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SETTING THE SCENE FOR CLIMATE CHANGE LITIGATION IN SOUTH AFRICA: *EARTHLIFE AFRICA JOHANNESBURG V MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS* [2017] ZAGPPHC 58 (2017) 65662/16

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Comment

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1 INTRODUCTION

On 8 March 2017 the Gauteng High Court handed down a judgment in the case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others*.[1] The applicant was Earthife Africa[2] and the Minister of Environmental Affairs, the Chief Director: Integrated Environmental Authorisations Department of Environmental Affairs (DEA), the Director: Appeals and Legal Review Department of Environmental Affairs and the Thabametsi Power Project (PTY) Ltd were the respondents (first, second, third and fourth respondents). The decision sets the scene for climate change litigation in South Africa, as it is the very first case in this regard. Here, the court was required to deal with two issues, namely a review of the decision of the Minister of Environmental Affairs relating to the granting of environmental authorisation for the construction of a coal-fired power plant, and the obligation of the Minister to reconsider conducting a climate change impact assessment report for the proposed coal-fired power station. The decision illustrates the role of South Africa's courts in affirming the country's international climate change obligations and the duty and responsibility of the state to curtail the adverse impacts of climate change in the context of socio-economic development activities.

This case note presents a background of the case and analyses the judgment in order to demonstrate its contribution in laying the foundation for future climate change litigation.

1 [2017] ZAGPPHC 58 (2017) 65662/16.

2 Earthlife Africa is a non-profit organisation founded to mobilise civil society around environmental issues. It is also an interested and affected party as contemplated by section 24(4)(v)(a) of the National Environmental Management Act (NEMA) 107 of 1998, and is therefore entitled to a reasonable opportunity to participate in procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment. As an interested and affected party, Earthlife Africa has the standing to bring a review application in its own interest, in the public interest, and in the interest of protecting the environment- NEMA, s 32(1).

2 THE FACTS AND ISSUES OF LAW

The case concerns the proposed construction of a 1200MW coal-fired power station in the outskirt of Lephalale in the Limpopo Province that will be in operation until 2061. The project is intended to address the acute energy challenges that hamper South Africa's socio-economic development. On 25 February 2015 the Chief Director of the DEA granted an environmental authorisation to Thabametsi (the fourth respondent) for the construction of a proposed coal-fired power station.[3] It is estimated that during the 40 years period of its activity the proposed coal-fired power station would emit greenhouse gas (GHG) in an ecologically vulnerable area, the negative climate change impacts of which on Lephalale and the country as a whole ought to be considered or investigated before granting the environmental authorisation.[4] The authorisation application was made and considered in terms of the Environmental Impact Assessments (EIA) Regulations (the Regulations)[5] of the National Environmental Management Act 107 of 1998 (NEMA) that provides the procedures to be followed in conducting EIAs. Thabametsi, appointed Savannah Environmental Pty Ltd to carry out the EIA process, and a scoping report was conducted.[6]

The applicant argued that the climate change impacts of the proposed coal-fired power station were relevant factors and that the Chief Director should have considered them when making his decision. The respondents rejected this claim and argued that in as much as there is no domestic legislation and there are

3 S 24 of the NEMA requires that any listed activity needs to obtain an environmental authorisation before its commencement. The NEMA was amended in 2013.

4 Earthlife (n 1) 119.

5 Environmental Impact Assessment Regulations GN R 543 in GG 33306 of 18 June 2010. It must be borne in mind that the EIA Regulations were changed in 2014. For details see the Environmental Impact Assessment Regulations GN R 982 in GG 38282 of 4 December 2014. Listing notice 2 of Regulation 2014 was amended in regulation 2017 under GN R326 in GG 40772 of 7 April 2017.

