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Article

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The Judge-Made 'Duty' to Consider Climate Change in South Africa

Melanie Jean Murcott* and **Clive Vinti****

Abstract

Environmental legislation in South Africa does not explicitly require that the executive branch consider climate change in environmental decision-making. Yet, in a handful of climate cases, the executive has been found to have acted unlawfully (and thus unconstitutionally) by failing to do so. We argue that the case law has implicitly introduced a 'duty' to consider climate change mitigation and adaptation issues. The precedent set entails that in order to act lawfully as required by the Constitution of the Republic of South Africa, 1996, decision-makers must take climate change into account in various contexts. This article describes the role of the judiciary within South Africa's transformative constitutional regime, and the interpretive approach they are mandated to adopt. The interpretive approach is a feature of South Africa's normative conceptualization of the separation of powers. We then describe how, in the exercise of this role, the 'duty' to consider climate change has emerged and evolved through three instances of climate litigation in the High Courts, and one before the Water Tribunal. We conclude that the power of judiciary in South Africa to respond to the myriad human rights and justice implications of the climate crisis derives not only from constitutionally entrenched human rights. Equally important are the mechanisms within the broader transformative architecture of the constitutional order. By making this modest point, we hope to deepen the understanding of the utility of human rights in climate litigation in the Global South.

Keywords: climate crisis; climate litigation; legal interpretation; transformative adjudication; South Africa

1. Introduction

Since 2017, a growing body of case law in South Africa has engaged directly and explicitly with climate change adaptation or mitigation issues, and/or climate science. The cases include *Earthlife Africa Johannesburg v. Minister of Environmental Affairs* (*Thabametsi*); *Philippi Horticultural Area Food and Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* (*PHA*); *Groundwork Trust v. Acting Director-General Department of Water and Sanitation* (*Khanyisa*), and *Sustaining The Wild Coast NPC v. Minister of Mineral Resources* (*Sustaining The Wild Coast*).[1] These cases have, in different ways, protected human rights and the climate system (Humby 2018; Kotzé and du Plessis 2020: 636–43; Murcott 2022a: 83–88; Murcott 2022b: 181–82; Bouwer 2022: 173–76; Okoth and Odaga 2021). As a consequence, key actors (the executive branch of the state and, to some degree, multinational corporations)

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1 Full details of cases mentioned are listed at the end, after the References.

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have been held accountable for climate mitigation or adaptation failures (Centre for Environmental Rights 2020; Sonday 2021; Isilow 2022). Some of what Hargreaves (2016) refers to as the 'deadly impacts' of extractivism have been averted. Such impacts include the loss of thousands of lives from water pollution and air pollution (Schneider 2015; Joubert 2021). Epitomising injustice, those living in poverty are most vulnerable to these impacts despite being least responsible for them (Murcott 2022b: 17–26).

This article engages with the role that the transformative Constitution of the Republic of South Africa, 1996 (the Constitution)—the country's supreme law—has played in South Africa's climate litigation. We show how High Court judges and members of the Water Tribunal have invoked various constitutional mechanisms in response to the unjust causes and impacts of climate change. These mechanisms include values (sect. 1), rights (chapter 2), the separation of powers doctrine, and provisions that inform judicial interpretation in the Constitution (sects. 8, 39). Using these mechanisms, judges and members of the Water Tribunal have purposively and substantively interpreted legislation and developed the law in climate cases. The legislation interpreted includes: the National Environmental Management Act 107 of 1998 (NEMA), the National Water Act 36 of 1998 (Water Act), and the Minerals and Petroleum Resources Development Act 28 of 2000 (MPRDA). Each of these laws has the explicit purpose of advancing the environmental right provided for in sect. 24 of the Constitution. In addition, a Land Use Planning Ordinance 15 of 1985 (LUPO) enacted during apartheid has been judicially considered. We describe the development through the case law as giving rise to 'a judge-made duty to consider climate change'. The duty is a corollary of judges reading into the law that climate-relevant issues are factors that must be considered in order for the decisions to be lawful as a matter of administrative law. Importantly, unlawful administrative decision-making is inconsistent with the value of the rule of law enshrined in the Constitution (sect. 1) and violates the right to administrative justice (sect. 33).

