

CLIMATE CHANGE INTERVENTIONS IN SOUTH AFRICA: THE SIGNIFICANCE OF

Earthlife Africa Johannesburg v Minister of Environmental Affairs (Thabametsi case)
[2017] JOL 37526 (GP)

1 Introduction

South Africa is exposed to climate vulnerabilities owing to its socio-economic and environmental situations (National Climate Change Response White Paper (2012) 8). It is, therefore, not a surprise that it is a signatory to:

- the United Nations Framework Convention on Climate Change (UNFCCC (1992) ILM 851, which South Africa ratified on 29 August 1999 http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 2018-10-13));
- the Kyoto Protocol (United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) entered into force 16 February 2005, to which South Africa acceded on 31 July 2002 http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 2018-10-13)); and
- the 2015 Paris Agreement (C.N.63.2016.TREATIES-XXVII.7.d of 16 February 2016, which South Africa ratified on 1 November 2016), and

has endorsed the Sustainable Development Goals ((SDGs) United Nations Sustainable Development Goals (2015) <https://sustainabledevelopment.un.org/?menu=1300> (accessed 2018-10-13); see SA committed to Sustainable Development Goals <http://www.sanews.gov.za/south-africa/sa-committed-sustainable-development-goals> (accessed 2018-10-13)), and thereby committed to contribute to the global effort to reduce and mitigate greenhouse gas (GHG) emissions (National Climate Change Response White Paper (2012) 10).

Both the Paris Agreement in its article 3 and SDG No. 13, respectively, require every nation to undertake effort with a view to addressing climate change. The application of the above instruments for the purpose of addressing climate change is important but, in reality, states hardly divert their attention to climate change while pursuing economic development objectives. Whether and to what extent a court can compel government and its agents in South Africa to take the impact of climate change into consideration in its developmental pursuit is the main subject matter of *Earthlife Africa Johannesburg v Minister of Environmental Affairs (Thabametsi)* ((2017) JOL 37526 (GP)). Although a High Court decision,

Thabametsi is the first case of its kind to engage with climate-change impact assessment in South Africa.

2 Facts of the case

At issue in *Thabametsi* was whether a climate-change impact assessment was a prerequisite for the authorisation of a proposal to build a 1200MW coal-fired power station near Lephalale in the Limpopo Province. The applicant, Earthlife Africa (Earthlife), a non-profit organisation and an interested party within the meaning of section 24(4)(v)(a) of the National Environmental Management Act (107 of 1998) (NEMA), pursued judicial review proceedings against various environmental authorities involved in granting authorisation to Thabametsi Power Company (Pty) Ltd (Thabametsi) for the construction of the power station projected to be in operation until at least 2061. The environmental authorities are the first respondent (Minister of Environmental Affairs referred to as “the Minister”), the second respondent (Chief Director: Integrated Environmental Authorisations Department of Environmental Affairs), and the third respondent (Director: Appeals and Legal Review Department of Environmental Affairs, referred to as “the Director”). Section 24 of NEMA provides that any of the activities listed or specified by the Minister require an environmental authorisation prior to commencement. The construction of a coal-fired power station is one such listed activity. The third respondent is the designated competent authority to decide on environmental authorisation for power stations. On 25 February 2015, the third respondent granted Thabametsi an environmental authorisation for the proposed power station.

