THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 479/2023

In the matter between:

SOUTH DURBAN COMMUNITY ENVIRONMENTAL ALLIANCE	**FIRST APPELLANT**
THE TRUSTEES OF THE GROUNDWORK TRUST	**SECOND APPELLANT**

and

THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**FIRST RESPONDENT**
CHIEF DIRECTOR: INTEGRATED ENVIRONMENTAL AUTHORISATIONS, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**SECOND RESPONDENT**
ESKOM HOLDINGS SOC LTD	**THIRD RESPONDENT**

Neutral citation: *South Durban Community Environmental Alliance and Another v The Minister of Forestry, Fisheries and the Environment and Others* (479/2023) [2025] ZASCA 134 (17 September 2025)

Coram: DAMBUZA, KGOELE and UNTERHALTER JJA, KOEN and DOLAMO AJJA

Heard: 30 August 2024

Delivered: 17 September 2025

Summary: Administrative Law Review – failure to take into account relevant considerations – environmental authorisations reviewable under ss 6 of the Promotion of Administrative Justice Act 3 of 2000.

Environmental Law – the principles established in s 2 of the National Environmental Management Act 107 of 1998 (NEMA) apply to interpretation and implementation of all environmental laws and policies, and to all exercise of public power that may significantly affect the environment – when considering an environmental authorisation application the Minister of Forestry, Fisheries and Environment must consider whether there was adequate compliance with the public participation requirements, the potential environmental impacts of the project or activity to which the authorisation relates, the cumulative environmental impacts of the project, and its need and desirability.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria:(Millar J, sitting as a court of first instance):

1. The appeal is upheld with costs including the costs of two counsel where employed;

2. The order of the high court is set aside and replaced with the following order:

'1. The decision of the first respondent which was issued on 13 October 2020 under reference no LSA 191719, to dismiss the applicants' appeal against the decision of the second respondent is reviewed and set aside and substituted with the following:

''The appeal against the decision of the Chief Director to issue an environmental authorisation for the proposed construction of the Richards Bay Combined Cycle Gas Power Plant which was issued on 23 December 2019 under authorisation reference no 14/12/16/3/3/2/1123 is upheld and that decision is set aside;

2. The respondents are ordered to pay the applicants' costs jointly and severally, one or more paying the other(s) to be absolved, including the costs of two counsel where employed.'''

JUDGMENT

Dambuza JA (Kgoele and Unterhalter JJA, Koen and Dolamo AJJA concurring)

Introduction

[1] During December 2019, the second respondent in this appeal, the Chief Director (the Chief Director) in the Integrated Environmental Authorisations section of the

Department of Forestry, Fisheries and the Environment (the Department), granted to the third respondent, Eskom Holdings SOC Ltd (Eskom),[1] an environmental authorisation for the construction and operation of a combined cycle gas power plant (the power plant) in Richards Bay. An appeal lodged by the two appellants against that environmental authorisation was dismissed by the first respondent, the Minister of the Department of Forestry, Fisheries and the Environment (the Minister). So was their application to the Gauteng Division of the High Court, Pretoria, (the high court) for a review and setting aside of the environmental authorisation and the dismissal of their appeal against the granting of the authorisation. This appeal, with the leave of this Court, is against the decision of the high court.

Background

[2] Eskom proposes to build a mid-merit[2] gas and diesel fuelled 'gas-to power' power plant with an installed power generation capacity of 3000MW at the Richards Bay Industrial Development Zone (the IDZ). The intention is primarily to power the plant with gas and to use diesel as back-up. Gas will be delivered to the plant from a gas terminal at the Richards Bay Port via a gas pipeline which is yet to be built. It is envisaged that Transnet SOC Limited (Transnet)[3] will construct the pipeline. It appears that the gas will be sourced from Mozambique, although this not certain. There is also an indication that it might be sourced from the Karoo Basin. Eskom states that the gas will be sourced from 'foreign countries'. Regardless of the source of the gas, the infrastructure related to the power plant will be located within Umhlathuze Local Municipality in the KwaZulu-Natal Province. According to the final environmental impact report, Richards Bay was identified by Eskom as the appropriate area for

[1] South Africa's State-owned public utility responsible for generating, transmitting and distributing electricity to the country's population and industry.
[2] Mid-merit power generation capacity is generation that is adjusted in line with fluctuating demand in the national power grid. In contrast, baseload power generation is continuous generation.
[3] A South African State-owned company responsible for operating the country's ports, railways, and pipelines, forming a critical part of the national freight to logistics chain.

locating the power plant because of its proximity to sources of gas 'close to the KwaZulu-Natal Province'.

[3] Because the plant will involve a number of listed activities, a scoping and environmental impact assessment[4] was conducted by Savannah Environmental (Pty) Ltd (Savannah) on behalf of Eskom.[5] A 'listed activity' is defined in s 1 read with s 24 (2) *(a)* and *(b)* of the National Environmental Management Act 107 of 1998 (NEMA).[6] In terms of these sections, the Minister or a Member of a provincial Executive Committee (MEC), with the concurrence of the Minister, may identify activities which may not commence without an environmental authorisation from a competent authority and geographical areas in which specified activities may not commence without such authorisation. In this case, the Minister is the competent authority responsible for considering, reviewing and granting applications for environmental authorisations. [7]

[4] Generally, in respect of each proposed listed activity, an applicant submits to the competent authority either a Basic Assessment Report or a Scoping and Environmental Impact Assessment Report (EIA Report).[8] This is followed by a detailed environmental assessment report on the assessed potential environmental impacts of the listed activity. In this case, Savannah published a first scoping report for the power plant on 21 August 2017. That report remained open for public

[4] Regulation 1 of the Environmental Impact Assessment Regulations, 2014 (EIA Regulations) defines an environmental impact assessment as '…a systematic process of identifying, assessing and reporting environmental impacts associated with an activity and includes basic assessment and S & IR [Scoping & Impact Reporting].'
[5] As required in terms of Regulations 21 to 24 of the EIA Regulations.
[6] Regulation 3 of the Environmental Impact assessment Regulations refers to listed activities in appendix 1 to the EIR Regulations.
[7] A competent authority is defined in s 1 of NEMA as follows: 'in respect of listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity.' In terms of 42 (1)*(a)* of NEMA the Minister may delegate his or her powers to the Director-General, and MEC, the management authority of a protected area, and any organ of state by agreement with that organ of state.
[8] Under EIA Regulation 21(1) 'if Scoping & Environmental Impact Reporting (S & EIR) must be applied to the application, the applicant must, within 44 days of receipt of the application by the competent authority, submit to the competent authority a scoping report which has been subjected to a public participation process of at least 30 days and which reflects incorporation of comments received, including any comments of the competent authority'.

inspection until 20 September 2017. It was then submitted to the Department on 6 October 2017.

