



**MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA**

Reference: LSA 190078

APPEAL DECISION

APPEAL AGAINST A DECISION TO GRANT A PROVISIONAL ATMOSPHERIC EMISSION LICENCE TO THABAMETSI POWER COMPANY (PTY) LTD FOR SOLID FUEL COMBUSTION INSTALLATIONS, STORAGE AND HANDLING OF ORE AND COAL ON FARM ONBELYK NO. 257, WITHIN THE LEPHALALE LOCAL MUNICIPALITY, IN LIMPOPO PROVINCE

Earthlife Africa and Groundwork

Appellant

Thabametsi Power Company (Pty) Ltd

Applicant

Department of Environment, Forestry and Fisheries

Licencing Authority

Appeal: This is an appeal against the decision of the Air Quality Officer of the Department of Forestry, Fisheries and the Environment (the Department) to issue a Provisional Atmospheric Emission Licence (PAEL) to Thabametsi Power Company (Pty) Ltd (the applicant) on 14 February 2019. The PAEL was issued in terms of section 41(1) (a) of the National Environmental Management: Air Quality, 2004 (Act No 39 of 2004) (NEMAQA), for solid fuel combustion installations, storage and handling of Ore and Coal on farm Onbelyk No. 257, within the Local Municipality of Lephalale, in Limpopo Province.

1. BACKGROUND AND APPEAL

- 1.1 On 12 November 2018, the applicant submitted an application for a PAEL as contemplated in terms of section 37 of NEMAQA, in respect of the proposed Thabametsi Coal-Fired Power Plant on the Farm Onbelyk No. 257, situated within the Local Municipality of Lephalale, in Limpopo Province.
- 1.2 After evaluation of the Atmospheric Impact Report dated 12 November 2018, the Department was satisfied on the basis of the information available at their disposal and subject to compliance with the conditions prescribed in the PAEL, that the applicant should be granted a PAEL in respect of the proposed activities, and accordingly proceeded to issue the applicant with a PAEL on 14 February 2019..
- 1.3 On 8 August 2019, after receiving a copy of the PAEL, the Centre for Environmental Rights (CER), representing the Earthlife Africa and Groundwork (the appellant), sent a request to the Department for reasons for the decision to issue the above PAEL. These reasons were thereafter provided to the appellant on 7 October 2019.
- 1.4 On 30 October 2019, the Directorate: Appeals and Legal Review (Appeals Directorate) within the Department received an appeal from the appellant against the abovementioned PAEL.
- 1.5 On 21 November 2019, the applicant filed a responding statement in respect of the grounds of appeal. This response was filed two (2) days outside the 20-day period prescribed by regulation 5 of the National Appeal Regulations, 2014. The late filing of responding statement was condoned by the Director of the Appeals Directorate on 12 December 2019.
- 1.6 The Department provided comments on the grounds of appeal on 29 November 2019.
- 1.7 The appeal is premised on the following grounds:
 - 1.7.1 Inadequate assessment of the air quality impacts and direct emissions;

- 1.7.2 Inadequate assessment of the cumulative impacts associated with the project;
- 1.7.3 The Department approved the PAEL despite contravention of section 39(a) of NEMAQA;
- 1.7.4 The Department did not adequately take into account the project's associated health impacts;
- 1.7.5 The mitigation measures identified in the PAEL do not constitute the best practicable environmental option available as required by section 39(c) of NEMAQA;
- 1.7.6 The Japanese company, Marubeni, is not a fit and proper person in terms of section 49 of NEMAQA;
- 1.7.7 The Department's decision to grant the PAEL is inconsistent with NEMAQA, NEMA and the Constitution; and
- 1.7.8 The Department's decision is in contravention of Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) (PAJA).

