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**South Africa: Environment,  
Sustainability and Climate  
Change Law Round-Up,  
2023**



# Overview of key developments in Environment, Sustainability and Climate Change Law in 2023

## Foreword

In the last 18 months, South Africa has seen several key policy and legal developments relating to environment, sustainability, and climate change.

The developments include: (i) domestic developments in climate change law; (ii) emerging jurisprudence in advancing climate action and enforcement of environmental laws; (iii) the final implementation of various provisions of the fourth amendment of national environmental management laws; and (iv) critical developments relating to regulation of waste.

In this legal update, we summarise these legal developments, especially those that are expected to have a bearing on South Africa's climate response, our collective journey to net-zero by 2050, and those relevant to managing corporate-level risk and liability.

We have organised this legal update into three parts, namely: (i) emerging trends including those that relate to greenwashing and green claims; (ii) recent case law; and (iii) legislative developments.

## Emerging trends

### Green washing and green claims

'Greenwashing' and 'green claims' are relatively new concepts, arising from increased societal scrutiny on business impacts on the environment, and calls that businesses contribute to a less carbon-intensive and more sustainable economy.

Given that climate and environmental concerns are playing an increasing role in driving market activity, business can expect greater scrutiny of such claims.

In [this](#) article we explore the current legal framework in South Africa and what we can expect based on international trends in this regard.

### The Climate Change Bill

The long-awaited South African Climate Change Bill was passed by the National Assembly on 24 October 2023 and now awaits National Council of Provinces concurrence and Presidential signature. This comes after a version was first published for comment on 8 June 2018, more than five years ago.

Once approved, it will establish, for the first time, a comprehensive South African legal framework for the regulation of the impacts of climate change, with the ultimate overall goal to achieve net-zero by 2050.

In [this](#) article published we assess the impact of the Climate Change Bill on our net-zero journey.

### Green hydrogen

South Africa, with its abundant solar and wind resources and land availability, is well placed to take advantage of the growing demand for green hydrogen. The regulatory environment for green hydrogen in South Africa is still developing.

Bowmans provided the South African analysis for an international review of the emerging regulation of green hydrogen published by Ashurst (available [here](#)). The complete review is available [here](#).

### Important ESG cases from 2023

There have been a number of interesting cases concerning sustainability and environmental matters this year. Climate change has been a consideration in a number of matters and principles such as 'sustainable development', 'polluter pays' and 'intergenerational equity' have all been considered and used by the courts this year in the judgements under consideration.

### ESG central to permitting decisions

#### *Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries and the Environment and Others (GDP) (June, 2023)*

In an important indicator of trends for fossil fuel projects, the Court considered that ESG factors were central to decision making in a matter concerning authorisations for a coal mining project.

The Court held that the factors militating against the grant of the authorisation were many. The local community was against the project, the economic impacts were, on balance, negative, as agricultural land would be irreparably harmed, and the Social Impact Report reflected on the development negatively.

The Court set the decision to approve the project aside. The appeal status of the decision is unknown at this stage.

Read the case report [here](#).

## The 'polluter pays' principle

### **Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others (2023) ZASCA**

In a recent judgment handed down by the Supreme Court of Appeal (SCA, or the Court) on 30 May 2023, the SCA considered the point at which a mining company can be said to be released from its environmental obligations. The Court highlighted the 'polluter pays' principle as central to its decision.

Read the case report [here](#).

## Environmental principles and human rights

### **Vukani Environmental Justice Alliance Movement in Action v The Minister of Environmental Affairs and Four Others (2022) ZAGPPHC**

In this matter, which is also referred to in the press as the 'Deadly Air' case, the South African Government was sued by environmental activists for the alleged violation of the constitutional right to clean air.

The Court found that the poor air quality in the Highveld Priority Area (which extends from eastern Gauteng across the Mpumalanga Highveld), is in breach of residents' section 24(a) Constitutional rights to an environment that is not harmful to their health and well-being.

The Deadly Air case demonstrates that courts are prepared to use human rights approaches and environmental principles such as 'intergenerational equity' in adjudicating environmental disputes.

Read the full judgement [here](#).