[5] A period for review and public comment on the EIA Report was provided from 24 March and July 2019. The availability of a first and revised EIA Report was advertised in March and July 2019. The final EIA Report was published in August 2019. On 23 December 2019 the Chief Director approved the environmental authorisation application. In granting the authorisation, the Chief Director reasoned that, amongst other things, the power plant will result in a reduction of Eskom's fuel use and therefore a reduced carbon footprint per Megawatt (MW) of electricity produced. He also found that a 'sufficient' public participation process was undertaken in relation to the environmental impact assessment report.

[6] On 27 January 2020, the appellants, South Durban Community Environmental Alliance (the first appellant), and the Trustees of the Groundwork Trust (the second appellant or the Trust) appealed the decision to grant the environmental authorisation. On 13 October 2020, the Minister dismissed the appeal and confirmed the decision of the Chief Director. In the internal appeal decision, the Minister said she had considered, amongst other factors, that the 2019 Integrated (energy) Resource Plan (IRP) includes the use of non-renewable energy resources to allow for the development of the renewable energy sector and the associated infrastructure, as well as to enable the establishment of energy developments that can fill the gaps in energy supply. She reasoned that there was still a need for baseload energy, and that gas-to-power is a cheaper energy option than coal power generation.

[7] In the ensuing high court review application, the appellants challenged the decision to grant the authorisation on nine grounds. They contended that the decision was based on inadequate assessment of the climate change impacts of the power plant, that it was premised on an inadequate evaluation of the need and desirability of the

plant, and of alternatives to it, and that it resulted from an inadequate consideration of the cumulative environmental impacts of the plant, the infrastructure relating to it, and its construction and operation on the coast. They also argued that the public participation process undertaken prior to the grant of the authorisation was inadequate and procedurally unfair.

[8] In the high court it was common cause that renewable sources of power were never considered when contemplating the new power station. Furthermore, neither the cumulative environmental impacts of the complete power plant development,[9] nor its impacts, together with those of similar developments, were examined. The high court accepted that only the combined cycle gas power generation plant was considered. The explanation of the respondents was that none of the existing sources of renewable power would be suitable for the specific role of providing emergency power generation.

[9] Eskom acknowledged the need to transition the country from fossil-fuel energy generation to renewable energy-based power sources. It contended however, that this does not mean that every application for environmental authorisation for a new power plant must be for a renewable power source. In this case, renewable energy sources were not considered because what was needed was the provision of emergency power, for short periods of time, as and when required. Renewable power sources are not suitable for this function, Eskom argued. In addition, the plan is that as coal is phased out as the country's main energy source, natural gas will act as a 'bridge before renewable alternatives are fully implemented'. A hasty transfer to renewables might have 'cataclysmic' consequences.

[9] From the source of the natural gas to the power plant location.

[10] The high court was satisfied with this explanation, particularly because of the imposition of two conditions to the environmental authorisation, being the submission of proof that natural gas is available to supply the plant, and confirmation that Transnet assumed responsibility for the construction of a liquid gas facility and the gas pipeline from the Richards Bay Port to the plant prior to the start of construction. In rejecting the ground of review that renewable energy sources should have been considered, the high court found that Eskom was entitled to submit its application to the Department without consideration of alternative energy generation sources.

[11] The high court also rejected the argument by the appellants that the upstream effects of the extraction of gas in Mozambique (or any other location), its shipping on international waters and the gas pipeline that would run through Mozambique, had to be considered under NEMA. It found that such a broad consideration of the upstream effects on foreign land and water would 'create an almost impossible situation' because the location of the source of the gas had not yet been ascertained. The court was satisfied with the explanation by the respondents that the assessment of the anticipated greenhouse effects of the gas facility at the Richards Bay Port, and the environmental authorisation in relation to transportation of the gas to the plant, will be the subject of a separate environmental authorisation application. It also accepted that the cumulative effects of the different components of the development would be considered when the environmental authorisation for the construction of the pipeline from the Richards Bay Port is sought. The court found that it was reasonable that the environmental authorisations for the other components be sought at a later stage of the power plant development.

[12] With regard to the failure to assess the environmental and social costs of the emissions, the high court found that the holistic view approach adopted by the Department, based on all the reports that had been submitted to it, was adequate because the parties were in agreement that there is no universally acceptable method

of quantifying the cost of greenhouse gas emissions. For the same reason, the court rejected the argument by the appellant that the Minister had failed to consider the cumulative impact on the air quality of the emissions from the power plant, together with the emissions from the nearby Mondi Paper Mill plant, the 32 Hillside Aluminium Smelter, and a 400MW gas power plant. It further found that Chapter 9 of the environmental impact report adequately dealt with potential cumulative impacts emanating from these entities.

[13] In respect of the failure to consider the adequacy of the climate change resilience of the power plant, the high court rejected as speculative the evidence emanating from a climate report which anticipated that seawater might have to be used for cooling the plant to mitigate the warming effect of climate change. The court also found that the respondents' complaint, that no meaningful obligations were placed on Eskom, ignored the conditions attached to the proposed wetlands offset plan[10] and the obligations imposed on Eskom as the holder of the authorisation under s 24N(7)(*a*) and (*d*) of NEMA.[11]

[14] During September 2020 (prior to the dismissal of the appellants' internal appeal against the environmental authorisation), the Minister of Mineral Resources and Energy published a Determination in terms of s 34 of the Electricity Regulation Act 4 of 2006 (the Electricity Regulation Act) to facilitate implementation of the 2019 integrated resource plan by allowing provision by independent power producers of

[10] The proposed offset plan is subject to the following condition:
'35 The preliminary Wetland Offset Plan dated January 2018 (updated February 2019 (with Option 2 indicated as the preferred option must be finalised in consultation with City of Umhlathuze Local Municipality and Ezemvelo (KwaZulu Natal Wildlife) prior to commencement.
36 The final Wetland Offset Plan must be submitted to the Department, Chief Directorate: Integrated Environmental Authorisations for written approval prior to commencement of the activity'.