The applicant appealed against the decision to the first respondent, the Minister, who, despite acknowledging that climate-change impact assessment was relevant in deciding whether to grant an authorisation, upheld the decision of the third respondent on 7 March 2016 (*Thabametsi supra* par 52–62). Subsequent to the appeal to the Minister, a climate-change report was prepared on 22 April 2016 and made available for comment on 9 October 2016. The report took into consideration some of the recommendations of the applicant in relation to climate-change impact assessment. Accordingly, the Minister decided to vary the conditions of authorisation granted prior to a climate change impact assessment (*Thabametsi supra* par 67–75). Contesting this approach as legally unfeasible, the applicant approached the court to review and set aside the decisions granting the environmental authorisation. The applicant invited the court to remit the decision about the application for environmental authorisation to the second respondent for reconsideration and direct him to consider, among other things, a climate change impact assessment report (*Thabametsi supra* par 117). The court granted the order in view of its significance to the public interest. It is submitted that the order of court was valid in that the decision authorising the power plant is incompatible with section 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which guarantees to everyone the right to just administrative action that is lawful, reasonable and procedurally fair. Section 1 of the Promotion of Administrative Justice Act (3 of 2000) (PAJA) describes administrative action as including:

“any decision taken, or any failure to take a decision, by – (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.”

It is important to examine the issues involved in the decision as they relate to climate-change-related projects in South Africa.

3 Overview of legal issues

Key issues in relation to climate change that the court considers, as distilled from the judgment, are: whether the impact of climate change was properly considered before authorisation was granted by the third respondent *Thabametsi supra* par 45), and whether, upon acknowledging that a climate-change impact assessment had not been made, the decision of the first respondent (on the understanding that it constituted administrative action as defined by section 1 of PAJA) to uphold the authorisation subject to such an assessment was regular *Thabametsi supra* par 62–67). On the first issue, the applicant contended a climate-change impact assessment was included in the compulsory requirements of section 24O(1) of NEMA, which calls for the consideration of all relevant factors before granting an environmental authorisation. The applicant also argued that section 24O(1) should be read together with the provisions of section 24 of the Constitution on the right to a healthy environment, and with the obligations of South Africa under international climate change conventions *Thabametsi supra* par 11–15).

The applicant argued that coal-fired power stations are inappropriate for generating electricity since other forms of power generation are sustainable and less damaging to the environment *Thabametsi supra* par 23). The applicant argued that non-compliance with the impact-assessment requirement rendered the decisions of the first, second and third respondents irregular in that they were inconsistent with the requirements under PAJA that administrative action be procedurally fair and lawful (*Thabametsi supra* par 11). In response, the first, second and third respondents argued that no specific provision exists in South African legislation, regulations or policies mandating the need for a climate-change impact assessment before the grant of an environmental authorisation, and that measures under international climate-change conventions are not compulsory, but merely within government’s discretion. They further contended that, in any event, government must balance its obligations under international instruments with its development needs, which the proposed coal-fired power station seeks to achieve (*Thabametsi supra* par 16–21).

The applicant also disagreed with the decision of the first respondent to confirm authorisation subject to the condition that a climate-change impact assessment be made. In its view, the first respondent acted unlawfully and undermined the purpose of the envisaged climate impact assessment; in that, if it turned out that authorisation ought not to have been granted, the Chief Director and the Minister would have lacked the power to withdraw the authorisation *Thabametsi supra* par 9 and 108). This is because the protective nature of NEMA and the Minister’s duty to act in terms of section 31L of NEMA which deals with power to issue compliance order, only allows

for amendment of authorisation by the Chief Director, not its revocation, and the power of the Minister under section 31N to revoke authorisation upon a finding of non-compliance with an amendment of the Chief Director is inapplicable in the circumstances as it would amount to using the provision to achieve an ulterior purpose *Thabametsi supra* par 110). Hence, it was further submitted by the applicant that the authorisation should be set aside by the court and the process should begin afresh (*Thabametsi supra* par 9 and 108). The first respondent countered that the protective nature of NEMA and the duty of the Minister to act in the interest of the environment suggest that, in the circumstances, the Minister has an implied power to revoke authorisation if it later turned out that the power station could cause irreparable damage (*Thabametsi supra* par 111).

4 Analysis and significance of the court's decision

As revealed by the analysis below, the engagement of the court with the issues described above carries significant implications for climate-change interventions in South Africa. As shall be made manifest, the analysis of the court demonstrates that the need for climate impact assessment is inherent in domestic law and policy of South Africa. It affirms that administrative decisions on projects must have regard to the impact of climate change. However, it also showcases a missed opportunity by the court to make explicit the relationship between climate change and the realisation of socio-economic rights.

