

**STATEMENT BY HON IVAN COLLENDAVELLOO, GCSK,SC,
DEPUTY PRIME MINISTER, MINISTER OF ENERGY AND PUBLIC
UTILITIES**

**SITTING OF THE NATIONAL ASSEMBLY ON THURSDAY 13
JUNE 2019**

**Privy Council Judgment on case by the State of Mauritius
against The (Mauritius) CT Power Ltd**

Madam Speaker,

1. I wish, with your permission, to make a statement on the circumstances leading to the judgment which the Judicial Committee of the Privy Council composed of Lord Reed, Lord Kerr, Lady Black, Lord Briggs and Lord Sales, gave last Monday, 10 June 2019. The judgment was a judgment on appeal from a decision of our Supreme Court composed of Their Ladyships A.F. Chui Yew Chong and R. Teelock and delivered on 7 July 2016 in the matter of an application by The (Mauritius) CT Power Ltd. for the judicial review of a decision taken by Government not to proceed with the CT Power project.
2. This judgment has far reaching legal and political implications and is poised to become a leading case in Mauritius administrative law as well as in the law of the United Kingdom and of several countries of the Commonwealth.

Madam Speaker,

3. In December 2005, a few months after the installation of a new government following the July 2005 elections, the Board of Investment received an **unsolicited** proposal from CT Power (Malaysia) Ltd for the implementation of a 2 x 55MW coal power plant. The project was to be implemented by a local subsidiary.
4. In April 2006, i.e. four months after receipt of this unsolicited proposal, the Board of Investment issued a letter of intent to the local subsidiary, The (Mauritius) CT Power Ltd. which had been incorporated on 15 March 2006. BOI's letter of intent indicated that the 3x50 MW (150MW) coal based power station may be accommodated in CEB's Power Expansion Plan. The project also included a jetty for coal handling at Pointe aux Caves, Albion. The letter of intent was valid up to 22 October 2006.
5. On 29 June 2006, i.e. half a year following receipt of the unsolicited proposal, the Ministry of Housing and Lands approved the grant of an industrial lease of approximately 80 acres of land at Pointe aux Caves, Albion to CEB for the purpose of setting up a coal power plant.
6. Less than one month later, i.e. 26 July 2006, the CEB Board approved that discussions be initiated with the company for a 100MW instead of a 150MW plant.
7. On 30 September 2006, the Board of Investment extended the Letter of Intent to October 2007.
8. In October 2006, the Ministry of Energy and Public Utilities gave approval for the project.

9. In October 2008, the then Government agreed to lease 92 acres of State land at Pointe aux Caves to CEB at the nominal value of Rs 480,000 per annum, to be adjusted every three years by cumulative inflation rate. The CEB would sub-lease the site to The (Mauritius) CT Power Ltd at full market rate as assessed by the Director of the Valuation Department and use the funds from the sub-lease of the land for an equity participation in the CT Power Project.

10. In the same year, the CEB incorporated a subsidiary, known as CEB Investment Company Ltd (CEBICL), which signed a Shareholders' Agreement on 23 December 2008 with The (Mauritius) CT Power Ltd. It was to hold 26% equity participation and have 3 Directors on the Board of the company.

11. On 23 December 2008, although no EIA license had yet been obtained, the CEB, represented by its General Manager, signed:

(a) a Coal Supply Agreement providing for CEB to be responsible for the procurement of some 350,000 MT of coal annually to be imported from South Africa and for The (Mauritius) CT Power Ltd to be responsible for unloading, handling, storage and transfer of the coal to the power station. The Mauritius Ports Authority put at the disposal of the CEB, a plot of land of about 1.3 hectares in the Port compound, to be sub-leased to The (Mauritius) CT Power Ltd for the unloading and transfer of coal.

(b) a Power Purchase Agreement providing for CEB to buy electricity from The (Mauritius) CT Power Ltd at an agreed

tariff, for a period of 20 years and thereafter the transfer of the power plant to CEB at a nominal sum of 1 USD.

(c) an Interconnection Facility Design and Build Agreement

relating to the design and construction of a sub-station at Pointe aux Caves and the transmission network up to La Chaumiere sub station, estimated at USD 9.9M to be executed within 23 months.