[11] These sub-sections provide:
'The holder and any person issued with an environmental authorisation-
(a) must at all times give effect to the general objectives of integrated environmental management laid down in section 23;
(b) …
(c) …
(d) Must monitor and audit compliance with the requirements of the environmental management programme.'

new 3000MW power generation from gas. In the review application, the respondents argued that in approving the environmental authorisation, the Minister gave no consideration to the independent power producers allocation that had been made in the Determination. The high court found that this argument intruded on the Minister's policy formulation prerogative.

[15] With regard to the public participation, even though the court acknowledged the shortcomings in the process undertaken, it rejected the review ground that the process was fatally deficient. The court considered that all required reports had been submitted to the Department and conditions were attached to the environmental authorisation. As such it could not be said that there was no rational basis between the material available to the Minister and her conclusion.

[16] In considering the appropriate remedy, the court reasoned that the environmental authorisation was the first in a chain of environmental authorisations that will be required in relation to the power plant development. Further environmental authorisation applications, including the one relating to the construction of the gas pipeline from the port terminal to the power plant, would also be subject to public participation processes. Therefore, setting the environmental authorisation aside would not be in the interests of the parties and the general members of the public.

[17] The high court then granted a 'just and equitable' order that would, in its view, ensure public participation in all 'further, ancillary, and/or linked' applications for environmental authorisations relating to the construction and operation of the power plant, to ensure public participation in further stages of construction and operation. It dismissed the review application and ordered that the respondents publish a copy of the environmental authorisation and conditions written in isiZulu in at least two newspapers circulating in Richards Bay and ensure that all subsequent linked and ancillary applications for environmental authorisations pertaining to the power plant

and all written notices be similarly published in isiZulu in the same manner as the environmental authorisation.

On appeal

[18] In this appeal the appellants persist only with the following five of their original grounds of appeal: (1) the inadequate assessment of the power plant's climate change impacts, (2) the need or desirability for the power plant, (3) a consideration of alternatives to the power plant, (4) the cumulative impacts of the power plant and (5) the inadequate public participation process. The appellants contend that these factors should have been central to the consideration of Eskom's environmental authorisation application. A finding of failure to sufficiently consider any one or more of them must result in a review and setting aside of the environmental authorisation in terms of s 6(2)(*e*)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[12] The appellants also rely on ss 11, 24 and 27 of the Constitution and NEMA.[13]

[19] The respondents argue that the polycentric nature of the environmental authorisation decisions does not permit of intervention by the courts, and that interference by this Court would undermine the principle of separation of powers. They contend that the impugned decisions align with the purpose of s 85 of the Constitution,[14] the National Energy Act 34 of 2008 (the National Energy Act) and the

---

[12] Under s 6(2) (*f*)(ii) a court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator and reasons given for it by the administrator.

[13] Section 24 of the Constitution provides: '**Environment**
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, 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.'

[14] Section 85 of the Constitution provides: '**Executive authority of the Republic** -
(1) The executive authority of the Republic is vested in the President.
(2) The President exercises the executive authority, together with the other members of the Cabinet, by-
(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
(b) developing and implementing national policy;

Electricity Regulation Act, to ensure that energy is available in sustainable quantities and at affordable prices to support economic growth and poverty alleviation. What is more, they contend, is that when the 2010 integrated resource plan and its later versions (2013 and 2019) were drafted, energy planning, increased generation, contingency energy supply, and adequate investment and access to energy infrastructure, were all considered. Besides that, the socio - economic advantages of establishing a large gas-to-power industry which will increase job creation, industrial development, and the potential to substitute diesel with cheaper liquid natural gas, are unquestionable.

[20] Eskom aligns itself with the Minister's arguments, emphasising that legislation and policies have been developed for the implementation of the energy mix strategy adopted by the government. It stresses that both gas and renewable energy form part of that energy mix which is provided for in the integrated resource plan and that, with regard to climate change, in the 2010 integrated resource plan the government adopted a 'peak-plateau-decline' strategy.[15] Further key considerations that were taken into account when formulating the integrated resource plan[16] included electricity demand and the underlying relationship with economic growth, new developments in technology and fuel options, scenarios for carbon mitigation strategies and the consequent impacts on electricity supply beyond 2023, and the affordability of electricity beyond 2020.

(c) co-ordinating the functions of state departments and administrations;
(d) preparing and initiating legislation; and
(e) performing any other executive function provided for in the Constitution or in national legislation.'

[15] The IRP 2010-2030 Update Report para 6.2 states: 'The peak-plateau-decline objective suggests that emissions would be allowed to peak in 2025 (originally indicated at 550 million tons per annum for South Africa as a whole), then plateau for some period before declining. In August 2011 the Department of Environmental Affairs published an explanatory note titled "Defining South Africa's Peak, Plateau and Decline Greenhouse Gas Emission Trajectory" which indicated the range of expected carbon dioxide emissions up to 2050. Under the PPD range, South Africa's upper limit is expected at 428 MT/a in 2050 and the lower limit at 212 MT/a, The Long-Term Mitigation Scenarios (LTMS) (October 2007) indicated that the electricity sector greenhouse gas contribution was 45% in 2003. The IRP 2010 assumed a 50% contribution, but this was seen by some observers at the time as an indulgence. Assuming the less indulgent 45% contribution, the upper limit for the electricity would be 193 MT/a in 2050 and the lower limit would be 95 MiT/a.'

[16] With reference to paragraph 3 the 2013 version of the IRP.

[21] The respondents assert that the integrated resource plan directs that gas is an obvious first choice for the short-term supply and demand site intervention because it will minimise the risk of load shedding.[17] In addition, the attendant capital costs for a combined cycle gas power plant are low and it can be constructed faster.