4.1 The climate impact assessment imperative is inherent in domestic law and policy

The court correctly noted that South Africa contributes to global GHG emissions as a result of mining and mineral processing and coal-intensive energy systems, and referred to the White Paper regarding the need for climate adaptation and mitigations, which indicates that, owing to its socio-economic and environmental context, South Africa is vulnerable to climate change (*Thabametsi supra* par 25–27). This represents the first time such an acknowledgement has been made in a judicial decision. The copious references by the court to government documents such as the White Paper (National Climate Change Response White Paper (2012) 8; *Thabametsi supra* par 26–27, 54), the IRP (*Thabametsi supra* par 31), and the Electricity Regulation Act (8 of 2006) (*Thabametsi supra* par 33) suggest that government's commitments in its policy documents can be useful to a court in determining the link between the actions of government and climate change.

As neither NEMA nor any government policy document on climate change specifically prescribes a climate-change impact assessment, the decision of the court is useful to future legal proceedings on climate-change litigation in that it clarifies the content of the envisaged climate-change impact assessment and its legal basis. Regarding the content of a climate-change impact assessment, the court took the view that it comprises: (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 (*Thabametsi supra* par 6). Arguably, these criteria are not only applicable in the context of coal-fired power stations; they could be useful in the context of any decision constituting an administrative action that may have adverse implications for climate change.

In relation to the legal basis for the requirement of a climate-change impact assessment, the court referred to section 24O(1) of NEMA and Regulation 31(2) (*Thabametsi supra* par 13–14) in coming to the conclusion that:

“All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy the environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project’s climate change impact and measures to avoid, reduce or remedy them.” (*Thabametsi supra* par 78)

To justify the conclusion, the court referred to section 24 of the Constitution and its mandate to apply international law under sections 39(1)(b) and 233 of the Constitution. Based on that provision, the court could situate the need for a climate-change impact assessment in the provision of article 3(3) of the UNFCCC on the precautionary principle that requires all states parties to anticipate, prevent or minimise causes of climate change, and in article 4(1)(f), which imposes an obligation on all states parties to take climate-change considerations into account in their relevant environmental policies and actions (*Thabametsi supra* par 81–83). This signifies that assuming (without conceding) that there is a lack of conclusive scientific evidence on climate change, the government of South Africa should still take climate change into consideration in the implementation of its socio-economic actions. The reference to international law shows that ongoing developments in international environmental law relating to climate change have a significant role in clarifying the State’s obligations on climate change. Climate change has been a subject of specific focus in international environmental law instruments consisting of the UNFCCC ((1992) ILM 851), the Kyoto Protocol (United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)) and the Paris Agreement (C.N.63.2016.TREATIES-XXVII.7.d of 16 February 2016). As Ngcobo CJ noted:

“Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law. ... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.” (*Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 97)

Thus, the approach of the court in *Thabametsi* confirms the long-standing position of the courts on the imperative to consider international law in determining disputes.

4.2 *Administrative decisions on projects must consider climate-change impact assessment*

The court held that the administrative action of the Chief Director overlooked relevant considerations such as the need for a climate-change impact assessment (*Thabametsi supra* par 101), and that the Minister erred in upholding the granting of the environmental authorisation (*Thabametsi supra* par 107). In the view of the court, once an application is tainted with irregularity, the Minister cannot revoke the authorisation, but must have it set aside (*Thabametsi supra* par 116).

The court's position signifies that it is crucial for administrative officials and political office holders to consider undertaking a climate-change impact assessment when deciding on whether to authorise developmental projects so that their decisions will not be found to be invalid administrative action susceptible to review. The decision is significant in that it takes the issue of climate change beyond the wave of partisan politics and commits project developers and government to embark on climate-change impact assessments as a concrete intervention on climate change. This has multiple implications for different stakeholders.