6 Earthlife (n 1) 38.

no regulations or policies that explicitly stipulate a requirement to conduct a climate change impact assessment prior to the granting of an environmental authorisation, the applicant's interpretation of the governing legislation was unsubstantial and thus should be set aside.[7] The only obligation for South Africa is to reduce GHG emissions and this is broadly framed without prescribing particular measures for the government to reduce GHG emissions. The respondents argued that measures to reduce GHG emission are discretionary[8] and the South African government in exercising this discretion has taken appropriate steps and measures, including the development of a complex set of mitigations measures, to address climate change impacts in the context of socio-economic development activities in the guise of the National White Paper on Climate Change of 2011. They further contended that although coal-fired power stations are heavy emitters of GHG, the applicant had failed to consider the broader development context in recognising South Africa's energy crisis, and that the government was taking measures such as the construction of a coal-fired plant to address the energy crisis.[9]

The applicant appealed against the second respondent's grant of the environmental authorisation to the first respondent- the Minster of Environmental Affairs. Instead the Minister refused to set the authorisation aside on 7 March 2016, but directed Thabametsi Power Company (Pty) Ltd to undertake a climate change impact assessment prior to the project's commencement. Unhappy with the outcome of the appeal, the applicant approached the court to review the Chief Director's decision authorising the grant of the environmental authorisation and the Minister's decision on appeal.

In her appeal decision of 7 March 2016, the Minister recognised that the climate change impacts of the proposed coal-fired power station were not 'comprehensively assessed and/or considered' prior to the issuance of the environmental authorisation by the second respondent.[10] The Minister then attempted to amend the authorisation, seemingly relying on the power to vary a decision on appeal in terms of section 43 of the NEMA,[11] and inserted an additional condition, which provides that:

> The holder of this authorisation must undertake a climate change impact assessment prior to the commencement of the project, which is to commence no later than six months from the date of signature of the Appeal Decision. The climate change impact assessment must hereafter be lodged with the Department for review and the recommendations contained therein must be considered by the Department.[12]

The Minister argued that her decision could not be impugned as irrational, unreasonable or unlawful, because clause 10.5 would serve a dual purpose. First, it would enable the gathering of emissions data to be used, among other purposes, for monitoring and reporting. Second, it would enable the DEA to determine if it was necessary to amend or supplement the conditions of the environmental authorisation to introduce additional mitigation measures if the emissions were higher than those provided in its carbon budget, or posed an unexpected and unacceptable health risk to the surrounding communities.[13]

The applicant contended that both the Chief Director and the Minister acted unlawfully, irrationally and unreasonably in granting the environmental authorisation in the absence of a climate change impact assessment, and that their action undermined both the purpose of the climate change impact assessment and the environmental authorisation processes, because the climate change impact assessment would have clearly indicated that the environmental authorisation should not be granted. Relying on the decision in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Other*,[14] the applicant argued that in as

7 ibid 16.
8 ibid 16.
9 ibid 19.
10 ibid 7.

11 NEMA (n 2) s 43(6).
12 Clause 10.5 of the inserted new condition of the environmental authorisation.
13 ibid 20.
14 2007 (6) SA 4 (CC).

much as the Minister's decision relating to the grant of the environmental authorisation constituted an administrative action in terms of the Promotion of Administrative Justice Act (PAJA) 3 of 2000, the decision should be set aside since it did not comply with section 8 of the Act.[15]

The applicant relied on the following grounds for a review of the Minister's decision under section 6 of the PAJA:[16] that there was material non-compliance with the mandatory preconditions of section 24(o)(1) of the NEMA, which requires the consideration of all relevant factors, including a climate change impact assessment, before the reaching of a decision on the proposed coal-fired power station; that in terms of the PAJA, the absence of a climate change impact assessment rendered the impugned decision of the Minister both irrational and unreasonable;[17] and that the Minister committed material errors in law in reaching her decision on environmental authorisation in as much as section 6(2)(d) of the PAJA was not complied with.[18]

Two legal issues were raised - one procedural and the other substantive. Procedurally, the case impugned the decision of the Minister for not properly considering section 24(o) of the NEMA, relating to the issuing of an environmental authorisation for the proposed coal-fired power station. It also challenged the failure of the administrative decision of the Minister to comply with section 8 of the PAJA.

Substantively, it impugned the Minister's decision for failing to consider requiring a climate change impact assessment prior to the granting of the environmental authorisation for the proposed coal-fired power station plant.