Discussion

Is the Minister's decision reviewable?

[22] The appellants accept and do not challenge the validity of the policy framework relied on by the respondents. They insist however that the national environmental framework provided under NEMA is applicable to all spheres of government. In other words, the implementation of all environmental management, including other environmental statutes and regulations, must be effected through the principles and procedures provided under NEMA.

[23] Indeed, NEMA establishes a comprehensive environmental management framework through which all laws that may significantly affect the environment must be interpreted. It guides the implementation of all environmental laws and policies, including the National Energy Act, the Electricity Regulation Act and the IRP. It is the overarching legislation by reference to which all other environmental legislation, policy formation and administrative decision-making that affects the environment should be informed. It is the lens through which administrative and executive actions that manage the environment must be viewed. This is made plain in s 2 of NEMA in terms of which the fundamental principles applicable to the interpretation and implementation of all environmental laws throughout the country are established. The section provides:

'**2 Principles**

[17] Load-shedding is a method of load management by reducing or cutting off electricity supply to different consumers or areas in a controlled manner to balance electricity demand with available resources. See: Nick Barney; TechTarget and Informa; https://www.techtarget.com, published 25 May 2023.

(1) The principles set out in this section shall apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and -

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) Serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

(d) Serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and

(e) Guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection of the environment.' (emphasis supplied).

[24] It is thus evident that the principles set out in s 2 of NEMA apply to all environmental decision making by all organs of state, whether the decision is made by a Member of the Executive, or consists of the administrative implementation of legislation. The reliance on the integrated resource plan was correctly rejected in *Earthlife Africa, Johannesburg v Minister of Environmental Affairs and Others,* [18] because macro-level planning does not determine the environmental impacts of a particular power plant. The purpose of the environmental management regime mandated in NEMA is to ensure that social, economic and environmental factors are integrated into all government environmental decision making, including those relevant to a particular project that may significantly affect the environment. In fact, even when formulating the integrated resource plan and the Determination under the Electricity Regulation Act, the Minister was obliged to observe the approach ordered under NEMA. Consequently, the 'separation of powers' argument is not sustainable

[18] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) para 95 (*Earthlife Africa Johannesburg*).

in this instance. NEMA specifies the approach that the Minister must adopt when considering environmental authorisation applications.

[25] The appeal to the Minister against the Chief Director's decision granting the environmental authorisation is provided for in s 43. However, the parameters of the power exercised by the Chief Director, and on appeal by the Minister, are set out in s 24. Section 24O(1*)(a)* and (*b*) is explicit in prescribing the criteria to be considered by the Minister responsible for the environment, the Minister responsible for mineral resources, or an MEC when considering an environmental authorisation application. The section emphasises that all of these office bearers must comply with the provisions of NEMA.[19] It provides:

'24O Criteria to be taken into account by competent authorities when considering applications

(1) If the Minister, the Minister responsible for mineral resources, an MEC or identified competent authority considers an application for an environmental authorisation, the Minister, Minister responsible for mineral resources, or MEC 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 applicant may be granted;

(iii) the ability of the applicant to comply with the prescribed financial provision;

[19] Section 24O(1)*(a)* of NEMA.

(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 minimize harm to the environment'.

[26] The respondents argued that the use of 'may' in s 24O(1)*(b)* means that the Minister has a discretion in relation to consideration of the factors listed under this section. Such interpretation is unsustainable within the context of NEMA. First, s 24O(1) requires compliance with the Act (NEMA). Hence the use of the word 'must' in s 24O(1), and the clear obligation in s 24O(1)(a) to comply with NEMA. Second, s 24O(1)(*b)* provides that the functionaries identified in the section must take into account all relevant factors. The words 'which may include' in the section are clearly intended to accommodate instances in which the factors listed in s 24O(1)*(b)*(i) to (viii) may not be applicable. The use of the word 'may' does not render the taking into account of the listed factors elective, if these factors are relevant to the authorisation sought. The controlling language is to be found in the use of the word 'must' in the introductory text of s 24O(1). Third, the application of the principles set out under s 2 in relation to all environmental management is required. This is evident from the language used throughout the section, and in particular s 2(1*)(b)(c)* and *(e),* as also s 2(2). Fourth, s 24*(a) and (b)* sets out in peremptory terms the procedures that must be followed with regard to investigating, assessing and communicating the potential consequences or impacts of activities on the environment.

[27] Section 43, read with ss 24O(1)*(b)* and 24(4) of NEMA define the parameters of the power exercised by the Minister when considering appeals in relation to environmental authorisation decisions.[20] Section 43(6) gives the Minister wide remedial powers to exercise on appeal. This indicates that the scope of the appeal is to determine whether the authorisation was correct, and if not, whether any authorisation should be permitted, and then under what conditions. In sum, the appeal requires the

[20] See para 25 above.

Minister to examine whether the authorisation complies with NEMA. Since NEMA is formulated with detailed provisions as to how an authorisation decision is to be made, an appeal to the Minister may invoke grounds of appeal that reference what NEMA requires in order to come to a compliant decision. And the Minister in deciding the appeal must consider whether the authorisation is in conformity with NEMA. The Minister's powers on appeal are thus wide in determining whether the authorisation was correctly given, and if not, what authorisation is warranted. But this appellate power is framed by the obligatory scheme that NEMA sets out. The decision as to whether to grant an authorisation under NEMA is not to be likened to an open-ended form of polycentric executive policy formation, precisely because of the density of specification with which NEMA sets out how an authorisation is to be given. It follows that both the original authorisation given by the Chief Director, as also the decision of the Minister on appeal, constitute administrative action that may be reviewed on the basis of their conformity with NEMA.

Inadequate public participation

[28] Public participation in environmental decision making is rooted in s 24 of the Constitution, which provides for the right to an environment that is not harmful and a corresponding obligation on the state to protect and fulfil that right. Here, we are concerned with the procedural obligation on Eskom to enable public participation in environmental decision-making through meaningful and effective participation of people in an inclusive manner. Public participation is pivotal to the fulfilment of the right to an environment that is not harmful to the health and well-being. To be effective, public consultation must be conducted in good faith, through culturally appropriate measures and procedures. Through this process, parties that are affected or likely to be affected by the project to which an environmental impact assessment relates, are provided with an opportunity to make input with regard to the proposed project.