12. An application for an EIA was made in 2009 at the Ministry of Environment which obtained UNDP assistance to appoint an independent Consultant, Mott Mc Donald, to evaluate and assess the application. In May 2009, the Consultant submitted its report, based on which the EIA Committee requested the Promoter to carry out additional studies, which in addition to the environmental concerns included the technical viability of the socio economic assessment and cost benefit analysis.
13. On 16 June 2010, the Promoter submitted the additional report and in January 2011, the EIA Committee recommended to the Minister that the EIA Licence should **not** be issued.
14. On 16 July 2012, following an appeal by the promoter, the Environment Appeal Tribunal, gave its ruling in favour of The (Mauritius) CT Power Ltd and on 23 January 2013, the Ministry of Environment issued the EIA license with 31 conditions, including Condition 15 that the promoter “**shall undertake to provide proof of its financial capabilities for the duration of the project to the satisfaction of the Ministry of Finance and Economic Development.**”

15. In December 2013, the CEB, represented by its chairperson and General Manager signed an amended Power Purchase Agreement to incorporate the requirements of the EIA. The purchase price of electricity would be Rs 4.58 kWh which was to include the annual cost of lease of the land and coal delivered at the port. It excluded the cost of transportation of coal from the port to the power plant (0.10cts kWh) and the power transmission from the plant to the substation at La Chaumiere (0.17 cents kWh). The price would change on the basis of an indexation formula over 20 years.
16. The CEB's commitment in the project included an amount of USD 18 million as equity participation, Rs 700 Million for the construction of a jetty and Rs 600M for underground cables as well as cost of obtaining way leaves. These way leaves were subject to court cases.
17. The effective date of the Power Purchase Agreement was subject to the signing of an Implementation Agreement.
18. The Implementation Agreement served as Government guarantee for the payment obligations of the CEB and is therefore a financial commitment for Government. The Ministry of Finance and Economic Development therefore asked The (Mauritius) CT Power Ltd to submit a Letter of Comfort from its banks to confirm its financial capacity.
19. The letter submitted by the promoter was not to the satisfaction of the Ministry of Finance. Thus, in March 2015, Government decided not to proceed with the CT Power project.

20. On 25 May 2015, The (Mauritius) CT Power applied to the Supreme Court for leave to apply for judicial review of the decisions of Government, of the Ministry of Finance and Economic Development and of my Ministry. The proceedings were also directed against the Minister of Finance and Economic Development and me, in my capacity as Minister of Energy and Public Utilities. The Central Electricity Board was joined as an interested party.
21. On 7 July 2016, the Supreme Court ruled in favour of The (Mauritius) CT Power and held that my decision as well as that of my Ministry not to sign the Implementation Agreement was “*misconceived, unreasonable, and irrational and in breach of the legitimate expectation of the company*”. A similar finding was made against the Minister and the Ministry of Finance and Economic Development.
22. The Supreme Court was of the opinion that The (Mauritius) CT Power had the legitimate expectation that the Implementation Agreement would be first signed and that The (Mauritius) CT Power would have nine months **after** signature to provide proof of its financial capabilities. As regards the Ministry of Finance, the Supreme Court was of the view that its decision was equally “*misconceived, unreasonable and irrational and in breach of the legitimate expectation*” of CT Power.
23. In March 2017, i.e. after the judgment of the Supreme Court, The (Mauritius) CT Power entered a claim for damages for some 4 billion rupees as damages. The claim is directed against the State of Mauritius as well as other parties. The matter is still pending.

24. The State of Mauritius appealed against the judgment of the Supreme Court to the Judicial Committee of the Privy Council.
25. In its judgment of 10 June last, the Judicial Committee of the Privy Council unanimously quashed the judgment of the Supreme Court.
26. I am tabling a copy of the judgment of the Judicial Committee of the Privy Council and draw attention to paragraph 65 of the judgment in which the noble lords held, *inter alia*, that as Minister, I was, I quote - “*entitled to have regard to a wide range of considerations, including political considerations*” adding that “*entering into the Implementation Agreement would involve a commitment requiring substantial payments of public money. There is inevitably a possible political dimension to such questions which it would be legitimate to take into account. In the present case, it appears that the incoming government after the general election of December 2014 may have been less convinced than the former government that the project was a good idea and that the commitment to be given in the Implementation Agreement was justified*”.
27. At paragraph 67, the Judicial Committee of the Privy Council also held that I was, I quote - “*entitled simply to take the view that, all things considered CT Power did not appear to be a satisfactory counterparty and that it was undesirable for the Implementation Agreement to be entered into.*”
28. The Judicial Committee of the Privy Council has therefore quashed the order made by the Supreme Court and has given judgment in favour of the State of Mauritius, in favour of the

Ministry of Finance and Economic Development, the Ministry of Energy and Public Utilities and their respective Ministers. It is expected that The (Mauritius) CT Power will have to pay the costs of the case.