3 THE COURT'S DECISION AND REASONING

The court rejected the respondent's claim that the Chief Director had considered and weighed the relevant factors that enabled him to make a decision in *good faith*, and that accordingly the court had no business to interfere with the decision.[19] Instead, the court held that the Chief Director had overlooked all relevant considerations relating to the grant of the environmental authorisation for which there was a material non-compliance with the relevant legal

15 Fuel Retailers (n 14) 38. S 8 of the Promotion of Administrative Justice Act (PAJA) 3 of 2000 provides that: The court or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable, including orders-(a) directing the administrator-(i) to give reasons; or (ii) to act in the manner the court or tribunal requires; (b) prohibiting the administrator from acting in a particular manner; (setting aside the administrative action and-(i) remitting the matter for reconsideration by the administrator, with or without directions; or (ii) in exceptional cases- (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or directing the administrator or any other party to the proceedings to pay compensation; (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;(e) granting a temporary interdict or other temporary relief; or (f) as to costs (2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders-(a) directing the taking of the decision; (b) declaring the rights of the parties in relation to the taking of the decision; (c) directing any other parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or (d) as to costs.

16 See s 6 of the PAJA, which provides that: (1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action (2) A court or tribunal has the power to judicially review an administrative action if (a) the administrator who too it- (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was materially influenced by an error of law; (e) the action was taken- (i) for a reason not authorised by the empowering provision;(ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered (iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or…

17 ibid ss 6(2)(f)(ii) and (h).

18 Earthlife (n 1) 11.

19 ibid 100.

provisions, and that the Minister must reconsider the appeal and review the Chief Director's decision in accordance with section 6(2)(e)(iii) of PAJA.[20] In the opinion of the court, the facts of the case were not such as to determine whether the weighing of the factors to be considered for environmental authorisation were reasonable or not, but rather that the Chief Director was unable to correctly weigh these considerations due to the lack of relevant information to balance climate change factors against other relevant factors, since 'it is simply impossible to strike an appropriate equilibrium where the details of one of the key factors to be balanced are not available to the decision-maker'.[21]

Instead, the Chief Director had approved the scoping report without considering and/ investigating the potential climate change impacts.[22] The emphasis had been only on the scanty information of the EIR report, which stated that the climate change impacts of the proposed power-station project would be relatively small.[23] In this regard, Murphy J was inclined to rule that:

> …I accept fully that the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal-fired power station which will emit substantial GHGs in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorisation.[24]

The court held that it would have been appropriate for the Chief Director to consider the information on the environmental EIR report before reaching his decision, because a climate change impact assessment report for the proposed power station would have helped *inter-alia* to determine the extent to which the proposed coal-fired power station would contribute to climate change over its lifetime; the resilience of the coal-fired power station to climate change impacts including rising temperatures, a diminishing water supply and extreme weather patterns and particularly how climate change would impact on its operation; and finally, how climate change impacts could be avoided, mitigated or remedied.[25]

The court also held that the respondents had provided no legal basis for rejecting the claim that a climate change impact assessment was necessary, particularly as the impacts had already been considered in the making of the Integrated Resource Plan (IRP).[26] The court was of the view that, in tandem with South Africa's international climate change agreements, including the Paris Agreements, the issue at hand was not whether a new coal-fired power station was permitted under the Paris Agreement and the National Determined Contributions (NDC), but rather whether a climate change impact assessment was required before authorising the construction of new power stations.[27] The court held that a climate change impact assessment was necessary and relevant to ensure that proposed power stations such as the present one were constructed in accordance with the requirement that they should fit 'South Africa's peak, plateau and decline trajectory as outlined in the NDC as well as its commitment to build cleaner and more efficient than existing power stations [sic]'.[28] In this regard, Judge Murphy stated that:

> In conclusion, therefore, the legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigation measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accompanied by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra-and extra-statutory context of section 42(0)(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are

20 ibid 101.
21 ibid 100.
22 ibid 38.
23 ibid 50; 101.
24 ibid 119.

25 ibid 6.
26 ibid 97.
27 ibid 90.
28 ibid 90.

relevant factors that must be considered before granting environmental authorisation.[29]

The court suspended the grant of the environmental authorisation until a full investigation and consideration of the climate change impacts assessment report of the proposed coal-fired power station had been conducted by the first and second respondents.[30]

4 ANALYSIS

This case note fully supports the purposive approach to interpretation adopted by the judge to comply with the DEA's legal obligations. The decision is particularly significant for two reasons. First, the judgment is aligned with South Africa's projected image as a leading champion in climate change negotiations. Second, it highlights the importance of the principle of judicial review under section 6 of the PAJA. To be sure, the judicial review of administrative action is a particularly popular and possibly the best method to bring climate change-related issues before a court,[31] and has been perceived as a means of adjudicating on climate change related impacts in the context of socio-economic development.[32] Even though the respondents argued that there is no statutory requirement obliging the consideration of climate change and its impacts in the context of development activities,[33] it was established that this does not negate a legal duty on their part to consider climate change impacts as a relevant consideration.[34] It was on these bases that the respondents were asked to conduct a full climate change impact assessment report for the proposed coal-fired power station.[35] It seems evident that without due consideration of the judicial review process, the judge would have found it difficult to order a reconsideration of the climate change impacts of the proposed coal-fired power station.