[29] In *Doctors for Life International v Speaker of the National Assembly*[21] the Constitutional Court described the nature and content of the right to public participation as an 'open-textured programmatic right' which is flexible and open to experimental reformulation and which changes in the light of ongoing national experiences.[22] This means that flexibility in a public participation process is essential to achieving meaningful consultation.

[30] The procedures to investigate, assess and communicate the potential consequences of listed activities on the environment are regulated under s 24(4) of NEMA. In terms of s 24(4)*(a)*(v), public information and participation procedures must provide all interested and affected parties with a reasonable opportunity to participate in environmental impact investigation processes. The section provides that '[p]rocedures for investigation of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorisation, public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that they have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures.'

[31] For clarity, the EIA Regulations promulgated under NEMA[23] require that after submission of an environmental authorisation application, public participation must be undertaken for either a basic assessment or a scoping and environmental impact report. In addition, the Minister published a Guideline on Public Participation in terms of s 24J of NEMA[24] to assist potential applicants, interested and affected parties and environmental assessment practitioners to understand what their role is, or what is expected of them in relation to the environmental impact assessment process. The Guideline highlights the importance of public participation. To this extent public

[21] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 para 96.
[22] Steiner 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77 at 134.
[23] EIA regulation 12.
[24] See Government Notice No 35769 dated 10 October 2012.

participation is the only process in the environmental authorisations mechanism from which there is no exemption.

[32] The Guideline also makes provision for instances where the minimum requirements set out in the EIA regulations for public participation may not be adequate for all applications, given the different projects to which authorisation applications relate.[25] It suggests three factors to be considered: (1) the scale of the anticipated impacts of the proposed project, (2) the sensitivity of the affected environment and the degree of concern about the impacts of the proposed project on it, and (3) the characteristics (attributes) of the affected parties. It provides that, depending on the constitution of the communities concerned, use must be made of, among different modes of communication, local radio stations in the local language at an appropriate time, participatory rural appraisals and approaches to community structures, committees and leaders.

[33] Under the Public Participation Guideline, the environmental assessment practitioner must give notice to all interested and affected parties. In paragraph 4 the Guideline prescribes the following methods of notification:

'[a] fixing a notice board at a place noticeable to the public at the boundary or on the fence of the site where the listed activity is to be undertaken as well as any alternative sites being considered;

[b] Giving written notice to [various persons specified under items (i) to (vii) including the owners and occupiers of the land adjacent to the site] of any alternative site to which the activity is proposed to be undertaken, and the owners and occupiers of the land where the site on which the activity is to be undertaken or any alternative site where the activity is to be undertaken];

[c] placing the advertisement in:

(i) one local newspaper (this should be an appropriate newspaper in terms of accessibility and written in a language that the interested and affected parties will understand); or

(ii) any official Gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these regulations; and

[25] EIA Regulations.

(i) placing an advertisement in at least one provincial newspaper or national newspaper if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or local municipality, and an advertisement is not being placed in any official Gazette referred to in (c) (ii) above.' (Emphasis supplied)

[34] The person conducting the public participation is vested with discretion to ensure that the language used allows for meaningful participation. Potential and registered interested and affected parties must be provided with meaningful opportunity to comment on the application. The EIA regulations prescribe a detailed notification procedure which includes a requirement that an effort must be made to reach illiterate, disabled, and any other disadvantaged persons. It is the obligation of state organs such as the Minister in this case, when making decisions pertaining to the protection of the environment, to ensure that the requirements of public participation have been truly observed. In sum, NEMA together with the EIA Regulations and the Public Participation Guideline provide a comprehensive structure for adequately communicating with affected and interested parties for purposes of fulfilling the right to meaningful participation.

[35] In this case, however, the availability of the environmental reports for public comment was advertised in 'The Mercury', 'Rapport', the 'Sunday Times', and the 'Zululand Observer', all English and Afrikaans newspapers. No advertisements were placed in local isiZulu newspapers. This, despite it having been stated in the final environmental report, that the most commonly spoken language in the area of the proposed project, by 79%, is isiZulu. The public participation information notices placed on the notice boards were written in English with no translation. No information was published on isiZulu, or other radio stations. No consultation was held with local communities or their leaders. There is no evidence of consultation with vulnerable people or even an investigation of their existence in the relevant area.

[36] In relation to these deficiencies, the Minister explains that the defects in the public participation process were never brought to her attention. Had this been done, she would have remitted the application to the Directorate of the Department with instructions to comply with the relevant requirements. But she also asserts, seemingly with approval, that the environmental assessment practitioner decided in her discretion to use English for the public participation process. In addition, no interested or affected party indicated that they were disadvantaged or requested that a different language be used. According to the Minister, the public participation guideline only requires that where environmental reporting is done in one of the three regional languages, executive summaries be made available in the other two languages. In any event, the Minister contends, the municipality conducted a public participation process before publishing its integrated development plan pursuant to which the project site was reserved for a gas power plant.

[37] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*[26] the Constitutional Court held that public consultation as an integral part of the fairness process because a decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the environmental authorisation application procedurally fair. In *Sustaining the Wildcoast NPC v Minister of Mineral Resources and Energy*[27] the Court held that consultation with the monarch or traditional leader was not sufficient. The community had to be consulted as such.

[26] *Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC).
[27] *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG); 2022 (2) SA 585 (ECG).

[38] The Minister's responses ignore the provisions of NEMA. Clearly, they are inconsistent with the national principles provided in s 2 and it is evident that the obligations created in that Act were not considered when the decisions were made. The ground rule in s 2(2) that environmental management must place people and their needs at the forefront of concern, and serve their physical, psychological, developmental, cultural and social interests equitably was not followed.

[39] Eskom's responses are equally unhelpful. Eskom responds that a full and proper participation process was held because all interested and affected parties were advised that the EIA report was made available for review for a period of 30 days, which was extended for a further month, and that the revised report was made available for more or less the same period. However, the process could not be adequate where the crucial requirement of meaningful participation was not substantially satisfied.

