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ENVIRONMENTAL ALERT

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FROM PARIS TO PRETORIA: HIGH COURT ADJUDICATES ON CLIMATE CHANGE FOR THE FIRST TIME

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

The commitment was recently brought to the forefront in South Africa's first-ever climate change court case, wherein the Pretoria High Court was called to pronounce on the necessity of a climate change impact assessment in an environmental impact assessment (EIA) for impacts of a coal-fired power station (Application).

The case concerned the grant of an environmental authorisation (EA) to Thabametsi Power Company (Pty) Ltd (Thabametsi) for the establishment of a 1200 megawatt coal-fired power station (Project) near Lephalale in Limpopo Province. Earthlife Africa (ELA) appealed to the Minister of Environmental Affairs (Minister) against the decision of the Chief Director of Integrated Environmental Affairs to grant the EA, submitting as a ground of appeal that the Chief Director had failed

to consider the State's international and national obligations to mitigate and take positive steps against climate change (Appeal Ground). The Minister dismissed the appeal, but made the EA conditional to a climate change impact assessment being submitted for consideration to the Department of Environmental Affairs (Department) prior to the Project's commencement.

ELA, however, labelled the condition as a "tick box" exercise, given that neither the Minister nor the Department would have the legal competence to withdraw the EA based on the findings of the climate change impact assessment. It therefore approached the High Court to have the Chief Director's decision and the Minister's dismissal reviewed and set aside in terms of the Promotion of Administrative Justice Act, 2000. The Appeal Ground was central to the Application, with ELA submitting that the EA could not have been granted before the Chief Director considered all relevant factors, which, because of the Government's obligations under national and international law, included a climate change impact assessment.

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A climate change impact assessment had to be conducted prior to granting an EA to ascertain whether the Project aligns with the NDC.



The Minister, Chief Director and Thabametsi opposed the Application, with the Minister's Answering Affidavit providing insight into the Government's present climate change management approach. In essence, it was argued before Court that:

- a climate change impact assessment is not yet a mandatory component of an EIA, 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 2010-2030, 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 parties on 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 stressed that the Government remains constitutionally bound to apply domestic law in a manner that is consistent with its international law obligations. Therefore, a climate change impact assessment had to be conducted prior to granting an EA to ascertain whether the Project aligns with the NDC.

Before the matter was heard in Court on 2 and 3 March 2017, the Project's initial climate change impact assessment was circulated for public comment on 27 January 2017. The results of the report note "very high" GHG emissions and "significant" climate change impacts associated with the Project, stemming from limitations in the power station's technological design, and the absence of carbon capture and storage as a mitigation technique.

Taking this into account and turning to the DEA's obligations in terms of the Constitution, relevant statutes, policy and international law, the Court remarked that:

The legislative and policy scheme and framework overwhelmingly support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the EA process, and that consideration of such will be best accomplished by means of professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context...support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting an EA.

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Giving practical consequence to the Paris Agreement, the Court held that “a climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa’s peak, plateau and decline trajectory.



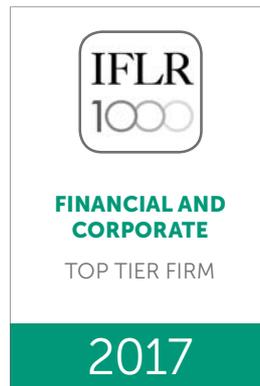
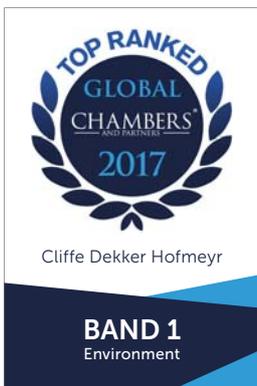
Finding that the Chief Director overlooked relevant climate change considerations and that the Minister had erred in upholding the EA, the Court ordered that Minister’s decision to uphold the EA and dismissal of the appeal be reviewed and set aside. The appeal is to be remitted back to the Minister for reconsideration, who is obligated to take into account *inter alia* a climate change impact assessment, public comments on this report and any additional information required by the Minister to reach a decision on the Appeal Ground.

Giving practical consequence to the Paris Agreement, the Court held that “a climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa’s peak, plateau and decline trajectory, as

outlined in the NDC, and its commitment to build cleaner and more efficient than existing power stations”.

The Court did not, however, delineate the exact scope or nature of a climate change impact assessment, but did consider the EIA process inherently flexible enough to allow for such assessments to be conducted on a case-by-case basis. This leaves room for an open-ended process that could lead to the incurrence of significant costs. Developers wanting to apply for EAs are urged to first seek advice on the necessity of incorporating a climate change impact assessment into the EIA process.

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