This article explores the duty's emergence, noting that it is filling a gap in South African environmental legislation. Such legislation does not explicitly require consideration of climate-relevant issues in environmental decision-making. The Climate Change Bill, initially tabled by Parliament in 2018 and seemingly in the final stages of being passed into law in October 2023, does not seek to fill this gap. However, various legal provisions in NEMA, the Water Act, the MPRDA, and LUPO, respectively, that require consideration of 'relevant factors' in environmental decision-making have been generously interpreted in climate litigation so as to require consideration of climate change.

Next, section 2 describes features of South Africa's constitutional order that make it possible for a duty to consider climate change to emerge. We outline the transformative, value-laden nature of constitutionalism in South Africa, its normative conceptualization of the separation of powers, and the interpretive approach mandated. In this context, the judiciary is vested with law-making powers to give effect to the spirit, purport, and objects of the Constitution and apply and enforce human rights. Section 3 then describes how the duty to consider climate change has emerged as 'judge-made' law in *Thabametsi*, *PHA* and *Sustaining The Wild Coast*. In addition, we discuss *Khanyisa*, a decision of the Water Tribunal (which adjudicates disputes in terms of the Water Act), illustrating the reach of the precedent set in *Thabametsi*. Given the need to address the human rights implications of the current climate crisis in the Global South (Murcott and Tigre 2024), the cases reveal the potential for judicial engagement with legislation that stimulates climate action in pursuit of the fulfilment of human rights and the protection of the most vulnerable in society. Section 4 concludes that the power of the judiciary in South Africa to respond to the myriad human rights and justice implications of the climate crisis derives not only from constitutionally entrenched human rights; it also owes its existence to the broader transformative architecture of the constitutional order.

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2. The transformative role of judges in post-apartheid South Africa

South Africa's post-apartheid Constitution recognizes the country's grossly unjust past (preamble; *Road Accident Fund v. Mdeyide*, para. 125). This supreme law of South Africa has been found to require 'a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive' (*S v. Makwanyane*, para. 262). The constitutional design is 'explicitly aimed at responding to historically entrenched structural and systemic poverty and inequality' (Murcott 2022b: 46). It calls for social justice and a truly equal society (preamble; Langa 2006: 353–54). With a view to transforming society, the Constitution is built on the foundational superordinate values of non-racism, non-sexism, human dignity, equality, the supremacy of the Constitution, the rule of law, and democracy (sect. 1). In addition, *ubuntu* has been recognized as an implicit value (*Union of Refugee Women v. Director: Private Security Industry Regulatory Authority*, para. 145; *S v. Makwanyane*, paras 225–27). A communitarian African philosophy, *ubuntu* connotes that our 'humanness is derived from our relatedness with others, not only those currently living, but also through generations, past and future' (Murove 2004: 196). It is exemplified by the protection of collective rights (Liebenberg 2010: 34–36), and the ability to litigate in the public interest (sect. 38). Constitutional values are given expression by several other mechanisms, including the fundamental rights in the Bill of Rights (chapter 2). Law and conduct inconsistent with the Constitution is invalid (sect. 2). Section 7(2) of the Constitution requires that 'the State must respect, protect, promote, and fulfil the rights in the Bill of Rights'. This provision, together with constitutional values, including constitutional supremacy, inform both how public power is to be performed by the legislative and executive branches, and how it is evaluated by judges. Positive measures are required. The judiciary has invoked section 7(2) to impose duties on the state in various contexts (see, for instance, *Glenister v. President of the Republic of South Africa and Others*, paras 198–202). In addition, section 8(1) confirms that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. Provisions in the Bill of Rights may also bind individuals and entities such as multinational corporations 'if, and to the extent applicable' (sect. 8(2)) such that rights can have horizontal application. Several rights have been found to impose obligations on multinational corporations, including the environmental right (Murcott 2018: 199).

Langa (2006: 353) explains the significance of the rights and values for judges under a transformative constitutional regime:

> The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

Langa's framing underscores the political and legal nature of the role of judges post-apartheid. Although the Constitution's transformative mandate should inform decision-making by every branch of government, given the focus on climate litigation, our focus is on the judiciary.

