for the commencement and indeed efficacy of the entire project. The entire CCGPP project is a chain which requires every link in that chain to be joined before the project can be undertaken at all. It seems to me to be eminently reasonable that an EA would be sought in stages, the first being in respect of the site where the CCGPP is to be constructed.
46. The imposition of conditions for readily apparent and distinctly different links in the chain, which conditions will require that each link is subject to obtaining an EA is entirely rational and reasonable.
47. Such a decision, is reasonable in light of the particular exigencies of the proposed project and maintains the oversight of compliance with NEMA and the Regulations as an integral requirement before any decision in regard to the

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<sup>22</sup> *ibid* *Earthlife* paras [113] to [116]



project as a whole, becomes final and so too this particular ground of review must fail.

## **FAILURE TO ASSESS THE ENVIRONMENTAL AND SOCIAL COST OF EMISSIONS**

48. The parties were in agreement that there is no universally accepted method to quantify the cost of GHG emissions. The Applicants argued that there was an outright failure to consider these costs notwithstanding there being several approaches that could have been adopted.
49. The DEFF for its part contended that there had been consideration of these costs but that the EIR and other specialist reports had to be viewed holistically on a consideration of the entirety of what was considered.
50. Since there is no universally accepted method to quantify the cost of GHG emissions, it cannot be said that the DEFF respondents, in considering the matter and taking a 'holistic view' based on a conspectus of all the reports can be said to have failed to consider the cost of GHG emissions or taken irrelevant considerations into account in coming to the decision that the overall cost was acceptable. For this reason, I find that this ground of review cannot succeed.

## **INADEQUATE ASSESSMENT OF RESILIENCE TO CLIMATE CHANGE**

51. An assessment of climate change impacts of a project must include both the project's impact on climate change and the project resilience to climate change.<sup>23</sup>
52. The Climate Report noted that climate change may cause warming and drought in KwaZulu-Natal and that this may require the Power Plant to use seawater for

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<sup>23</sup> Ibid Earthlife paras [6], [49] & [95].

cooling. This is of course entirely speculative – not as far as climate change affecting KwaZulu Natal but as far as whether or not the CCGPP will require sea water for cooling or other purposes.

53. The parties differ in regard to the efficacy of the water usage report submitted – the applicants contending that the reports obtained by it were to be preferred over the report submitted by ESKOM. It is readily apparent that the reports are premised on differing assumptions – particularly in regard to the anticipated water consumption based on operational time. This is a matter that falls squarely within the domain of the experts<sup>24</sup> and this court is not able to prefer one over the other.<sup>25</sup>
54. However, the utilization rate of the CCGPP is limited by a condition attached to the EA which provides that:

*“52. The facility must operate as a mid-merit, as this is the chosen operating mode.”*

and accordingly, it cannot be said that the DEFF failed to consider relevant information before it. The condition referred to above is mitigatory of the concerns raised by the SDEC expert and so this ground of review also fails.

## **ALLOCATION OF CAPACITY TO OTHER INDEPENDENT POWER PRODUCERS**

55. In September 2020 (before the Appeal Decision was taken) the Minister of Mineral Resources and Energy published a determination (“the 2020 Determination”) in terms of section 34 of the Electricity Regulation Act. This determination catered for the implementation of the IRP 2019 by providing for 3000MW of new power generation from gas. However, it expressly recorded that this capacity was to be provided by independent power producers.

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<sup>24</sup> Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 at para [20]

<sup>25</sup> Durbanville Community Forum v Minister for Environmental Affairs and Development Planning, Provincial Government Western Cape, and Others 2015 JDR 0172 (WCC)

56. It was argued that when granting the EA, the Minister gave no consideration to the fact that power generation capacity which Eskom would provide via the CCGPP had already been allocated for provision by independent power producers. This is a matter of policy which is subject to modification from time to time. It must be borne in mind that the application for which the EA has been granted is not granted on the basis that ESKOM is obligated to implement the approved project.

