



Centre for Environmental Rights

Advancing Environmental Rights in South Africa



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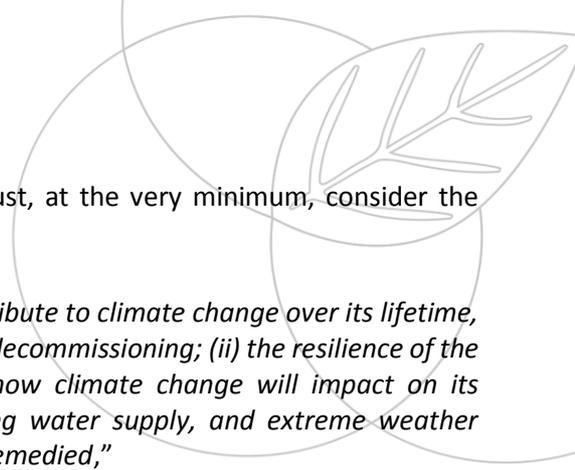
Dear Sirs

IMPLICATIONS OF THE JUDGMENT IN EARTHLIFE AFRICA JOHANNESBURG V MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS CASE NO 65662/16

1. We are writing to you with reference to the recent decision, delivered in the North Gauteng High Court in the case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (“the Thabametsi case”).¹
2. As you will be aware, the North Gauteng High Court has now confirmed that a climate change impact assessment (CCIA) was required as part of the environmental impact assessment (EIA) for the Thabametsi power station before a decision could have been made to authorise Thabametsi, and that a plain reading of section 240 of the National Environmental Management Act, 1998 (NEMA) confirms that climate change impacts are indeed relevant factors that must be considered as part of an EIA.

¹ Judgement of 8 March 2017, Murphy J, *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and 4 others (NGHC)*, case number: 65662/16 / [2017] JOL 37526 (GP)

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3. The judgment in the Thabametsi case further confirms that a CCIA must, at the very minimum, consider the following factors:

"(i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied,"

and that these climate change impacts are best assessed by means of a "*professionally researched climate change impact report*".

4. The judgment is relevant for all proposed future coal-fired power stations, including those under the Coal Baseload Independent Power Producers Programme (CBIPPPP), and any activities with potentially significant climate change impacts. As such, we trust that the Department of Environmental Affairs ("the Department") will give effect to this judgement when exercising its function as the authority for considering EIAs and issuing environmental authorisations for future activities with potentially significant climate change impacts.
5. In relation to activities which have already been authorised, but which have not yet commenced, and which should have conducted a CCIA as part of their EIAs, it is our considered view that allowing these projects to proceed without any measures in place to determine the extent of the climate change impacts and mitigate these impacts - where possible - would amount to a breach of the NEMA duty of care and the environmental right enshrined in section 24 of the Constitution – thereby exposing these decisions to legal challenges.
6. We also suggest that the Department begin taking urgent steps to adopt measures such as, for example, guidelines which set out how a CCIA should be conducted and what it should consider. Such measures must provide for a risk-averse and cautious approach² and must require wider analysis of not only greenhouse gas (GHG) emissions, but also broader climate change impacts. We refer to our previous comments on the Thabametsi scoping and draft climate change impact report, and a subsequent email to Mr Malaza, wherein submissions were made as to what a CCIA should consider. Copies of these are attached. We again emphasise that a CCIA must, at least, take into account:
- 6.1. an activity's direct impacts on climate change - in addition to simply considering the extent of GHG emissions to arise from the activity, this must include as assessment of: indirect and full life-cycle emissions; cumulative emissions; and the environmental and social cost of the GHG emissions;
 - 6.2. the sensitivity and vulnerability of the proposed activity's location to the impacts of climate change;
 - 6.3. the extent to which the viability of the project itself will be affected by climate change impacts;
 - 6.4. how predicted climate change effects on the environment and society – at both national level and locally - will be aggravated by the activity's impacts; in other words, the extent to which the activity will exacerbate the vulnerability and exposure of the environment and communities to the impacts of climate change; and
 - 6.5. mitigation measures, if any, to address the climate change impacts; and where the impacts cannot be substantially mitigated, must include a recommendation that the project should not go ahead in light of the significant and irreversible climate change impacts.
7. Should you have any queries in relation to the above, or require any additional information, please let us know.
8. We look forward to receiving your response.

Yours sincerely

² NEMA section 2(4) (vii).

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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