While the Constitution does not expressly mention the separation of powers, it is well-established that the doctrine is 'ever-present' within the text (Fish Hodgson 2018: 73; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (*Certification Judgment*)). Various provisions address the distribution of power among the three branches of government as set out in detail by Fish Hodgson (2018: 71–75). In particular, chapter 8 sets out the inherent powers of the judiciary. This chapter provides that the judiciary is 'independent and subject only to

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Constitution' (sect. 165(2)). Importantly, section 165(5) confirms that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies'. The judiciary is vested with extensive remedial powers (s 172). In constitutional matters, courts *must* declare law and conduct that is inconsistent with the Constitution invalid (s 172(1)(a)). The courts are further empowered to grant orders that are 'just and equitable' (s 172(1)(b)).

The South African model of separation of powers has its genesis in Principle VI of the multi-party negotiated Constitutional Principles devised at the end of apartheid to which the Constitution had to give effect. Principle VI required that the Constitution provide for 'a separation between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'. When the Constitutional Court certified the text of the Constitution it explained with reference to Principle VI that South Africa does not have a rigid or strict doctrine of separation of powers and thus countenances necessary intrusions of one branch of government on another (*Certification Judgment*, paras 109, 112). As the separation of powers doctrine is a flexible constitutional norm, it occurs in different forms, subject to checks and balances (ibid.). Courts have been described as being in a 'dialogic partnership' with the legislature and executive (Albertyn and Davis 2010: 215). Separation of powers requires that the judiciary should apply the law impartially and independently of the legislature and the executive (para. 123). In the adjudication of disputes, they may also make law, as we discuss below. The legislature makes the laws but does not implement them (*South African Association of Personal Injury Lawyers v. Heath and Others (Heath)*, para. 25; Thabo and Odeku 2021). The executive drafts and initiates legislation to be adopted by the legislature, and implements the laws thus made, but has no legislative power other than that vested in it by the legislature (*Heath*, para. 25).

The fact that the doctrine of separation of powers is implicit (*President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, para. 132) does not impact upon its normative weight. Express and implicit or tacit terms of law in South Africa carry equal legal force (*Heath*, para. 20). The separation of powers is thus a binding constitutional norm operating as 'a contextual, institutional arrangement that promotes the normative objectives imposed by the Constitution' (Maree 2021: 42).

The judiciary is cast in the role of 'guardian and custodian of the Constitution' (Thabo and Odeku 2021: 549), including to prevent abuse of power on the part of the other branches of government and ensure the fulfilment of the rights enshrined in the Constitution (Murcott 2022b: 69). In performing this role, the judiciary must accord the other branches due respect, which it does by fulfilling its judicial review function with appropriate deference (Thabo and Odeku 2021; *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, paras 46–48). At the same time, as Fish Hodgson (2018: 73) argues,

> because the entirety of the state machinery is constitutionally obliged to respect, protect, promote and fulfil all rights in the Bill of Rights, the constitutional conception of separation of powers is never disconnected from the Constitution's ambition to combat poverty and inequality.

Thus, the separation of powers incorporates a normative component that goes beyond controlling power and ensuring efficiency by also requiring the judiciary to pursue social justice (ibid.). In the context of climate litigation, judges ought to appreciate that a well-functioning climate system is a precondition for social justice—without it, social justice cannot be achieved (Murcott 2022b: 135, 165).

In administrative law judicial review proceedings, South Africa's model of separation of powers requires that the judiciary ensures that the legislature and executive act within the law and fulfil their constitutional responsibilities. All public power is susceptible to

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scrutiny against the constitutional value of the rule of law (*Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, paras 56–59). Administrative action, a species of public power, must be performed in a manner that conforms with the right to just administrative action entrenched in section 33 of the Constitution, given effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It must be lawful, procedurally fair, and reasonable (sect. 33). When it is not, it will be inconsistent with the Constitution and invalid due to the supremacy of the Constitution (sect. 2). One of the grounds upon which administrative action may be found to be unlawful as a matter of administrative law is a failure on the part of a decision-maker to consider relevant factors (sect. 6(2)(e)(iii) of PAJA). This ground of administrative law review was cautiously applied during the apartheid era due to the high degree of deference judges showed to Parliament (Hoexter and Penfold 2021: 440). However, 'the post-1994 law reports abound' with instances of judges setting aside decisions for failure to consider relevant considerations, including those that are read into the text on the basis of constitutional rights (ibid.; see, for example, *National Council of the Society for Prevention of Cruelty to Animals v. Minister of Environmental Affairs and Others*). As we discuss in section 3, this ground of review has been relied upon in climate litigation to find that a failure to consider climate change has rendered various decisions of the executive branch unlawful. A corollary of these findings is that a duty to consider climate change has emerged.