[40] The Minister's reference to public participation for purposes of the municipal integrated development plan is misguided. A public participation process for one purpose, the determination of the power plant site, cannot serve as compliance with the prerequisites for a different unrelated purpose, the consideration of the environmental impact assessment report. In this case, the purported public participation process fell short of the purpose for which it was created. A large portion of the public was deprived of the right to participate in and influence a decision that relates to their fundamental right.

[41] For this reason alone, the environmental authorisation decisions must be reviewed and set aside. The authorisation granted by the Chief Director was thus vitiated by reviewable error by reason of the failure of the public participation required by NEMA. The failure by the Minister, on appeal, to correct that error renders the Minister's decision subject to the same legal conclusion. This ground of review is thus

sustained and renders the authorisation subject to the remedial remit of a court on review.

[42] However, it is important that this Court also considers the other issues raised in this appeal. Clearly, the Minister's attention was not drawn to the provisions of NEMA when considering this appeal. Neither was the Chief Director's attention. There may be similar matters requiring their attention. I therefore proceed to deal with the rest of the issues raised in this appeal.

Inadequate assessment of the power plant's climate change impacts, its cumulative impacts, and its need and desirability.

The Climate Crisis and climate change impacts

[43] The final EIA report reveals that when the plant is burning gas the resultant Green House Gas emissions (GHGs) will be comparable to 0.37 tonnes of carbon dioxide (CO2) per Megawatt hour (MWh) of electricity generated. The plant will require 2000-5000m3 of water per day to generate steam used to drive the turbines. And its design is such that it will be able to generate electricity for 'base-load', 'mid-merit' or 'peaking' capacities. The respondents do not point to any evidence of what the impacts of these emissions and water usage will be on the environment.

[44] The appellants argue that the Minister failed to consider the expert evidence tendered in support of the contention that generation of electricity, using wind, solar and/or other sources of renewable energy, is a reasonable and feasible alternative to the construction and operation of the power plant. They complain that the final environmental report ignored this consideration as an alternative to gas power generation. Consequently, they argue, the decisions do not comply with s 24O of NEMA and should be reviewed and set aside.

[45] The respondents place at the forefront their obligations under the National Energy Act and the IRP to ensure that energy resources are available in sustainable quantities at affordable prices to support economic growth and poverty alleviation in South Africa. The Minister explains that when the environmental authorisation application was made, the integrated resource plan provided for 7,5GW of electricity to be generated by gas or diesel energy through either open cycle gas turbines or combined cycle gas turbines, such as the power plant under consideration.

[46] Despite these contestations however, it is not in dispute between the parties that there is an urgent need to adhere to conduct that promotes the limitation of global warming. There is also no protestation to the emphasis by the appellants on the present day climate crisis and the need to limit global warming to 1.5°C within the next decade. In fact, this is what South Africa has committed to in various international agreements.[28] The country is party to numerous international environmental agreements, including the United Nations Framework Convention on Climate Change (UNFCCC) and its Paris Agreement.

[47] South Africa has had to struggle with how best to meet its responsibilities to its people and the international world and achieve its socio-economic and environmental goals. Almost two decades ago, in *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province, and Others*[29] the Constitutional Court described this predicament as follows:

[28] South Africa is a Party to the United Nations Framework Convention on Climate Change and its Kyoto Protocol. It signed and ratified the Paris Agreement in 2016, committing to limit warming to 1.5 °C. In its 2021 Nationally Determined Contribution, it referred to the Talanoa Dialogue and the Intergovernmental Panel on Climate Change Special Report on 1.5 °C. At the 26th Conference of the Parties in 2021, it entered into the Just Energy Transition Partnership with international partners to support this commitment.

[29] *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province, and* Others [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) paras 41 to 44.

'The need to protect the environment cannot be gainsaid. So too is the need for social and economic development. How these two compelling needs interact, their impact on decisions affecting the environment and the obligations of environmental authorities in this regard, are important constitutional questions.

……

What is immediately apparent from s 24 [of the Constitution] is the explicit recognition of the obligation to promote justifiable 'economic and social development' Economic and social development is essential to the well-being of human beings. This court has recognized that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of the enjoyment of other rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked'.

[48] In this context the principles laid down in NEMA provide crucial guidance in the examination of the factors that are relevant in environmental decision-making processes. They must be practically integrated into those processes by all organs of state. In *Earthlife Johannesburg*[30] the court correctly found that on a plain reading of s 24O(1) of NEMA the climate change impacts of a listed activity must be considered when assessing applications for environmental authorisations. The court also correctly found that the provisions of s 24O(1)*(b)* of NEMA are peremptory and require that a competent authority considering an application for an environmental authorisation for a listed activity must consider all relevant factors, including the factors listed in that section.

[49] With regard to the assessment of alternatives to the listed activity in relation to which an environmental authorisation is sought, s 24(4)*(a)*(iv) requires an

[30] *Earthlife Africa, Johannesburg* para 79.

investigation of potential consequences for or impacts of the activity on the environment and an assessment of the significance of those potential consequences or impacts. In addition to that, s 24(4)*(b)*(i) requires that an investigation be conducted by an environmental assessment practitioner into the potential consequences of alternatives to the listed activity on the environment and an assessment must be done on the significance of those potential consequences or impacts, including the option of not implementing the activity.

[50] EIA Regulation 18 also refers to the criteria to be considered by competent authorities when considering environmental applications. [31] It provides that the competent authority 'must have regard to s 24O and 24(4) of the Act, the need for and desirability of the undertaking of the proposed activity, the requirements of the Regulations, and any protocol or minimum information requirements relevant to the application as identified and gazetted by the Minister in a government notice or any relevant guideline published in terms of s 24J of the Act.'

[51] Section 23(2)*(b)* of NEMA provides that one of the objectives of integrated environmental management is to identify, predict and evaluate the actual and potential impacts of an activity as well as the risk consequences, alternatives and options for mitigation. The respondents' responses demonstrate that their attention was not directed at compliance with these imperatives. The focus was on implementing the integrated resources plan.

