



OUR BURNING PLANET: OP-ED

Climate Change Litigation in South Africa

By Brandon Abdinor • 7 November 2018



A dead cow in the dried mud of the empty water supply dam in the rural farming town of Senekal, South Africa, 11 January 2016. L EPA/KIM LUDBROOK

2 Reactions

As activists and citizens become increasingly anxious about the perceived inaction of governments and business to meaningfully address climate change, the courts are ever increasingly being approached to compel action. The Sabin Center for Climate Change Law at Columbia Law School (with US law firm Arnold & Porter) maintain the Climate Change Litigation database. The database has over 950 US-based cases logged, and 271 cases logged for the rest of the world.

Governments the world over are finding themselves defending climate change related suits. The Dutch government was sued in 2015 by the Urgenda Foundation in collaboration with nearly 900 Dutch citizens. The plaintiffs claimed that the government is not taking sufficient action to reduce greenhouse gas ("GHG") emissions. Last month the Hague Court of appeal upheld a 2015 lower court decision that compels that government to reduce GHG emissions by 25% as compared with 1990 levels, and has given it two years to do so.

In the UK, a legal support group called Plan B, along with 12 citizens, has launched legal proceeding against the UK government calling for it to revise its 2050 "carbon targets" as the current targets are inconsistent with Paris Agreement goals and are "not safe according to the science".

In *Juliana et al v The United States*, 21 youth plaintiffs are suing the federal government for allowing activities that “harmed the climate”. Similar actions at various stages of implementation are to be found in Pakistan, India, Uganda, Philippines, Portugal, Belgium and other countries.

Another angle being taken is to sue the businesses perceived as major contributors to climate change. The cities of San Francisco and Oakland sued five major oil companies for the costs of protecting against sea level rise and similar adaptation measures. That case was dismissed by the court, but other US cities, including New York, are pursuing similar claims. A Peruvian farmer, Saul Lliuya, is suing German energy giant RWE, arguably Europe’s largest single GHG emitter, for causing glacial melt and consequent flooding in his home region. The case is still under way and being watched closely.

South African litigation – at the coal-face

The litigation database records three actions in South Africa. The most advanced is the case of the proposed Thabametsi power station, to be constructed and run by the Thabametsi Power Company (Pty), an independent power producer (“IPP”). In 2015 the Department of Environmental Affairs granted an environmental authorisation in favour of Thabametsi for construction and operation of the plant despite the fact that the environmental impact assessment did not include a comprehensive climate change impact assessment as arguably required by the National Environmental Management Act (“NEMA”).

In 2016 the minister, in an appeal against the authorisation, acknowledged the deficiency and instructed Thabametsi to conduct a climate change impact assessment within six months, but at the same time unprocedurally upheld the authorisation. Environmental NGO Earthlife Africa, represented by the Centre for Environmental Rights (“CER”), launched an application in the Gauteng High Court, challenging the legitimacy of the decisions by the department and the minister. In addition to defending its unprocedural actions, the department also argued that the government has no specific domestic or international legal obligations to consider climate change impacts.

The Court upheld Earthlife’s claim in its March 2017 judgment, setting aside the Minister’s ruling and instructing the Department to fully and properly consider a complete climate change impact assessment. This took place and again the Department issued an authorisation, and again the Minister upheld it on appeal. Earthlife, along with fellow environmental NGO Groundwork, instructed the CER to sue the government earlier this year, this time on the basis that its reasoning for granting and upholding the environmental authorisation was flawed, ‘unreasonable and irrational’.

Interestingly the authors of the final climate impact assessment determined that although the greenhouse gas emissions were going to be “Very Large,” the impacts thereof would have a “Medium to Low” significance. In contrast, a peer review assessment by another consultancy (commissioned the minister), found that the risk posed by the high emissions should have been recorded as “Very High”.

The applicants take issue with the minister incorrectly relying on the 2010 Integrated Resource Plan (“IRP”) as having addressed climate change impact concerns. She is also challenged for overlooking deficiencies in the assessment in that the social impact, water scarcity factors, the impact on local climate resilience and inadequate mitigation measures are not addressed. The minister also concluded that the benefits of the power station outweigh the climate change harms that will result from its construction and operation.

This application is still to be heard but the entire matter is noteworthy in that it has evolved from a largely procedural challenge into a legal challenge of the substantive aspects of how government is handling climate change impacts of the power generating activity it authorises. The courts will probably now have to start interrogating the science behind climate change and its broader impacts. The other two cases being fought, both by Groundwork with the CER, are similarly based on the issue of improper consideration and handling of climate change factors. There are also a number of administrative challenges under way around the granting of water, waste and atmospheric emissions licenses. NERSA has also approached with objections to the granting of licenses for the IPP funded and operated coal plants.

Where to from here?

We can see that civil society is increasingly going to challenge government's unprocedural approach and neglect to address climate change concerns on a case by case basis. But what about its overall policy approach? After the state published its Climate Change Response white paper in 2011, official policy signals went relatively quiet until the introduction of the Climate Change Bill in June of this year. Comment on the bill had to be in by early August. Already there has been dissatisfaction from certain quarters around the state providing insufficient opportunity for meaningful consultation, opening it up to being challenged on procedure yet again.

Among other things, the bill purports to provide for an integrated response to climate change and its impacts, and enable a "fair contribution" to global efforts to reduce GHG emissions. This will be provided for by the bill's inclusion of Sectoral Emissions Targets (SETs) and carbon budgets. This will likely open the stage for a tussle between business interests which will resist limitations and costly interventions, and environmental interests which may well conclude that targets and time frames are inadequate to stave off catastrophe. Government would find itself in the middle of some of these opposing interests, and may find itself facing legal challenges from both sides as to how it is implementing and enforcing the legislation.

Local business enterprises potentially face the prospect of specific legal challenges to their activities. Sasol, South Africa's largest JSE listed emitter, has claimed that carbon tax proposals could cost it R1-billion per year, money it is unlikely to give up without a fight, Eskom, South Africa's largest emitter (accounting for nearly 50% of the country's emissions), would be a relatively easy target and may find its policies and approaches subject to challenge.

There is a colossal balancing act under way, and the courts will almost certainly be the arbiters in many of the increasingly intense battles that are both current and looming. **DM**

Brandon is an attorney and mediator practicing in Johannesburg, and also consults on dispute resolution, governance and organisational HR best practice. He is a keen observer of, and occasional participant in, social and environmental justice issues, and believes that South Africa is the most dynamic place in the world.

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