In exercising their review function and interpreting legislation with reference to the values underpinning the Constitution, courts may sometimes make law (Botha 2012: 100). Once the court has made law, there exists a responsibility to comply, in the sense that there will be consequences for non-compliance. For instance, future administrative decisions of the same nature may be found unlawful and set aside if the judicial interpretation adopted is not adhered to by a member of the executive branch. Leaving aside the dictates of a transformative constitutional regime for a moment, the idea that judges sometimes make law was well articulated by the Zimbabwean Supreme Court in the 1991 decision of *Zimnat Insurance Co Ltd v. Chawanda*. The court held that it sometimes happens that the objects of socio-economic changes occur more quickly through legal development by the judiciary than by the legislature (832H-I). This is because judges have discretion in the process of interpretation and application of the law (ibid.). The court in *Zimnat Insurance Co Ltd v. Chawanda* asserted that judges do not simply discover the law, 'but they also make law', an 'inherent and inevitable' component of the judicial function (ibid.). Returning to the South African context post-apartheid, in *Matiso v. Commanding Officer, Port Elizabeth Prison*, the court explained that in terms of the Constitution, the courts have the mandate to concretize or substantiate the law and, in the process, judges will 'invariably "create" law' (paras 597, 598). This does not mean that judges have a carte blanche licence to make law, since theirs is a limited law-making function in the context of adjudication of disputes (ibid.).

The courts' law-making power is not an infringement of South Africa's separation of powers doctrine, but rather a feature of it (Botha 2012: 100; Currie and De Waal 2013: 57). This is because the country's project of transformative constitutionalism requires legal interpretation aimed at 'transforming [South Africa's] political and social institutions and power relationships in a democratic, participatory, and egalitarian direction inducing large-scale social change through processes grounded in law' (Klare 1998: 150). This is known as 'transformative adjudication', which occurs when judges exercise their interpretive powers under the Constitution and indirectly apply and enforce human rights (Murcott 2022b: 70; Liebenberg 2010: 71; Du Plessis 2008: 32/80). The interpretation clause in the Bill of Rights (sect. 39(2)) provides that when interpreting legislation, courts must give effect to the spirit, purport, and objects of the Constitution. Doing so necessarily entails reasoning that applies and enforces human rights and upholds the Constitution's foundational values (Langa 2006: 353–54; *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and*

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Tourism and Others, para. 72; Albertyn and Davis 2010: 202). According to Botha (2012: 100) the approach to interpretation mandated by section 39(2) of the Constitution recognizes that the judiciary has inherent law-making powers during statutory interpretation.

While it is not without its critics (see, for example, Sibanda 2020), 'transformative constitutionalism allows judges to acknowledge the material power relations of race, class, and gender that underly the functioning of society' (Hoexter 2008; Murcott 2022b: 50). Transformative adjudication mandated by section 39(2) of the Constitution is 'justified by South Africa's thick, social justice-oriented conceptualisation of the rule of law' (Murcott 2022b: 60). It requires 'the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the promotion of a 'culture of justification' in public-law interactions' (Hoexter 2008: 286). To achieve these goals, courts engage with extra-legal factors in a value-laden manner. The choice of values available to South African judges are those explicitly and implicitly provided for by the Constitution (Hoexter 2008: 87–88). Moreover, judges are required to make their choices consciously and openly (ibid.). In 2023 the Constitutional Court affirmed that it is alive to its transformative role in *Minister of Water and Sanitation and Others v. Lotter N.O. and Others*, which concerned the right to trade water rights. Engaging with extra-legal factors, the court recognized that water remains in the hands of 'advantaged white farmers' and that this 'injustice' must be addressed to deal with the legacy of racially 'skewed enjoyment of water rights' (para. 39). We argue that transformative adjudication informed the climate litigation discussed in section 3.

In disputes about the environment, the kind of adjudication described is a feature of transformative environmental constitutionalism, a nascent legal theory. The theory weaves together Klare's idea of a project of societal transformation grounded in law in pursuit of social justice and mandated by the Constitution (transformative constitutionalism), and the elevated protection of the environment in constitutional texts (environmental constitutionalism), recognizing that a well-functioning environment is a precondition for social justice (Murcott 2022b). In developing this nascent theory, it is argued that (Murcott 2022b: 141):

> Transformative environmental constitutionalism requires transformative adjudication of environmental law disputes from a rights-based perspective, i.e., substantive legal reasoning that gives effect to, and is consistent with, relevant rights and the overarching substantive vision of the Constitution, including the pursuit of social justice, dignity and equality. This kind of substantive reasoning in environmental law disputes could facilitate engagement with socio-ecological contexts and their impacts on vulnerable people, which, in turn, could serve to 'augment the attention that constitutional environmental rights receive in public discourse', and further 'meaningfully contribute to the success of environmental claims in future' to develop law for the Anthropocene.