**NONCOMPLIANCE WITH THE PROVISIONS OF NEMA AND THE REGULATIONS AND ALLEGED SHORTCOMINGS IN THE ENVIRONMENTAL IMPACT REPORT (EIR) AND OTHER REPORTS SUBMITTED WITH THE APPLICATION**

**FAILURE TO CONSIDER CUMULATIVE ENVIRONMENTAL IMPACTS<sup>26</sup>**

57. The Applicants asserted that the final EIR's assessment of the cumulative impacts<sup>27</sup> associated with the Power Plant was deficient in that:

57.1 Firstly, that it did not consider the cumulative impact on air quality of the Power Plant together with the nearby Mondi Paper Mill and South 32 Hillside Aluminium Smelter. These it was argued are significant sources of pollution and should have been included as part of the assessment of cumulative impacts.

57.2 Secondly, that the conditions of the EA do not include any conditions relating to the assessment of the pipeline's impact. In any event, if a

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<sup>26</sup> EIA Regulations, item 1.

<sup>27</sup> "The past, current and reasonably foreseeable future impact of an activity, considered together with the impact of activities associated with that activity, that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impact eventuating from similar or diverse activities".

subsequent assessment were to show that these impacts indicate that the Power Plant should not be pursued, the Department and Minister and *functus officio* and cannot withdraw the EA<sup>28</sup>.

57.3 Thirdly, the Final EIR does not consider the cumulative impacts arising from various other proposed projects in the area. For example, the construction of a 400MW gas to power plant in Richards Bay.

58. The approach to assess cumulative impacts requires a holistic view, an interpretation and analysis of the biophysical, social and economic systems and is limited by the current methods used for identifying and analysing cumulative effects.
59. Firstly, as to the air quality having regard to the Mondi Paper Mill and the Hillside Aluminium Smelter, the Air Quality Impact Assessment specifically identified and assessed the cumulative impact of the proposed facility and ambient air quality concentrations.
60. It is to be noted that while Chapter 8 of the final EIR dealt with the cumulative effects of the CCGPP only, Chapter 9 of the Final EIR sufficiently dealt with the assessment of potential cumulative impacts taking into account surrounding developments. In the circumstances it cannot be fairly asserted that there was no consideration taken of the cumulative impacts taking into account surrounding developments.
61. Secondly, while the cumulative impacts arising from the proposed pipeline were not considered, they were adequately considered, and provision made for an assessment of these in special conditions 33 and 34 attached to the EA. This has already been discussed. However generally, in response to these concerns, the

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<sup>28</sup> *Ibid* Earthlife paras. [113] to [116].

DEFF and ESKOM pointed to the conclusion in the final EIR which contained the following conclusions regarding cumulative impacts, and which found that:

- 61.1 The CCGPP will not result in unacceptable loss of threatened of protected plant species;
- 61.2 It will not result in unacceptable loss of water resources provided that a suitable wetland and biodiversity of the plan is adopted and implemented;
- 61.3 The CCGPP will not result in the complete or wholesale change in sense of place and character of the area nor will the project result in unacceptable visual intrusion, largely as a result of the zoning of the site for industrial development;
- 61.4 The CCGPP will not significantly increase the negative impact on socio-economic environment provided that appropriate mitigation measures are implemented. In contrast there will be numerous positive impacts that can be expected as result of the proposed CCGPP in terms of production and employment benefits.
- 61.5 The project as a whole will contribute towards a reduction in greenhouse gas emissions in general resulting from an alternative energy generation perspective when compared to coal energy generation and will aid the country in meeting the commitments made under the COP21 Agreement;
- 61.6 The project will contribute significantly to traffic volumes which can be accommodated on the existing road network.

- 61.7 The project will not contribute to the loss of heritage sites as no heritage sites of significance will be affected by the CCGPP; and
- 61.8 The project will not contribute significantly to the potential impacts on surrounding human populations and is considered of low significance.
62. Accordingly, the cumulative impacts associated with the construction operation of the proposed Richards Bay CCGPP and other developments within the Richards Bay Industrial Development Zone were considered to be acceptable.
63. Thirdly and in regard to the cumulative impact of other proposed developments within the area, none of the proposed projects received authorization and the one that did lapsed.<sup>29</sup> There is presently only one project - a 320 MW liquid gas risk mitigation Power Plant for which Phinda Power Producers sought authorisation: the application for EA was submitted and granted. The decision is presently on appeal however the application was only done after the final EIR for the CCGPP was concluded.
64. There is in the circumstances no merit to the claim that the cumulative environmental impacts, for the CCGPP itself, were not considered and so this ground of review also fails.

