

Climate Change

EARTHLIFE AFRICA JOHANNESBURG V MINISTER OF ENVIRONMENTAL AFFAIRS & OTHERS

The High Court, Pretoria, South Africa. Decided 8 March 2017.

A civil society organisation challenges coal plant based on climate change

Parties

Applicant: Earthlife Africa (A non-profit organisation founded to mobilise civil society around environmental issues)

Respondents (Decision makers): Minister of Environmental Affairs; Chief Director: Integrated Environmental Authorisations in the Department of Environmental Affairs (DEA); and The Director: Appeals and Legal Review in DEA

(Independent Power Producers) Thabametsi Power Project (Pty) Ltd; and Thabametsi Power Company (Pty) Ltd

Key Facts

- This is the first climate change court case in South Africa.
- The Chief Director granted environmental authorisation in terms of the National Environmental Management Act, 107 of 1998, to build a 1200MW coal-fired power station (Thabametsi) near Lephalale in the Limpopo Province, without the benefit of a climate impact assessment to inform his decision. The application raises concerns about the environmental impacts of that decision.
- Earthlife lodged an administrative appeal to the Minister of Environmental Affairs against the decision to grant environmental authorisation. However, the Minister upheld the decision to grant the authorisation, but directed that the power company undertake a climate impact assessment prior to the commencement of the project.
- Earthlife launched a judicial review of the decisions of the Chief Director and the Minister.
- Earthlife argued that the Chief Director was obliged to consider the climate change impacts of the proposed power station before granting the authorisation, which he failed to do.
- Coal-fired power stations are the single largest national source of greenhouse gas emissions in SA. Coal-fired power stations thus not only contribute to climate change, but are also at risk from the consequences of climate change.
- Thabametsi's own reports indicate that the power station, if it proceeds, would have an operational lifespan of 40 years. It would emit 8.2 million tons of carbon dioxide equivalent each year, thereby contributing up to 2% of South Africa's total GHG emissions by 2020, and up to 3.9% by 2050.

Key Rights

Right to an environment not harmful to health or well-being

The Court's Decision

- The court confirmed that climate change poses a substantial risk to sustainable development in SA, which is enshrined in the constitutional environmental right.
- Adequate consideration of climate change forms part of the principle of intergenerational justice.
- The decision-maker should have given proper consideration to the climate change impacts of the proposed coal-fired power station before a decision on the application was made.

	<ul style="list-style-type: none"> • The legislative and policy scheme and framework support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process. • The assessment of climate change impacts and mitigating measures will be best accomplished through a professionally researched climate change impact report. • Where the Minister upholds an environmental authorisation on appeal, she has no power to subsequently withdraw the authorisation based on the results of a later study. • The decision was based on a material error of law, was irrational and unreasonable (which are grounds for judicial review under the Promotion of Administrative Justice Act, 3 of 2000).
The Court's Order	<ul style="list-style-type: none"> • The court set aside the appeal decision of the Minister and remitted the matter back to the Minister for reconsideration of the appeal. • The Minister was directed to consider a climate change impact assessment report, a paleontological impact assessment report, comments on the reports from interested and affected parties, and any relevant additional information.
What now?	<ul style="list-style-type: none"> • In compliance with the court order, a climate change impact assessment was undertaken and the Minister reconsidered the appeal. The Minister again upheld the Chief Director's decision to grant environmental authorisation for the proposed power station. Earthlife Africa and groundWork have instituted High Court review proceedings to challenge this decision, which is still to be heard. • On 13 January 2019, three of the South African commercial banks (Nedbank, FirstRand and Standard Bank) withdrew finance for the project. • On 30 October 2019, Earthlife Africa and groundWork appealed against the decision to grant a Provisional Atmospheric Emission Licence to Thabametsi. The appeal is pending. Until a decision is made, the licence is suspended.
International Impact	<ul style="list-style-type: none"> • The case sets an important precedent challenging decisions which rely on outdated energy policies supporting new coal development, and on the application of international agreements in the local context. • Whilst the decisions are being challenged, the construction of the plant, and emissions associated with its operation, are suspended.
International Agreements Cited	<p>United Nations Framework Convention on Climate Change, Kyoto Protocol, Paris Agreement</p>
Key Principles	<p>Sustainable Development, intergenerational justice, precautionary principle ("risk averse and cautious approach"), preventative principle, functus officio doctrine</p>
Key Issues	<p>Consideration of climate impacts as a precursor to environmental decisions, application of international legal obligations in the local context</p>
References & Further Reading	<p>Judgment can be found here. Additional information: Centre for Environmental Rights website Tracy-Lynn Humby in Wits University news</p>