The fact that there is a duty to consider cumulative impacts as part of the environmental assessment process, suggests that such assessments must in principle broadly assess and consider all identified impacts and risks including the nature, significance, consequences, extent, duration and probable impacts of the development project.[36] Such assessment is necessary for two reasons: Firstly, the assessment could relate to a listed activity which emits GHG, for which the NEMA and its Regulations apply. Secondly, the assessment could also lead to an increased vulnerability of the local population and the surrounding environment to the impact of climate change, as in the case of the proposed coal-fired power station.

Although coal will most probably in future remain a major source of government medium-term electricity generation,[37] it is the dirtiest of all energy sources because the generation process has the potential to emit high levels of GHG,[38] and may cause serious impacts on human health and the environment. Because the proposed coal-fired power station could significantly contribute to augmenting South Africa's GHG emission, it was crucially important to address its peak, plateau and decline trajectory *inter alia* through the consideration of a climate change impact assessment. Moreover, South Africa is a water-stressed country and it was found that as water scarcity increases as a result of climate change, it will certainly place electricity generation at high risk, given the fact that it is a highly water-intensive industry.[39]

29 ibid 91.
30 ibid 121.
31 David Markel and JB Ruhl 'An Empirical Analysis of Climate Change in the Courts: A New Jurisprudence or Business as Usual? (2012) 15(64) *Florida Law Review* 74.
32 Olivia Rumble and Richard Summers 'Climate Change Litigation' in Tracy-Lynn Humby and others (eds) *Climate Change Law and Governance in South Africa* (Original Service 2016), 6-16.
33 Para 21; Rumble and Summers (n 32) 6-17-6-18.
34 Earthlife (n 1) 88.
35 ibid 91.
36 Appendix 3, s 3(h)(v) in GN R982 of 4 December 2014.
37 Earthlife (n 1) 26.
38 Karin Lehmann 'South Africa's Climate Change Commitment and Regulatory Response Potential' in Humby and others (eds) *Climate Change Law and Governance in South Africa* (Original Service 2016), 8-3; WNA, 'Comparison of Lifecycle Greenhouse Gas Emissions of Various Electricity Generation Sources' (World Nuclear Association, July 2011), <http://www.world-nuclear.org/uploadedFiles/org/WNA/Publications/Working_Group_Reports/comparison_of_lifecycle.pdf> accessed 10 April 2017.
39 Earthlife (n 1) 25.

South Africa is a Non- Annex I country,[40] but it has signed and ratified the United Nations Framework Convention to Climate Change (UNFCCC), whose aim is to stabilise GHG in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[41] As part of the fulfilling of the country's commitment in the UNFCCC, the South African government in 2012 adopted the National Climate Change Response Policy White Paper,[42] which clearly outlines the country's climate change response measures and requires that these measures must be guided by principles contained in the Constitution of the Republic of South Africa, 1996; the NEMA; and the UNFCCC.[43]

Yet, it was found that the above principles were not adhered to. Particularly, section 24(o)(1) of the NEMA and its Regulations relating to the content of an EIA report were not respected. While Regulation 31(2) of the NEMA EIA Regulations requires that an EIA report contain all the relevant information[44] necessary to enable a competent authority to reach a decision, Regulation 31(2)(k) requires the report to include a description of all environmental issues identified during the assessment processes and an indication of the extent to which the issues would be addressed.[45] An EIA report must also contain information on and address issues such as cumulative impacts; the nature of the impacts; the extent and duration of the impacts; the probability of the impacts' occurring; the degree to which the impacts can be reversed; the degree to which the impacts may cause irreplaceable loss of resources and the degree to which the impacts can be mitigated.[46] It was reasonably expected of the Chief Director to reject the grant for environmental authorisation in as much as the foregone requirements had not been complied with. Regrettably, the Chief Director did not do this. Instead, the Chief Director granted the authorisation, which was supported by the Minister, and in so doing acted unlawfully and undermined the very purpose of the environmental authorisation process. As the Minister recognised and appreciated the fact that a fuller climate change impact assessment was required, it is surprising that she still upheld the environmental authorisation, subject to the additional clause above.