## **INADEQUATE WATER RESOURCES ASSESSMENT**

65. The Seventh Review Ground is that the Water Resources Assessment (“WRA”) was inadequate. The deficiencies in the WRA were identified by one of the

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<sup>29</sup> The 2800MW liquid gas Nseleni Independent Floating Combined Cycle Gas Turbine Power Plant for Anchor Energy (Pty) Ltd; the 2100MW combined cycle gas for Canopus Energy (Pty) Ltd was refused on 30 May 2016; The Karpowership SA (Pty) Ltd application was refused on 23 June 2021. Regarding the gas pipeline extension project for which Sasol Gas Ltd sought authorization, the application lapsed.

Applicants' experts, Dr Day. This report was not available at the time that the EA was initially granted and similarly when the decision was taken on Appeal. This was not one of the grounds of appeal that were proffered or considered.

66. The water resources assessment report that was submitted with the EIR was found to be adequate for the decision maker to make an informed decision and also for consideration of the appeal. It does not behove the applicants to now raise new matter and seek to rely on evidence which was not available to the DEFF when the decision was taken, and the appeal considered. For this reason, this ground of review does not succeed.

#### **INAPPROPRIATE WETLAND OFFSET**

67. The WRA and the Final EIR recommend a wetland offset to the unavoidable loss of wetlands which will be caused by the Power Plant. The applicants take issue with the provision for the wetland offset, primarily because it does not impose meaningful obligations upon ESKOM and secondly because the plan does not cater for public participation.

68. The proposed offset plan is subject to a number of conditions in the EA as follows:

“35. *The preliminary Wetland Offset Plan dated January 2018 (Updated February 2019 (with Option 2 indicated as the preferred option must be finalized in consultation with City of uMhlathuze Local Municipality and Ezembelo (KwaZulu Natal Wildlife) prior to commencement.*

36. *The final Wetland Offset Plan must be submitted to the Department, Chief Directorate: Integrated Environmental Authorizations for written approval prior to commencement of the activity.”*

69. It was argued that neither the DEFF nor Eskom point to any meaningful obligation placed on Eskom by the proposed wetland offset plan and that there is in reality no connection between the CCGPP and the proposed offset plan. This is nothing other than an attempt to pass off the activities of KZN Ezemvelo as an offset.
70. The EA and the conditions attached to it must be read together with the obligations imposed upon a person who is the holder of or issued with an EA – as set out in sections 24N(7)(a)<sup>30</sup> and (d)<sup>31</sup> which impose direct obligations upon Eskom regarding environmental impacts. It is thus not correct that there are no obligations on Eskom and for this reason this ground of review does not succeed.
71. None of the conditions which have been attached to the EA provide for public participation. This aspect will be dealt with below.

## PUBLIC PARTICIPATION

80. It is one of the foundational principles of NEMA that the participation of all interested and affected parties must be promoted and the participation of disadvantaged people must be ensured.<sup>32</sup>
81. Section 23(2) of NEMA provides for “adequate and appropriate opportunity for public participation in decisions that may affect the environment”.
82. The Notice requirements are set out in Regulation 41<sup>33</sup>. They require:

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<sup>30</sup> “(a) must at all times give effect to the general objectives of integrated environmental management laid down in section 23”

<sup>31</sup> “(d) must monitor and audit compliance with the requirements of the environmental management programme”

<sup>32</sup> See NEMA sections 2(4)(f), 23(2)(d) & 24(4)(a)(v)

<sup>33</sup> Environmental Impact Assessment Regulations, 2014 published under GN 982 in GG 38282 of 4 December 2014.