To the government, the finding offers a legal basis for all the organs of government dealing with the environment and development to evaluate themselves on their commitment to mitigate climate change both in domestic and international frameworks. With the ingredients of a climate-change impact assessment clearly set out in the decision, project developers can integrate into their work the cost of implementing a climate-change impact assessment, while civil society can use the judgment to mobilise for activism to hold government accountable in different fora, and sensitise different sectors of the public on the reality of climate change, its consequences and the need to take climate-change impact assessments into account when making a decision on development projects.

4.3 *Missed opportunity: Lack of an explicit link with socio-economic rights*

South Africa is facing acute energy challenges that hamper economic development (*Thabametsi supra* par 18). Hence, the court noted that meeting development needs to be done sustainably and that climate-change impact assessments are a key means to promote sustainable development (*Thabametsi supra* par 80). The court's position in fact reinforces the interconnected nature of sustainable development and climate change, which has been recognised since the first International Panel on Climate Change (IPCC) assessment report in 1990 (Watson, Rodhe, Oeschger and Siegenthaler "Greenhouse Gases and Aerosols" in Houghton, Callander and Varney (eds) *Scientific Assessment of Climate Change* (1990) 1).

This interconnection is mentioned 23 times in the Paris Agreement against just three times in the Kyoto Protocol (Olsen, Taibi, Braden and Verles "Sustainable Development Impact Assessment of Climate Actions: Best Practice, Tools and Guidance for Sustainable Development

Assessment of Climate Actions and Relevant Considerations for Article 6 of the Paris Agreement” (4 August 2018) https://www.goldstandard.org/sites/default/files/documents/3.policy_brief_sd_assessment_180824.pdf (accessed 2018-10-13)). The improved focus on sustainable development in the context of climate change portrays a steady shift away from a “climate first” approach as seen in the Kyoto regime in 1997 towards the “climate-compatible development” approach of the Paris regime in 2015 (Olsen, Verles and Braden “Aligning the Agendas: A Party-Driven Dialogue on Sustainable Development in the Context of Article 6 Paris Agreement” (2018) <http://www.unepdtu.org/newsbase/2018/04/aligning-the-agendas-on-development-and-climate?id=26c033d5-5598-4d8e-8fec-fede9a748307> (accessed 2018-10-14)).

A lack of adequate regard for climate change, according to the court, infringes the provisions of section 24(b)(iii) of the Constitution, which provides that the environment should be protected by securing the ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (*Thabametsi supra* par 82). An inadequate regard for the impact of projects on the climate can undermine sustainable development. The court referred to the decision of the Constitutional Court in the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* (2007 (6) SA 4 (CC) par 86), which emphasised the need for government and its organs to consider the social and economic impact of projects. This reference is a good development as it affirms that climate change can negatively impact the realisation of socio-economic objectives.

The court in *Thabametsi* missed an important opportunity to use national and international law to connect the significance of climate change to the realisation of socio-economic rights, despite the observation that the need for climate-change impact assessment is crucial in South Africa’s socio-economic context, and water supply (*Thabametsi supra* par 25). Relying as it did on sections 39(1)(b) and 233 of the Constitution, one would have expected the court to refer to the effect of adverse climate change on human rights in making a case for the necessity of climate-change impact assessment as a tool for preventing projects that can contribute to global warming.

