

Court outcome will dictate SA's commitment to Paris Agreement

The practical consequences of the [Paris Agreement](#) may soon be better understood as an application regarding climate change is being heard in the Pretoria High Court. At the hearing Earthlife Africa (ELA) will argue that the nationally determined contribution (NDC) cannot be met unless coal-fired power developers are required to assess climate impacts.

By [Sandra Gore and Alecia Pienaar](#) 2 Mar 2017



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Since the Paris Agreement was adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change in December 2015, companies have been grappling with the potential implications the global commitment to combat climate change could have on their businesses. The Paris Agreement is hailed as the first-ever universal, legally binding global climate deal that seeks to accelerate the reduction in global greenhouse gas emissions (GHG).

South Africa ratified the Paris Agreement in November 2016 and committed in its (NDC) to a peak, plateau and decline greenhouse gas emissions trajectory range, which are estimated to range between 398 and 614 Mt CO₂-eq by 2025 and 2030.

The Thabametsi saga

Thabametsi Power Company was granted an environmental authorisation (EA) to establish a 630MW coal-fired power station near Lephalale in Limpopo Province. ELA appealed to the minister of environmental affairs against the decision of the chief director of integrated environmental affairs to grant the EA.

The minister dismissed the appeal, but made the EA conditional to a climate change impact assessment (CCIA) being submitted for consideration to the department of environmental affairs prior to the project's commencement.

Tick box exercise

ELA however labelled the condition as a "tick box" exercise, given that neither the minister nor the department would have legal competence to withdraw the EA based on the finding of the CCIA. It therefore approached the High Court to have the court's decision and the minister's dismissal reviewed and set aside in terms of the Promotion of Administrative Justice Act, 2000.

Central to the application is ELA's submission that the EA could not have been granted without the CD's consideration of a

relevant factors, which, because of the government's obligations under national and international law, includes a CCIA.

The Minister, CD and Thabametsi are opposing the application. The minister's answering affidavit provides insight into the government's current climate change management approach. In essence, it is argued that:

- a CCIA is not yet a mandatory component of an environmental impact assessment, particularly given the current absence of GHG emission guidelines in South African law. In any event, climate change impacts were considered in both the air quality and water impact studies Thabametsi conducted during the EIA process;
- climate change impacts have been considered in the development of the Integrated Resource Plan for Electricity 2013-2030, which, together with other national electricity legislation and policy, permits the establishment of coal-fired power stations;
- until such time as the Paris Agreement's obligations are enacted into national law, they are not binding on any party at a domestic level, including Thabametsi;
- South Africa's transition to a low carbon economy is anticipated to be rigid and slow, especially in light of current challenges faced by the energy sector, which is acknowledged in the NDC; and
- the project will establish a high efficiency power plant, which includes modern emission abatement technology that complies with the South African government's obligations under the Paris Agreement.

In reply to these submissions, ELA stresses that the government remains constitutionally bound to apply domestic law in a manner that is consistent with its international law obligations. Therefore, a CCIA must be conducted to ascertain whether the project aligns with the NDC before an EA can be granted.

First climate change lawsuit

The project's initial CCIA report has in the interim been circulated for public comment. The results note "very high" GHG emissions and "significant" climate change impacts associated with the project, and with ELA vying to bring the report before the court, it is difficult to predict the outcome of what has been labelled South Africa's "first climate change lawsuit". Of importance will be the judiciary's pronouncement on the role of a CCIA in the greater EIA scheme and the weight it will attach to the NDC.

What will be interesting to see is the extent the Paris Agreement will bring climate change to the forefront of development disputes. It is apparent that Government seeks to, in the interest of managing energy and other socio-economic challenges, sustain a slow transition to a decarbonised economy.

Businesses that will eventually have to decouple from carbon intense processes are however urged to closely follow these developments and seek advice on compliance with air quality and water legislation, as they are evolving rapidly in light of South Africa's international commitment.

ABOUT THE AUTHOR

Sandra Gore and Alecia Flenaar are environmental law experts at Cliffe Dekker Hofmeyr.

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