We are alive to Sibanda's valid criticism that the notion of transformative constitutionalism has judicialized governance and thus may fuel the counter majoritarian dilemma (Sibanda 2020: 104). However, as the public administration is grappling with immense corruption, the courts have emerged as the last bastion of good governance, in no small part because of their commitment to the spirit, purport, and objects of South Africa's transformative constitutional regime. In other words, judicialized governance that embraces transformative constitutionalism has played an important accountability enhancing role, including in the context of responding to climate change.

Having outlined the role of judges under South Africa's post-apartheid constitutional design, in section 3 we describe the judge-made 'duty' to consider climate change with reference to *Thabametsi*, *PHA*, *Khanyisa*, and *Sustaining The Wild Coast*. The 'duty' emerges from the reasons for deciding (*ratio decidendi*) and findings in *Thabametsi*, and subsequent development thereof in *PHA*, *Khanyisa*, and *Sustaining The Wild Coast*. This is dictated

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by the doctrine of judicial precedent, which entails that the decisions of relatively higher courts bind the lower courts (*Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another*, para. 60). In South African law, the *ratio decidendi* carries the same weight as the finding or decision of the court. Of course, we are fully aware of the inherent weaknesses of judge-made law, since courts are by their nature reactionary, dictated to by the issues raised before them. Further, judgments of the various High Courts set precedent that is binding within their area of jurisdiction (province), [2] but only persuasive in other jurisdictions in South Africa (Devenish 2007). However, in practice, judges in one province often consider themselves bound by decisions of other provinces (ibid.). Despite these weaknesses, the nature of the 'dialogic partnership' of the judiciary with the other branches of government in South Africa has meant that the precedent set in *Thabametsi* has had an impact beyond courts. First, it has influenced the Water Tribunal, as we show with reference to *Khanyisa*.[3] The case law has also led to the development of a guideline on the consideration of climate change in environmental decision-making (Department of Forestry, Fisheries and Environment 2021).

3. The emerging judge-made 'duty' to consider climate change

In this section we discuss *Thabametsi*, *PHA*, *Khanyisa*, and *Sustaining The Wild Coast*. We view these cases as climate litigation since they involve judicial or quasi-judicial engagement with climate mitigation and/or adaptation challenges.[4] *Thabametsi*, *Khanyisa*, and *Sustaining The Wild Coast* relate to new fossil fuel developments. They 'reflect resistance to long term investments in fossil fuel infrastructure, as well as localized pollution, and the risks to water supplies' (Bouwer and Field 2021: 126). *PHA* concerned water scarcity in a time of climate change potentially exacerbated by urban development, impacting upon livelihoods and food security. Each of the cases is illustrative of the trend of non-governmental organizations and environmental defenders using litigation to address climate governance gaps, identifying environmental risks and promoting human rights in response to destructive neo-colonial and capitalist development agendas in the Global South (Bouwer 2022: 174; Setzer and Benjamin 2019; Gonzalez 2021: 112–15). While Chamberlain and Fourie 2024) evaluate the significant role of environmental defenders in South Africa, including through litigation, our analysis is primarily doctrinal. We identify a judge-made 'duty' to consider climate change emerging against the backdrop of the transformative constitutional regime that creates enabling conditions for this kind of legal development. In this way, we contribute to the existing scholarship reflecting on South Africa's nascent body of climate litigation (see, for example, Ashukem 2017; Humby 2018; Kotzé and du Plessis 2020; Murcott 2022a; Murcott 2022b; Chamberlain 2023; Bouwer 2022; Moodley 2022). Bouwer (2022: 175–76) has usefully commented with reference to *Thabametsi* and *Khanyisa* that human rights have strongly influenced the nature of the relevant legislative duties in 'a subtle but effective way' in African climate litigation. Our analysis goes further

2 High Courts are distributed across South Africa's nine provinces. They are typically courts of first instance in administrative law issues in their area of geographical jurisdiction. Appeals against decisions of High Courts may be pursued in the Supreme Court and the Constitutional Court (i.e. national (federal) courts).