[52] The integrated resource plan is the country's long-term energy policy blueprint. The integrated resource plan, in essence, predicts future energy demand and outlines how that demand will be met – through a balanced mix of generation technologies. It is a 'living plan' that is subjected to periodical updates and coordination with other

[31] EIA regulations 12 and 13(1).

policies to fulfil the need to plan ahead and ensure the sustainable provision of electricity. NEMA, on the other hand, requires evaluation of the potential environmental impacts of each listed activity that is to occur at a particular point in time.

[53] The responses by the Chief Director and the Minister that there is no requirement under the EIA Regulations to assess the impacts of renewable power is incorrect. The regulations do not only allow an assessment of the 'preferred alternative and the no-go alternative,' as they contend. They mandate an assessment of reasonable and feasible alternatives to a proposed project, including location, design, technology and the 'no-go option'. The preferred alternative must be the final choice after comparing the social, environmental, technical, and economic impacts of all the considered options. Importantly, sustainable development remains the goal.

[54] Consequently, the high court's conclusion that the Minister, in rejecting the appellants' appeal, had a wide discretion to make a decision based only on policy considerations or based on the integrated resource plan cannot be upheld. Similarly, the conclusion that environmental authorisations are 'not the exclusive domain of renewable energy' and that the 'specific exigencies' for the combined cycle gas power plant were properly considered, is erroneous.

Failure to consider the cumulative effect of the listed activities

[55] Section 24(*2(a)* of NEMA requires a consideration of impacts that may become significant when combined with other existing potential activities. An environmental authorisation is required in respect of a listed activity rather than a development. However, in terms of ss 24(1), 24(2)*(a)* and the EIA Regulations, if other components of the development also include listed activities, the environmental authorisation application must include all listed activities forming part of the overall development proposal. The comprehensive development context is important for a complete

assessment of the combined impacts of the listed activities in a combined development. The assessment considers the potential impacts of all the activities, including cumulative impacts.

[56] Under the EIA Regulations, 'cumulative impact' is defined as including the past, current, and reasonably foreseeable future impacts of an activity, considered together with the impacts of associated and similar activities. This means that, when assessing the impact of a listed activity, the competent authority must also consider how the environmental impacts of the listed activity under consideration, when combined with impacts of other similar activities, could become significant. That must be so, particularly where such other similar or associated activities relate to the same development. Appendix 3 to the EIA Regulations also requires an evaluation of how the impacts of a proposed project, when added to similar existing and foreseeable developments, can lead to significant environmental changes that would not be apparent from the consideration of the project in isolation.

[57] The argument that the Minister failed to consider the cumulative effect of the extraction and transportation of the gas must be upheld. It is evident that the respondents' persistence in the view that the environmental impacts of the pipeline to the power plant only become relevant at a later stage is incorrect.

[58] In light of the conclusion on the interpretation of 24(2)*(a)* – the requirement to consider the cumulative impacts of a project, something must be said about the need for environmental authorisation in relation to the sourcing of the gas. The final EIA Report records that Mozambique has sufficient natural gas to enable its transportation by a pipeline to South Africa. Eskom will purchase liquid natural gas from potential suppliers once the connection to Richards Bay is completed. When the current environmental authorisation was approved environmental studies were underway in preparation for an application for the environmental authorisation for the pipeline that

will transport the gas from the Richards Bay Port Terminal to the power plant. The greenhouse gas emissions associated with the extraction and transportation of the gas from the source to Richards Bay and to the power plant were not assessed or indicated in the final EIA report.

[59] The respondents contend that South African authorities and courts have no jurisdiction over the assessment of the environmental impacts of gas extraction and transportation outside the South African territory. The extra-territorial consideration of environmental impacts is a matter of considerable complexity. There may well be circumstances in which the authorisation of an activity under NEMA requires consideration of the sourcing inputs from abroad that may have harmful environmental impacts in South Africa. So too an activity undertaken in South Africa may have harmful impacts outside the country that warrant consideration. Whether an activity requires an environmental authorisation and gives rise to activities that occur abroad and have impacts abroad that require consideration under NEMA is a matter that we do not need to determine in this appeal. It is, in any event, not certain where the gas will be sourced in this instance.

The failure to consider need and desirability

[60] With regard to need and desirability, Eskom's response is that the scoping report and the final environmental assessment report highlighted the need and desirability of the power plant and concluded that: (1) the plant would ensure that the supply and demand in the country is met and would thus enable economic and social growth; (2) it will reduce transmission losses because of its close proximity to Richards Bay; (3) it will 'provide flexible generation solution where renewable energy fuel resources [are] not available'; and (4) the resultant carbon emissions and water usage will amount to half of the coal emissions. This argument is again based on the integrated resource plan.

[61] Apart the provisions in NEMA which have already been referred to in this judgment the comprehensive Guideline on Need and Desirability issued by the Minister in 2017 highlights that: '[i]t is essential that the national policies and strategies support the growth of the economy. It is also essential that these policies take cognisance of strategic concerns such as climate change, food security, as well as sustainability in supply of natural resources and the status of our ecosystem services'. The Guideline re-states the factors that must be considered under s 24(4) of NEMA. The Minister and Eskom say nothing about these factors.

[62] The Determination which the Minister relies on, was published by the Minister of Mineral Resources and Energy in terms of s 34 of the Energy Regulation Act 4 of 2006 to cater for the implementation of the 2019 integrated resource plan. It provided for 3000MW of new power generation from gas by independent power producers.

[63] The appellants argue that when granting the environmental authorisation to Eskom the Minister failed to consider that 3000MW electricity generation capacity had already been allocated to independent power producers in terms of the Determination. They contend that this was a relevant factor in the need and desirability determination process which the Minister ignored when granting the authorisation. In the high court the respondents offered no response to this argument. The high court found that the allocation of generation capacity to IPPs was a policy decision, and the authorisation was not granted on the basis that Eskom was obliged to construct the power plant.

[64] For context, s 34 of the Electricity Regulation Act provides:

'**34. Additional electricity, new generation capacity and electricity transmission infrastructure,**- (1) The Minister may, in the event of the failure of a market, or in the event of an emergency, or for the purpose of ensuring security of energy supply in the national interest, after

consultation with the Regulator and the Minister of Finance, by notice in the *Gazette,* make a determination-

(a) that additional electricity or new generation capacity is needed to ensure the optimal supply of electricity;

(b) that new electricity transmission infrastructure is needed to ensure the optimal supply of electricity;

(c) determine that electricity thus produced may only be sold to the persons in the manner set out in such notice.