- 82.1 there must be a notice board conspicuously placed at the boundary of the proposed site and at any alternative site. The board must contain specified information and must be of a certain size. If the activity in question is a linear activity or ocean-based activity, the notice board requirements may be inappropriate and other arrangements may be agreed upon with the competent authority;
- 82.2 written notice must be given to owners or occupiers that are either adjacent to the site where activity is to be undertaken or to any alternative site where activity is to be undertaken;
- 82.3 written notice must also be given to the local councillor, the municipality and any organ of state having jurisdiction over any aspect the activity; and any other party required by the competent authority;
- 82.4 an advertisement must be placed in at least one local newspaper or, if the impact of the activity will extend beyond the boundary of the local municipality, in at least one provincial newspaper or national newspaper, or in the Government Gazette; and
- 82.5 using reasonable alternative methods, as agreed to by the competent authority, in those instances where a person is desirous of but unable to participate in the process due to illiteracy; disability; or any other disadvantage. (my underlining)
83. Regulation 42 provides for the opening and maintenance of a register of interested and affected parties. The people listed on the register include those who have attended meetings or have submitted written comments as well as those who have requested that their names be included on the register. This also

includes all organs of state with jurisdiction in respect of the activity must be listed as interested and affected parties.

84. The public participation process must be facilitated in a manner that provides all potential interest and affected parties a reasonable opportunity to comment on the proposed project.<sup>34</sup>

85. The 2017 Public Participation Guidelines<sup>35</sup> provide that:

85.1 The level of public participation must be informed by the characteristics of the potentially affected parties.

85.2 The method of communication must be an effective method that will easily reach the intended audiences.

85.3 The language used must provide all potential interested and affected parties a reasonable opportunity to comment without unnecessary difficulty.

86. The final EIR notes that the most commonly spoken language in the affected areas is isiZulu (with 79% of people speaking that language) and that affected region includes traditional areas.

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<sup>34</sup> Regulation 41(6)(b) which specifically provides that "*participation by potential or registered interested or affected parties is facilitated in such a manner that all potential or registered interested and affected parties are provided with a reasonable opportunity to comment on the application or proposed application.*"

<sup>35</sup> Regulation 41(2) of the EIA Regulations requires that the public participation process take into account the relevant guidelines.

87. Somewhat surprisingly, and despite this the public participation process did not include any notices, boards, or advertisements (whether print or radio) in isiZulu, and there was no indication of any attempt being made invite consultation directly by the non-English speaking communities in traditional areas.
88. ESKOM contends that this objection amounts to a “pedantic” approach. The DEFF contend that these deficiencies should be overlooked because a public participation process was followed as part of the local municipality’s integrated development plan and furthermore no registered interested or affected party requested the use of any other additional languages<sup>36</sup>.
89. The public participation process that was followed in the present matter incorporated:
- 89.1 Two public meetings were convened, a morning session was held on 27 March 2019 at Empangeni Public Library and an evening session was held 26 March 2019 Premier Hotel in Richards Bay. These sessions were held during the 30-day review period of the EIA Report (revision 0). The public meetings were advertised in The Mercury and the Zululand Observer on 21 March 2019, as well as in The Rapport and in The Sunday Times on 24 March 2019. Registered interested and affected persons and NGO’s were notified of the public meetings in writing.
- 89.2 The consultations and public meetings allowed for a process wherein interested and affected parties were given opportunity to comment on, or raise issues relevant to, the EA application process.

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<sup>36</sup> The public participation process is dealt with in Regulation 41 of the 2014 EIA Regulations which indicates that “*where environmental reporting is done in one of the three regional languages, executive summaries in the other two languages should be made available, on request*”.