3 Decisions of the Water Tribunal do not set precedent but do carry persuasive force (Baboolal-Frank 2019: 116–22). It is, however, possible to approach the High Courts to enforce decisions of the Water Tribunals (sect. 147 of the Water Act).

4 Many other cases deal more peripherally or indirectly with climate mitigation and adaptation issues by challenging harmful land uses, and addressing pollution, as discussed, for instance, in Vinti 2019; Murcott and Webster 2020; Huizenga 2021; and Mukwevho 2022. Moreover, the body of case law is growing. Cases engaged with climate issues decided in 2023 include: *Thungela Operations (Pty) Ltd v. Chief Director, Water Use License Management: Department Of Water And Sanitation and Others*; *Iswelethu Cemforce CC v. Trustees for the time being of the National Education Collaboration Trust and Another*. See also the 2022 decision, *South Durban Community Environmental Alliance and Another v. Minister of Forestry, Fisheries and The Environment and Others*.

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by linking this development to the role of judges within the broader constitutional architecture, discussed in section 2.

3.1 *Thabametsi*: consideration of climate change in approving a coal-fired power station

Decided in 2017, *Thabametsi* is widely regarded as South Africa's first climate case (Humby 2018; Peel and Lin 2019: 684). It was instituted by Earthlife Africa Johannesburg, a non-profit organization that 'seeks a better life for all people without exploiting other people or degrading the environment' (Earthlife Africa. 2023). The case formed part of a broader climate justice campaign focused on the need to keep fossil fuels in South Africa in the ground (Chamberlain and Fourie 2024). A central issue was whether the Department of Environmental Affairs (DEA) as it then was (now the Department of Forestry, Fisheries and Environment (DFFE)) was subject to a legal duty to consider climate mitigation and adaptation issues when granting an environmental authorization for the development of a new coal-fired power station. The developer, Thabametsi Power Company (Pty) Ltd, had applied for, and been granted an environmental authorization in terms of section 24 of NEMA, South Africa's framework environmental legislation (para. 2). The provision requires that in order to commence activities listed or specified by the Minister of Forestry, Fisheries and Environment an applicant (developer) must obtain an environmental authorization. One such listed activity is the construction of a coal-fired power station. Section 24O(1) of NEMA requires the evaluation of *all relevant factors* in deciding on an application for environmental authorization, including any pollution, environmental impacts, or environmental degradation likely to be caused if the application is approved or refused (our emphasis). This evaluation occurs through an environmental impact assessment (EIA) process provided for by regulations giving effect to NEMA, intended to provide authorities with all the necessary information on the environmental impacts of the proposed activity.

Earthlife argued that the climate change impacts of a proposed coal-fired power station were relevant factors that ought to have been properly considered (para. 4). At the time that the Chief Director of the DEA took his decision, however, the climate change impacts of the power station had not been investigated or considered in detail (para. 7). Earthlife contended that a climate change impact assessment in relation to the construction of such a power station would entail an evaluation of the impact of the contribution of the proposed coal-fired power station to climate change over its lifetime, the resilience of the coal-fired power station to climate change, and how these impacts may be negated (para. 6). A failure to consider these factors, according to Earthlife, would result in the granting of an environmental authorization being unlawful and irrational as a matter of administrative law (paras 9, 10). Among other grounds, Earthlife placed reliance on section 6(2)(e)(iii) of PAJA, which provides that a decision is reviewable if the decision-maker has failed to take into account relevant considerations.

The court in *Thabametsi* agreed with Earthlife that climate change was a relevant factor that had not been taken into account, rendering the authorization unlawful (paras 87, 101). The court found that a 'plain reading' of section 24O(1) of NEMA confirmed that climate change impacts are indeed relevant factors that must be considered (para. 78). Looking beyond the text, the court reasoned that the peremptory mandate in section 24 of NEMA to consider any pollution, environmental impacts, or environmental degradation before the commencement of a listed activity invariably required consideration of climate change (ibid.). It was accepted that the emission of greenhouse gases (GHGs) from a coal-fired power station amounts to pollution that contributes to climate change (para. 59). In essence, the court reasoned that relevant legal framework explicitly demands that the government must consider how to negate, mitigate or address the environmental impacts of a project (para. 78). This implicitly required an evaluation of the project's climate change impacts and measures to avoid, reduce or remedy them (ibid.).