[65] The Determination provided that electricity provided through the new generation capacity would constitute IPP procurement programmes as contemplated in the Regulations. The procurement programmes would aim to connect to the grid for the new generation as soon as reasonably possible in line with a specified timetable. The electricity would be sold to Eskom.

[66] It is apparent that when the Minister upheld the granting of the environmental authorisation, the Determination had already been made specifying that the 3000MW new generation capacity would be procured through tendering procedures that would constitute the IPP allocation. Indeed, this fact was a relevant consideration in the need and desirability assessment but was not taken into consideration when upholding the environmental authorisation.

Remedy

[67] As stated, the high court reasoned that the environmental authorisation was the first in a chain of environmental authorisations that are required in relation to the power plant development. For that reason, the defects in the public participation process would be corrected during the consideration of further environmental authorisation process. Therefore, setting the environmental authorisation aside would not be in the interests of the parties and general members of the public.

[68] The multi-stage basis for the relief granted by the high court is incorrect. In terms of NEMA an environmental authorisation is required for each listed activity (save that an applicant or applicants may make a combined environmental authorisation application). The majority of the residents in the Umhlathuze Municipality were permanently deprived of participating in the environmental authorisation process for the power plant construction and operation. The order of the high court entrenches the deprivation. The re-publication of the environmental authorisation notices would merely confirm that the process is incomplete. An appropriate remedy should enable members of the public to participate meaningfully in the process. Consequently, the order of the high court cannot stand.

[69] The high court is not ordinarily permitted to substitute the Minister's decision with its own. Neither is this Court. With regard to remedies in proceedings for judicial review s 8(1) of PAJA makes provision for the Court in proceedings for judicial review in terms of s 6 (1) to grant any order that is just and equitable, including orders setting aside the administrative action and remitting the matter for reconsideration by the administrator, or, in exceptional cases, substituting or varying the administrative action. With regard to the case before us, this means that once we determine, as we do, that the Chief Director's and Minister's decision should be reviewed and set aside, we should remit the matter back to the Chief Director for reconsideration.

[70] However two of the factors recognised by the Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*[32] as exceptional and therefore constituting a proper basis for the substitution of the decision under review by the court, are present in this case. The first is that the conclusion that the Minister must reach on reconsideration of the appeal is a forgone conclusion. As stated, the Chief Director did not consider the principles and

[32] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22.

factors laid down in NEMA. Remitting the matter to the Minister would therefore be futile.[33] The second is that this Court is in as good a position as the Minister to make the decision because the appeal inquiry is an evaluation of whether there has been compliance with the law or statutory provisions. Therefore, exceptional circumstances in this case permit of substitution of the Minister's decision. What order, then, should this court grant?

[71] The appellants seek an order that the two environmental authorisation be reviewed and set aside, and that a declarator be granted to the effect that when reconsidering the application for environmental authorisation (assuming it serves before them again in the future) the decision makers must ensure that: (1) their decisions are consistent with the Bill of Rights and s 2 of NEMA, (2) their decisions are appropriate considering the social, economic, and environmental impacts of the activity, (3) their decisions consider the full life-cycle of greenhouse gas emissions from the combustion of any fuel used and the cumulative impacts of those emissions with other South African emissions, (4) the decision makers must consider the extent to which the objective of the activity could be achieved using alternative means, including renewable energy resources, and (5) they must consider the constitutional rights contained in ss 11, 24 and 27 of the Constitution.

[72] The declarator sought merely sets out the legal principles and the obligations of the respondents in law. I have made findings in the judgment on these aspects. It is therefore not necessary to issue a declarator.

[73] The decision of the first respondent falls to be reviewed. The appeal against the decision of the second respondent to issue an environmental authorisation for the proposed construction of the Richards Bay Combined Cycle Power Plant which was

[33] See *Trencon* paras 35 to 39.

issued on 23 December 2019 under authorisation reference no 14/12/16/3/3/2/1123 should have been upheld by the first respondent and that decision set aside. In reviewing and setting aside the decision of the first respondent I substitute for it an order that the appeal against the decision of the second respondent is upheld and the decision to issue the environmental authorisation is set aside. The decision substituted for that of the first respondent does not remit the matter to the second respondent. This is inappropriate relief because the flaws in the required process of public participation must be remedied. This will necessitate a fresh application by Eskom for authorisation once the required public participation has taken place and the fruits thereof have been considered. The appropriate remedy rather upholds the appeal that was made to the Minister, and sets aside the authorisation granted by the second respondent. The effect of this order is that the authorisation is a nullity. Eskom is at liberty to renew its application for an authorisation once the various requirements which had not been complied with, have been attended to. A remission, if it was to occur on the same facts as served before the second respondent previously, will meet the same fate and be senseless.

[74] The order I grant is the following:

1. The appeal is upheld with costs including the costs of two counsel where employed;
2. The order of the high court is set aside and replaced with the following order:

‘1. The decision of the first respondent which was issued on 13 October 2020 under reference no LSA 191719, to dismiss the applicants’ appeal against the decision of the second respondent is reviewed and set aside and substituted with the following:

‘‘The appeal against the decision of the Chief Director to issue an environmental authorisation for the proposed construction of the Richards Bay Combined Cycle Gas Power Plant which was issued on 23 December 2019 under

authorisation reference no 14/12/16/3/3/2/1123 is upheld and that decision is set aside;

2. The respondents are ordered to pay the applicants' costs jointly and severally, one or more paying the other(s) to be absolved, including the costs of two counsel where employed.'''

_____
N DAMBUZA
JUDGE OF APPEAL

Appearances

For the appellants:	A Gabriel SC with IA Learmonth
Instructed by:	Cullinan & Associates Inc, Cape Town
	Pieter Skein Attorneys, Bloemfontein

For the first & second respondents: MC Erasmus SC with M Vimbi

Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein.

For the third respondent:	J A Motepe SC
Instructed by:	Renqe FY Incorporated, Pretoria
	Kramer Weimann Inc, Bloemfontein.