The link between climate change and human rights is already clarified through the work of the United Nations Human Rights Council (UNHRC) and United Nations Treaty monitoring bodies. For instance, the development under the UNHRC is replete with resolutions that link climate change to human rights. Five key resolutions could have been referred to by the court to show the implication of climate impact assessment for socio-economic rights: Resolution 7/23 of 2008, Resolution 10/4 of 2009, Resolution 18/22 of 2011, Resolution 26/33 of 2014 and Resolution 32/34 of 2016 (UNHRC “Human Rights and Climate Change” Res. 7/23, U.N. Doc. A/HRC/7/78 (UNHRC Resolution 7/23); UN Human Rights Council Res 10/4 “Human Rights and Climate Change”, 41st meeting A/HRC/RES10/4, 25 March 2009; UNHRC, “Human Rights and Climate Change” A/HRC/RES/18/22 (2011) (UNHRC Resolution 18/22); UNHRC “Human Rights and Climate

Change” A/HRC/26/L.33 (23 June 2014) (UNHRC Resolution 26/33); UNHRC “Climate Change and Human Rights” A/HRC/32/L.34 (2016) (UNHRC Resolution 32/34).

Resolution 7/23 required a detailed analytical study from the Office of the High Commissioner for Human Rights (OHCHR) on the connection of climate change to human rights (UNHRC Resolution 7/23). In response to the requirements of Resolution 7/23, the OHCHR Report describes the effect of climate change on a range of rights, including the right to adequate food (UNHRC Resolution 7/23 par 25–27), the right to adequate water (UNHRC Resolution 7/23 par 28–30), the right to health (UNHRC Resolution 7/23 par 31–34), the right to adequate housing (UNHRC Resolution 7/23 par 35–38), and the right to self-determination (UNHRC Resolution 7/23 par 39–41). The report on the analytical study conducted by the OHCHR informed Resolution 10/4, which affirms the potential of human-rights obligations and commitments to inform and reinforce international and national policy-making and practice in the area of climate change (UNHRC Resolution 10/4 Preamble). This position is further supported by Resolution 18/22 (par 1), emphasised in Resolution 26/33 and Resolution 32/34, which note that climate change is an “existential threat” that has impacted negatively on the fulfilment of the Universal Declaration of Human Rights (UNHRC Resolution 32/34 Preamble), an instrument that has arguably attained the status of international customary law (Hannum “The Status of the Universal Declaration of Human Rights in National and International Law” 1995 25 *Georgia Journal of International and Comparative Law* 287).

The implications of climate change for socio-economic rights are also evident in the functioning of the treaty bodies monitoring human rights. The impact of climate change is evident, for instance, in the normative content of the right to food in General Comment No 12 of 1999, where the Committee on Economic and Social Cultural Rights (CESCR) highlights that climatic and ecological factors can have adverse bearing on the normative elements of the right to food – that is, its availability, accessibility, acceptability and safety (UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 12: The Right to Adequate Food (Art 11), E/C.12/1999/5, adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 par 4 and 7). In delineating states’ obligations in General Comment No 15 of 2002 on the right to water, the CESCR Committee urges states parties to formulate strategies and programmes to prevent climate change from hampering the realisation of the right to water (UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant), E/C.12/2002/11, adopted at the Twenty-Ninth Session of the Committee on Economic, Social and Cultural Rights on 20 January 2003 par 28; Orellana, Kothari and Chaudhry *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (2010) 21; Jegede “Climate Change in the Work of the African Commission on Human and Peoples’ Rights” 2017 31(2) *Speculum Juris* 136). While explaining states’ obligations under General Comment No 4 on the right to adequate housing in 1991, the CESCR Committee indicates that the security of tenure, availability, accessibility, location, affordability, habitability and cultural adequacy of housing can be hindered by climatic and ecological

considerations (UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 par 18). The Paris Agreement, to which South Africa is signatory, provides that “parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights” (Paris Agreement C.N.63.2016.TREATIES-XXVII.7.d of 16 February 2016; South Africa ratified the Paris Agreement on 1 November 2016, Preamble).

In summary, *Thabametsi* is novel in clarifying the content and legal basis of climate-change impact assessments for development-oriented projects. It is also useful in shaping future administrative decisions on development projects. However, there is scant emphasis on the link between climate change and the realisation of socio-economic rights. This represents a gap in the judgment, which otherwise is a pace-setter for climate-change litigation in South Africa.

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