As the DEA has a mission to provide leadership in environmental management, conservation and protection towards sustainability for the benefit of South African and the global community,[47] it would have been appropriate had the Minister either referred the matter back to the Chief Director or adjourned the *de novo* appeal and directed Thabametsi to obtain a climate change impact report in order to reconsider the application for environmental authorisation.[48] Regrettably, the Minister willingly and consciously failed to do so, and instead resorted to clause 10.5.[49] The fact that human-induced activities such as the construction of coal-fired power station contribute significantly to GHG emissions suggests that the actions required to curb their impacts through mitigation or adaptation entail strict adherence to legislative provisions such as those applicable to EIA and climate change impact assessments, that serve to guide the extent to which these impacts could be reduced, avoided, minimised and remedied against

40 In terms of the UNFCCC, only Annex I countries have obligations to reduce GHG emission. However, this does not mean that Non-Annex I countries, including South Africa should deviate from the aims of the Convention. Non-Annex I countries are still expected to observe and report in general terms on their actions relating to measures to address climate change as well as measures to adapt to its impacts within their domestic jurisdictions. See the United Nations Framework Convention on Climate Change, 'First steps to a safer future: Introducing the United nations Framework Convention on Climate Change' <http://unfccc.int/essential_background/convention/items/6036.php.> accessed 08 May 2017.

41 Art 2 of the UNFCCC.

42 Government of the Republic of South Africa *National Climate Change Response White Paper* (2011) GN 757 GG 34695 of 19 October 2011 (NCCRP).

43 Donald A. Brown and others, 'South Africa and Climate Change Ethics' in Tracy-Lynn Humby and others (eds) *Climate Change Law and Governance in South Africa* (Original Service 2016), 7-5.

44 Such information includes: a description of the environment likely to be affected and the manner in which the physical, biological, social, economic and cultural aspects of the environment may be affected by the activity, a description of identified potential alternatives to the proposed activity with regard to the activity's advantages and disadvantages.

45 Earthlife (n 1) 14.

46 Reg 31(2)(I).

47 See https://www.environment.gov.za/aboutus/department#vision. Date accessed 18-04-2017.

48 Earthlife (n 1) 121.

49 ibid 7; 8.

the background of the constitutional obligation on the state to promote an environment not harmful to health and well-being, and to ensure that justifiable socio-economic development is ecologically sustainable.[50]

In view of the absence of climate change impact assessment from the South African legal framework and particularly the EIA Regulation, it appears that this case has made a major advance for climate change regulation in South Africa. The judgment raised and discussed pertinent factual and interesting substantive and procedural legal issues, and 'it is…a landmark ruling that actually holds the environmental affairs department to account'.[51] Being the first South African climate change litigation, the ruling actually sets a precedent for future climate change litigation in the country. As a country heavily dependent on fossil fuel, which emits high levels of the GHGs that contribute to the country's being a significant polluter, it is hoped that future climate change cases will be adjudicated in a similar manner to help mitigate any climate change impacts in the context of development-related activities generally, and specifically in the construction of coal-fired power stations. The impact of climate change is not limited only to the environment, but also pertains to the people who inhabit it.[52] Attention must therefore be paid to combatting its impacts, especially as climate change means less water, more storm surges, less food and more floods.

In the light of the above, the judge was correct in ordering a review of the administrative decision granting the environmental authorisation to the effect that it was to include a climate change impact assessment.

50 The *Constitution of the Republic of South Africa*, 1996, s 24.

51 Mail and Guardian, 'Earthlife Africa wins South Africa's first climate change case' (8 March 2017) <https://mg.co.za/article/2017-03-08-earthlife-africa-wins-south-africas-first-climate-change-case> accessed 18 April 2017.

52 Department of Environmental Affairs *National Climate Change Response Green Paper* 2010; Government of the Republic of South Africa (n 42).

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