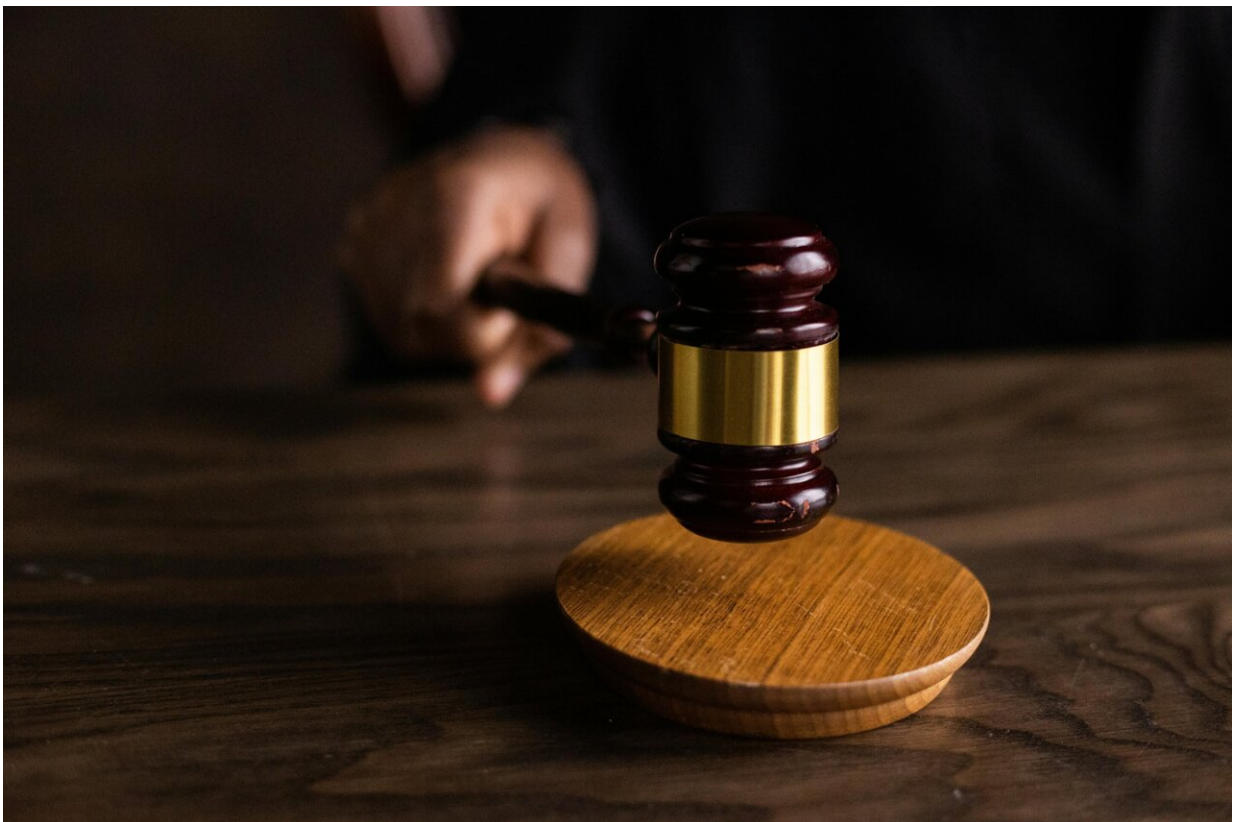


South Africa's laws aren't geared to protecting against climate change: Judges are trying to fill the gap

April 1 2024, by Melanie Murcott and Clive Vinti



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South Africa has plenty of environmental laws but none that specifically oblige government officials to consider the risks and impacts of climate

change when they approve new developments.

In their research, environmental law experts Clive Vinti and Melanie Jean Murcott [set out](#) how judges are dealing with this gap in the law.

What are the gaps in the law?

The main gap is that no law specifically obliges companies establishing mines or building new developments like power stations to do a [climate change assessment](#) before they start construction. A [climate change](#) assessment would look at how a proposed development would contribute to—or worsen—climate change. It would assess how sustainable the development was in a time of climate change and how to mitigate the climate change effects of the project. It would also have to take into account the ability of communities and the environment to cope with and adapt to climate impacts.