2. EVALUATION

- 2.1 Due to the nature of my decision I have deemed it unnecessary to evaluate the merits of each of the abovementioned grounds of appeal. My reasoning for this is based on the following:
 - 2.1.1 The PAEL in question is linked to the Environmental Authorisation (EA) issued by the Chief Directorate: Integrated Environmental Authorisation (CD: IEA) of the Department on 25 February 2015 to the applicant in respect of the proposed Thabametsi Coal-Fired Power Plant on the Farm Onbelyk No. 257, situated within the Local Municipality of Lephalale, in Limpopo Province.
 - 2.1.2 The above EA, in particular condition 26 made provision to the effect that an air emission licence is required under NEMAQA for the release of emissions to the atmosphere.
 - 2.1.3 The information before me indicates that, on 15 May 2015, the appellant appealed the granting of the abovementioned EA. The said appeal was, in the main, premised on the ground that the environmental impacts associated with the proposed coal-fired power station were inadequately assessed. This appeal also challenged the approval of the EA

- application without the benefit of the climate change impact assessment (CCIA), as a relevant consideration in terms of NEMA.
- 2.1.4 In an appeal decision dated 7 March 2016, the then Minister responsible for the Department found that the climate impacts associated with the proposed development were not comprehensively assessed and/or considered, prior to the issuance of the EA. For this reason, the Minister proceeded to amend the above EA by inserting condition 10.5. This new condition obliged the applicant to undertake a climate change impact assessment prior to the commencement of the proposed project.
- 2.1.5 After receiving a copy of the appeal decision dated 7 March 2016, the appellant lodged a judicial review application in accordance with the provisions of section 7 of the PAJA, challenging the said decision of the Minister.
- 2.1.6 In the case of *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others (65662/16) [2017] ZAGPPHC 58 [2017] 2 ALL SA 519 (GP) (8 March 2017)* (the Earthlife Africa Case), the court held that CCIA is a relevant consideration in respect of the EA application for the proposed development. On this basis, the court set aside the appeal decision of 7 March 2016 and remitted the matter to Minister for reconsideration. The court ordered that the CCIA, amongst others, must be conducted and thereafter submitted to the Minister for reconsideration of the ground of appeal dealing with the requirement of CCIA.
- 2.1.7 The information before me indicates that, subsequent to considering the CCIA report, the Minister dismissed the ground of appeal dealing CCIA and confirmed the decision of the Department to grant the abovementioned EA to the applicant. This appeal decision dated 30 January 2018 was again challenged in court by the appellant.
- 2.1.8 By agreement on 19 November 2020 between the First and Second Applicants and First, Second, Third and Fourth Respondents, the court proceeded to set aside the abovementioned EA, as well as the appeal decision of 30 January 2018. The application for the EA by Thabametsi Power Company (Pty) Ltd was then remitted to the Chief Director: Integrated Environmental Authorisations, for reconsideration.

- 2.2 As indicated above, the PAEL is directly linked to the EA for the proposed Thabametsi Coal-Fired Power Plant. Considering that the EA for the Thabametsi coal-fired power station has been set aside and therefore null and void, I am of the view that the PAEL, which existed on account of condition 26 of the invalid EA, falls to be set aside in its entirety. This view is informed by the proposition that the PAEL, which is the subject of this appeal, cannot exist without the required EA for the proposed Thabametsi coal-fired power station.
- 2.3 In light of the foregoing, I hereby proceed in terms of section 43(6) of NEMA to set aside the PAEL issued to the applicant on 14 February 2019.

3 DECISION

- 3.1 In reaching my decision on the appeal lodged against the PAEL in question, I have taken the following into consideration:
- 3.1.1 EA for the proposed Thabametsi coal-fired power station, dated 25 February 2015;
 - 3.1.2 Appeal decision dated 7 March 2016;
 - 3.1.3 Court Judgment dated 6 March 2017;
 - 3.1.4 Appeal decision dated 30 January 2018;
 - 3.1.5 PAEL dated 14 February 2019;
 - 3.1.6 The grounds of appeal against PAEL, received on 30 October 2019;
 - 3.1.7 Responding statement submitted by the applicant on 21 November 2019;
 - 3.1.8 Comments submitted by the Department on 29 November 2019;
 - 3.1.9 Condonation decision dated 12 December 2019; and
 - 3.1.10 The court order dated 19 November 2020.
- 3.2 In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.
- 3.3 Having carefully considered the information mentioned above, and in terms of section 43(6) of NEMA, I have decided to set aside the PAEL issued to the applicant on 14 February 2019.

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- 3.4 In arriving at my decision on the appeal, it should be noted that I have not responded to each and every statement set out in the appeal and/or responses thereto, and where a particular statement is not directly addressed, the absence of any response thereto should not be interpreted to mean that I agree with or abide by the statement made.
- 3.5 Should any party be dissatisfied with any aspect of my decision, it may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof, in accordance with the provisions of section 7 of PAJA.



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 12/14/2021