- 89.3 Key Stakeholder Workshop held at Richards Bay IDZ with the following participants:
- 89.3.1 Richards Bay Industrial Development Zone (RBIDZ);
  - 89.3.2 City of Mhlathuze Local Municipality;
  - 89.3.3 King Cetshwayo District Municipality;
  - 89.3.4 Department of Water and Sanitation;
  - 89.3.5 KwaZulu-Natal DFFE;
  - 89.3.6 Ezemvelo Wildlife;
  - 89.3.7 Mondi;
  - 89.3.8 Transnet; and
  - 89.3.9 Richards Bay Clean Air Association.
90. Furthermore, it was argued, throughout the process no interested or affected person requested notifications and or correspondence in any other language, including isiZulu, and this included Groundwork, Friends of the Earth, South Africa which on 26 August 2019 made various comments on behalf of the community and in relation to the CCGPP but in any event, because the municipality followed a public participation process before the publishing of its integrated development plan. The project site, Phase 1D of the Richards Bay IDZ has been specifically reserved for a gas plant, and the municipality is in favour of the proposed development.
91. Additionally, prior to the scoping report, ESKOM undertook the Compilation of a Background Information Document (BID) for the project in order to provide information regarding the Richards Bay Power Plant and the EIA process. The BID was distributed to identified stakeholders and I&APs, placed at public places such as libraries and was also made available electronically on the Savannah Environmental website.

92. The DEFF argues that the absence of publication in isiZulu was never raised by the Applicants, either in the process of objecting to the application for the EA, nor in the appeal lodged to the Minister. It was argued that had it been raised at any of these stages, it would have been a simple matter of remitting it back to the EAP, with an instruction to place advertisements and publications in isiZulu.

93. In *Federation of South African Fly Fishers*<sup>37</sup>, in the context of public participation in environmental processes, this Court held:

*“Public participation in democratic process is not the exclusive preserve of educated members of society who can read English, or the privileged few who have access to the internet. Participative democracy is one of the foundational values of the Constitution and everyone should be encouraged and enabled to participate”.*

94. The DEFF’s argument is similar to the argument advanced by *Shell Sustaining the Wild Coast NPC*,<sup>38</sup> where it relied on advertisements placed in newspapers that were in English and Afrikaans, and not in isiZulu or isiXhosa to notify the public about the proposed project. The Court dismissed these arguments, finding, *inter alia*:

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<sup>37</sup> *The Federation of South African Fly Fishers v Minister of Environmental Affairs* 2021 JDR 2304 (GP), para. 66.

<sup>38</sup> *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG)

*“... a person who does not know of the process cannot be expected to register and participate in the process as an interested and affected person.”<sup>39</sup>*

*... those who cannot read English or Afrikaans were excluded from the consultation process.<sup>40</sup>*

*Meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations.<sup>41</sup> “*

95. The arguments of the DEFF and Eskom must fail. It is self-evident that in the absence of publication in any language other than English, it is highly probable anyone who did not speak English would have become aware of the public participation process and register as an interested and affected party.
96. Furthermore, the making available of information at either libraries or on the internet has as an express prerequisite for access to that information a certain level of education and ability to access the internet. For those who are not conversant in English, notwithstanding that they may be sufficiently educated and have access to the internet, even this is of no assistance.
97. In the circumstances while the public participation process did comply procedurally with the requirements for public participation set out by NEMA and the EIA Regulations – both in respect of the EA process generally and specifically regarding the wetland offset, I find that it did not do so adequately<sup>42</sup>. There is accordingly some merit in this ground of review.

## THE REMEDY

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<sup>39</sup> *ibid* para 21.

<sup>40</sup> *ibid* para 22.

<sup>41</sup> *ibid*, para 26.

<sup>42</sup> *“While the legislation itself may purport to advance the collective good, the application of legislation in a concrete situation can often have adverse effects on individual rights”* – Administrative Law in South Africa, C Hoexter, Juta & Co, 2<sup>nd</sup> Edition, 2012, page 53.

98. The present application for an EA for the CCGP is but the first in a chain of inextricably linked applications, all of which must pass muster before there can be any commencement of construction or implementation of any of the proposed measures.
99. It is probable that further applications, such as that for the gas pipeline from the port terminal to the CCGPP, will also be subject to conditions – at the very least in respect of the assessment of both upstream and downstream GHG emissions. Those further applications will take into consideration other linked parts of the total project for which EA's have been granted. Additionally, all the required reports were submitted and considered. Where appropriate pertinent and relevant conditions were attached to the EA and thus it cannot be said that there was no *'rational objective basis justifying the connection made by the administrative decision-maker between the material available and the conclusion arrived at.'*<sup>43</sup>
100. I have found the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> to 7<sup>th</sup> grounds of review are without merit and cannot succeed. For the reasons I have stated above I am of the view that the 5<sup>th</sup> ground of review has some merit.
101. Were it not for my finding that the present EA for the construction of the CCGPP is the first link in a chain of successive applications, the shortcomings in the public participation process may have warranted setting aside the decision to grant the EA.
102. However, to do so in the present circumstances would not serve either the interests of any of the parties or for that matter the public at large. In my view it would be just and equitable<sup>44</sup> to make an order that will ensure proper public participation in all further, ancillary, and/or linked applications for EA's relating to the construction and operation of a CCGPP in Richards Bay. For this reason the

