

Part 4

Obey the rules – the Earthlife Africa climate change case

By Ian Cox

I step out of the sequence of these short articles to deal with the breaking news that is the judgement in the [matter](#) between Earthlife Africa and the Minister of Environmental Affairs. This case has caused some excitement in environmental circles because it is the first time an environmental approval decision has been challenged on issues relating to climate change.

The challenge was successful. Judge John Murphy handed down a lengthy and technically detailed judgement on Wednesday 9 March 2107 setting aside the Minister's decision to grant environmental approval under [NEMA](#) for the proposed Thabametsi power station.

The decision is of a single judge and thus by itself carries limited weight. If past behaviour is anything to go by, it is likely that the Minister will seek leave appeal the judgement. I do not hold out much hope for the Minister will have much success in his regard. You see while the idea of introducing climate change is new the legal principles upon which she lost the case are well established.

In very simple terms if government wants its laws or decisions to stick, it must obey the rules that apply to the making of that law or decision. This is basic rule of law 101.

Building powers stations such as the one proposed at Thabametsi is an activity that has been identified by the Minister as having a significant environmental impact in terms of section 24 of NEMA. An environmental impact assessment and Ministerial approval is thus required before the developer can start work.

Section 24 of NEMA started life as a relatively [simple section](#). The section sketched out in 7 short subsections what had to be done in going about the business of applying for and granting environmental approval. That was back in 1998. The section has grown like Topsy since then and is now a complicated and some might even say a confused mess of detailed rules and processes.

One of those rules sits in section 24O(1). Yup one section with seven subsections now comprises 19 separate sections each running to many subsections. Anyway section 24O(1) deals with what the Minister must take into account when considering applications for environmental approvals.

Note the word "must". Must is a big and powerful word in law. It means that follows cannot be ignored. "Must" does not mean "may". An instruction with the word must in it is peremptory and must therefore be obeyed.

Section 24O(1) says, amongst other things, that the Minister "must take into account all relevant factors, which may include any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused".

Regulations dealing with the environmental impact assessments and in particular regulation 31(2)(k) require the assessment report to "include a description of all environmental issues identified during the assessment process and an indication of the extent to which the issues could be addressed by the adoption of mitigation measures".

Unfortunately the EIA report did not deal with the impact a coal fired power station, and in this case a particularly dirty one, could have on climate change. What makes it worse is the Minister acknowledged the mistake in her appeal decision by making the approval subject to a climate change impact report being approved by the department.

The judgement is long and the issues complex. It is going to require careful study. But on this simple issue, the outcome was a bit of a no brainer. The Minister argument that climate change was not a thing was never going to fly given that South Africa has ratified the [UN Framework Convention on Climate Change](#). There is a list of judgements as long as my arm that say if the rules are broken in the law making or approval process then the law or approval lacks legality and can be set aside.

Decisions like this, although legally correct, have consequences. Development is retarded, jobs are lost, the supply of electricity restricted at a time when electricity is in short supply.

The question that will be asked is whether this kind of regulation is assisting or restricting sustainable development. In essence, is this sort of regulation is reasonably necessary to give South African's an environment that is not harmful to their health and wellbeing or is this a case of overkill?

I do not think this is a good test case. This power station could have been designed to be far cleaner than what is presently contemplated. Coal fired power stations are probably a necessity in South Africa. But do they have to be dirty as well?