South Africa's [constitution](#) says that everyone has the right to an environment that's not harmful to health or well-being, and to have the environment protected for the benefit of present and future generations. The environment includes the climate system.

A number of environmental laws have been enacted (mostly since the end of [apartheid](#) and the adoption of the country's constitution in 1996). There are gaps, however. There are some laws that specifically protect the climate system. These laws all have different functions. For example, the [National Greenhouse Gas Emission Reporting Regulations](#) say that certain companies and organs of state must report on their [greenhouse gas emissions](#). None explicitly oblige [government officials](#) to consider the risks and impacts of climate change when they approve new developments.

Other regulations require polluters in certain industries, such as [coal](#)

[mining](#) and [electricity production](#), to submit pollution prevention plans that show how they will curb these emissions.

Four years ago the country introduced a [Carbon Tax Act](#) which imposes a tax on certain polluters in respect of their greenhouse gas emissions.

A draft [Climate Change Bill](#) was introduced in 2018 but has not yet become law. The speculation is that this is due to the [government's commitment to fossil fuel development](#). If it becomes law, the government will be obliged to take climate action through various measures, including developing adaptation strategies and plans. Until the bill is made law, the government does not have an explicit statutory mandate to tackle climate change comprehensively.

South Africa's overarching environmental law is the [National Environmental Management Act, 1998](#). This law requires that before activities that significantly affect the environment are conducted, [environmental impact assessments](#) must take place. These determine the long and short term effects on the environment and inform whether government officials should grant authorizations allowing [new developments](#). The act says that all "relevant considerations" must be taken into account, but it is not clear that climate change impacts and risks must be assessed. This is where the courts have begun to play a gap-filling role.

How are judges developing climate change law?

The courts have a mandate from the constitution to interpret and apply the law in a way that protects the environment, pursues [social justice](#), and promotes dignity and equality for all people in South Africa. Some recent judgments promote climate action. These judgments [set precedent](#) that it is unlawful for officials to authorize certain developments without assessing climate risks and impacts.

The 2017 Gauteng High Court case known as [Earthlife Africa](#) started this trend. In that case, the judge found that government officials had failed to consider the effects of climate change when they gave the go-ahead for a new coal-fired power station. The officials were ordered to take climate risks and impacts into account, and to reconsider their decision.

Following this judgment, [land use planning](#) and [water use](#) decisions have been found to be unlawful because of a failure to consider climate change impacts and risks. In 2022, a [controversial decision](#) to permit exploration of oil and gas along South Africa's Wild Coast was found to be [unlawful](#). The development was halted. The court reasoned that not only did the decision exclude affected communities and ignore their cultural practices, a climate change assessment had not been done.

These judgments are developing a duty to consider climate change.

Courts protecting the climate system and people

The judgments relied on [human rights](#) and constitutional values to interpret the National Environmental Management Act and other statutes. In these cases the courts fulfilled their constitutional mandate to interpret environmental laws in ways that [protect the climate system and pursue social justice](#). In doing so, they require government officials and developers to take climate action.

Our research describes this approach as aligned with [transformative environmental constitutionalism](#), where judges adopt a social justice framing in environmental disputes. The judgments reflect that protecting the environment is also about protecting people, particularly those most vulnerable in society who are least able to cope with adverse environmental impacts like climate change.

Transformative environmental constitutionalism encourages judges to acknowledge how climate change undermines ecological systems flourishing, which is bound together with human flourishing.

What the approach offers ordinary people is a rejection of the idea that protecting the environment is about advancing the needs of an elite minority who benefit from pristine environments. It helps reposition the environment as the places where ordinary people live, work, rest, play and learn. This supports what grassroots activists have been saying for years: that struggles for justice for the [environment](#), justice for people, and justice for the climate system [are intertwined](#).

The judgments set precedent that empowers people to insist on climate change impact and risk assessment. Without having done such assessments, developers and government face having authorizations declared unlawful and invalid by courts because they are inconsistent with the constitution, the supreme law of South Africa.

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