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Crucially, the court held that NEMA, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation (para. 80). The court acknowledged that, as a point of departure, when interpreting legislation, it was bound by section 39(2) of the Constitution to promote the purport, spirit and objects of the Bill of Rights, particularly the environmental right (para. 81). Section 39(2) was triggered because the provision being interpreted—section 24O of NEMA—must give effect to the environmental right enshrined in section 24 of the Constitution (ibid.). The court then explained that in terms of the right (section 24(b)(iii) of the Constitution), the environment is to be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (para. 82). Engaging in contextual reasoning, the court acknowledged that climate change poses substantial risks to sustainable development in South Africa (ibid.). This is because of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters (ibid.). Further, the court found that sustainable development is 'integrally linked with the principle of intergenerational justice, requiring the state to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change' (ibid.). As Bouwer (2022: 174) argues, human rights had 'a subtle but effective influence' on the interpretation of NEMA in *Thabametsi*. This was possible by virtue of the broader transformative constitutional architecture, discussed in section 2.

The court promoted a culture of justification by disclosing contextual factors that informed its reasoning. Engaging in transformative adjudication to justify that climate change was a relevant consideration the court reasoned that:

- 'an environmental impact assessment process is inherently open-ended and context specific' (para. 89);
- '[a] climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory' required by its Nationally Determined Contribution in terms of the Paris Agreement, 2015 (para. 90);
- 'the legislative and policy scheme and framework overwhelmingly support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process' (para. 91);
- 'the text, purpose, ethos and intra and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before the granting of an environmental authorisation' (ibid.).

Having failed to consider climate change, the decision-makers had acted unlawfully, in contravention of the ground of review under section 6(2)(e)(iii) of PAJA (para. 87). As a result, the conduct was inconsistent with the right to administrative justice entrenched in section 33 of the Constitution, and the value of the rule of law in section 1 of the Constitution. The decision was not remitted to the original decision-maker, and instead the Minister, exercising an internal appeal authority, was ordered to reconsider the granting of the environmental authorization and directed to consider a climate change impact assessment report (para. 126).

Much has been written about *Thabametsi*, including the remedy fashioned and the reliance on human rights arguments (Humby 2018; Setzer and Benjamin 2019: 11–12; Bouwer 2022: 173–74; Murcott 2022b: 174–81). Our focus is on the court's textual, purposive, and contextual approach to the interpretation of the explicit provisions in NEMA mandated by section 39(2) of the Constitution. Interpreting NEMA with reference to the environmental right and environmental principles, the court clarified that climate change had to be

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considered by the decision-makers in the executive branch. The corollary of doing so was to introduce a 'duty' to consider climate change before approving a coal-fired power station. The effect of the precedent set is that climate change is a relevant factor in the environmental authorization process that must be taken into account in order for the executive branch to act lawfully. By clarifying what is relevant through the interpretive approach mandated by the Constitution, the court, in effect, made law.

Following *Thabametsi*, a climate impact assessment was conducted. It revealed that the construction of the power station 'would be one of the most emission intensive plants in the world' (Centre for Environmental Rights 2020). Further, scientific modelling showed that the power station was not necessary and 'would require costly increased mitigation efforts in the power sector in order to meet climate commitments' (ibid.). The project has since been cancelled (Chamberlain and Fourie 2024). Okoth and Odaga (2021: 137) posit that *Thabametsi* relied on procedural flaws (the unlawfulness of the state's failure to consider a relevant factor) rather than a substantive obligation to consider climate change. Yet South Africa's model of separation of powers and the interpretive approach mandated by section 39(2) of the Constitution empowered the court to read in to NEMA that climate change was a relevant factor, which goes beyond the purely procedural realm. The court's interpretive approach was informed by the obligation to give effect to the right to have the environment protected for the benefit of present and future generations. *Thabametsi* is viewed as adopting a radical approach: the courts have taken the step of overseeing state compliance with climate change obligations (Glazebrook 2020: 22).