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<sup>43</sup> Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA) – para 21 at 354H – 355A.

<sup>44</sup> Section 8(1)(a)(ii) of PAJA

concerns raised by the SDEC and the public's right to participate in the process has not been rendered nugatory notwithstanding the shortcomings in the public participation part of the NEMA process.

## COSTS

103. While the SDEC have not been successful in their review to set aside the EA in its entirety, they have raised several important issues – the most significant of which is that related to the public participation. While in the present matter the failure to advertise and notify the public in a language other than English is not determinative of participation in the CCGPP project as a whole – because of the successive and linked applications for EA's that must still be brought, the cavalier approach of the DEFF and Eskom to this aspect is to be deprecated.
104. It offers no answer to say that documents would have been furnished or adverts placed in isiZulu had it been requested. It is self-evident, as stated in Sustaining the Wild Coast NPC<sup>45</sup>, that if people do not know about a process, then they cannot participate in it.
105. The DEFF and Eskom criticized the SDEC for raising this ground of review in this application and not doing it sooner. Had it been raised sooner, they may well have addressed it, but the fact remains that some 79% of the people directly affected by the decision were not given notice in their mother tongue of the process and invited to participate.
106. Were it not for the present application, the failure to ensure a proper and all-inclusive public participation process may have gone unrecognized in not only the present application but also in respect of all subsequent and linked applications for EA's relating to the CCGPP, the pipeline and other ancillary facilities.

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<sup>45</sup> para 94 supra



107. While the application for review has not been successful in setting aside the decision to grant the EA for the CCGPP, it has brought to the fore the deficit in the public participation process – an essential element central to the legitimacy of the entire application process<sup>46</sup>. For this reason, I am of the view that the costs ought not to follow the result and that it would be just and equitable that, costs should appropriately, in the exercise of my discretion, be awarded in favour of the SDEC.

108. In the circumstances it is ordered:

108.1 The application for review of the granting of the EA and dismissal of the appeal in respect thereof is dismissed.

108.2 The respondents are ordered and directed to:

i.

108.2.1 Cause a copy of the EA and conditions attached thereto to be published in the isiZulu language in at least two newspapers circulating widely within the Richards Bay area of the KwaZulu Natal Province.

ii.

108.2.2 Ensure that in respect of all subsequent linked and ancillary applications for EA's pertaining to the CCGPP, all written notices are similarly published in isiZulu as set out in 106.2.1 above and that in addition, translation facilities are made available at any public meetings to enable proper participation by any person who speaks isiZulu and is not conversant in the English language.

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<sup>46</sup> s 8(1)(f) of PAJA

108.3 The respondents are ordered to pay the applicants costs of the application, jointly and severally, the one paying the others to be absolved, on the scale as between party and party which costs are to include the costs consequent upon the employment of two counsel.



**A MILLAR**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

HEARD ON:	2 AUGUST 2022
JUDGMENT DELIVERED ON:	6 OCTOBER 2022
COUNSEL FOR THE FIRST AND SECOND APPLICANTS:	ADV. A GABRIEL SC ADV. I LEARMOTH
INSTRUCTED BY:	JACOBSON & LEVY INCORPORATED
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COUNSEL FOR THE FIRST AND SECOND RESPONDENTS:	ADV. C ERASMUS SC ADV. M VIMBI
INSTRUCTED BY:	THE STATE ATTORNEY PRETORIA
REFERENCE:	MR LT CHOKWE
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