## Climate change and sustainable development

### **Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (2022) ECMk**

In another case demonstrating the difficulties that fossil fuel projects face in the current context, this matter saw the courts set aside an exploration right for the exploration of oil and gas on the basis of the precautionary principle.

In concluding that the exploration right was unlawfully granted, the Court, *inter alia*, concluded on a number of bases that the grant of the exploration failed to take into account: (i) the anticipated harm to the marine and bird life along the Eastern Cape coast; (ii) the communities' spiritual and cultural rights and their rights to livelihood; and (iii) the climate change considerations and requirements advocated by the intervening parties.

Although the Wild Coast case is subject to a pending appeal, it demonstrates the developing courts' approach to decisions relating to environmental permitting requiring climate change considerations being taken into account in environmental decision-making.

Read the full judgement [here](#).

## Precautionary principle

### **African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others [2023]**

This matter considered the meaning of the 'precautionary principle' imposed under section 2(4)(a)(vii) of NEMA which provides that a risk adverse and cautionary approach should be followed. The principle requires that the limits of current knowledge about the consequences of decisions and actions should be considered when decisions are taken. The precautionary principle has been specifically incorporated in the GMO Regulations.

The Court considered that the principle causes the evidentiary burden to shift placing responsibility on the person who may cause harm to demonstrate the harm will not be caused.

Read the full judgement [here](#).

## Municipal effluent and the environmental duty of care

### **Leopiet Ontwikkeling (Pty) Ltd v Lephalale Municipality (7355/20) [2023] ZALMPPHC 15 (23 March 2023)**

This case is one of a number of cases concerning the dilapidated state of municipal effluent and sewage works. This one stands out because the plaintiffs were not in fact successful. Nevertheless it was an interesting use of the duty of care to claim damages. The plaintiff claimed that the municipality has since approximately 2010 continuously failed to maintain or upgrade its sewage infrastructure, leading to the consequential overflow of contaminated water, wastage and effluent material onto the immovable property and onto the agricultural development, grazing and natural water sources situated upon the immovable property. The plaintiff alleged that the municipality's legal duty to prevent this consequence is derived from, amongst others, section 28 of NEMA.

The municipality successfully excepted on the basis that the plaintiff's particulars of claim failed to disclose the cause of action (i.e., wrongfulness and/or negligence).

Read the full judgement [here](#).

## Regulation of waste and by-products

### ***South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others (2023) ZACC***

On 26 June 2023 the Constitutional Court handed down judgement in favour of our clients holding that Parliament's failure to consult with the public, including the applicants – The South African Iron and Steel Industry Association, Fertilizer Association of Southern Africa, Arcelormittal South Africa Ltd, and H Pistorius & Kie (Pty) Ltd – in enacting far-reaching changes to the way co-products and by-products of industrial processes are dealt with, is unconstitutional.

Read our case report [here](#).

## Trading in water use entitlements

### ***Minister of Water and Sanitation and Others v Lotter N.O (2023) ZACC***

In another case with important commercial implications, the Constitutional Court settled the long-standing debate about the permissibility of trading in water use entitlements in terms of section 25 of the National Water Act. The Court found that **water use entitlements may be traded between parties for a fee**.

Read the full judgement [here](#).

## Legislative developments

### **NEMLAA 2022**

Legislative developments in 2023 have been dominated by the commencement of the far-reaching National Environmental Management Laws Amendment Act, 2022 (**NEMLAA 2022**) which amends various specific environmental management statutes. The changes include:

- changes to the NEMA section 24G rectification procedure and Air Quality Act rectification procedure;
- changes to the duty of care under NEMA;
- effect of appeal of directive; and
- a new approach to the regulation of residue stockpiles and deposits

A full consideration of these changes in NEMLAA is available [here](#).

### **The compliance date for NEMA's Financial Provisioning Regulations is pushed out, again**

Read the implications of this, the fifth such extension, to 24 February 2024 [here](#).

### **Proposed draft regulations**

In August 2023, the Draft National Appeal Regulations in terms of NEMA, were published. Under the National Water Act, 1998, draft regulations were published in May 2023 that propose expansive changes to the procedural requirements for water use licence applications (**WULA**) and amendments, including regarding B-BBEE. Read more about these [here](#).

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