3.2 *PHA*: consideration of climate change in approving an urban development

Subsequently, *PHA* prompted judicial reflection on whether climate change was a relevant actor in approving a massive urban development. The Philippi Horticultural Area Food and Farming Campaign challenged decisions approving a proposed development on 479 hectares of land owned by Oakland City Development Company (Pty) Ltd in Cape Town (paras 1–9). The Campaign expressed concern that the development (housing for 15,000 families, as well as schools, commercial, industrial, and other facilities) would compromise an aquifer that was central to its farming activities in the adjacent Philippi Horticultural Area (para. 12). The Campaign's farming activities have been described as crucial to food security in Cape Town (Battersby-Lennard and Haysom 2012). They played a vital role in providing food to vulnerable communities during South Africa's Covid-19 lockdown (Sonday 2021).

As in *Thabametsi*, the Campaign's challenge was based in administrative law. The Campaign sought to review and set aside decisions taken by provincial and municipal officials that had the effect of permitting Oakland's proposed urban development. Among other grounds of review relied upon, the Campaign argued that the approval fell to be judicially reviewed as unlawful in terms of section 6(2)(e)(iii) of PAJA as a result of a failure to consider several relevant factors (para. 56). One of the issues was the Campaign's allegation that the impacts of the proposed urban development on an aquifer that was central to the proper functioning of their horticultural endeavours had not been considered, and that these impacts were particularly pertinent in a time of water scarcity brought on in Cape Town by climate change (paras 56, 80, 102, 130). This issue resulted in judicial engagement with whether the legislation, properly construed, required that the officials consider climate change in their environmental and land use planning decisions concerning urban development. Environmental decisions were taken by various officials in terms of ss 24 and 24O of NEMA (as in *Thabametsi*). Certain planning (rezoning and subdivision) decisions were taken in terms of section 36 of Land Use Planning Ordinance 15 of 1985 (LUPO). None of the legislative provisions explicitly impose a duty on the state to take climate mitigation and adaptation challenges into account. Instead, as mentioned above, section 24O of NEMA

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requires an assessment of 'all relevant factors', while LUPO requires that in planning decisions 'consideration be given to the preservation of the natural environment', the safety and welfare of members of the community, as well as the effect of applications on existing rights (paras 114, 124).

In relation to the Campaign's challenge to the granting of an environmental authorization in respect of the urban development, the court commenced its analysis by highlighting that section 24O of NEMA must be 'interpreted purposively in a manner consistent with the Constitution, with due regard to the text and context of the legislation' (para. 71). This context included the environmental right enshrined in section 24 of the Constitution, to which section 24O of NEMA gives effect, as well as NEMA principles (sect. 2) (ibid.). The NEMA principles have been described as 'justice-oriented principles of environmental governance in South Africa, that apply to "the actions of all organs of state that may significantly affect the environment"' (Murcott 2022b: 78). The court confirmed that the NEMA principles must inform all decisions taken under NEMA, and that they provide that 'sustainable development requires the consideration of all relevant factors' (ibid.).

Having scrutinized the EIA process conducted and the evidence before the officials concerned, the court found that an up-to-date specialist report regarding the impact on the aquifer and its concomitant impact on climate change and water scarcity was necessary in order for the officials to make a rational and lawful decision (paras 102, 103). The officials had considered groundwater studies in 2001 and 2008, and geohydrological reports in 2012 and 2013 (para. 97). In addition, the EIA report addressed stormwater management (para. 96). However, these reports had not specifically or recently assessed the impacts on the aquifer in a time of climate change (para. 100). They reasoned that 'none of these studies appeared to have been focused particularly on the impact of the development on the aquifer, the importance of the preservation of the aquifer, and how best to achieve this, in the context of water scarcity and climate change in the Western Cape' (ibid.).

The Campaign's assertion that it was necessary to properly assess water scarcity in a time of climate change was taken seriously by the court, and given legitimacy through transformative adjudication, promoting a culture of justification. A failure to consider an up-to-date report that focused on the impacts of the development on the aquifer (including climate change) rendered the granting of the environmental authorization unlawful and irrational (para. 103) as a matter of administrative law, informed by the values underpinning the Constitution. In reaching this conclusion, the court expanded the precedent set in *Thabametsi* by requiring an assessment of climate change issues in the context of an EIA for an urban development. The court ordered that the officials were required to reconsider the approval of the development with reference to new evidence and reports relating to the aquifer (para. 107). The court noted, in granting this relief relating to the environmental decisions, that it was not its role to 'second-guess' the evaluation of relevant considerations such as climate change or food security, but rather to ensure that the officials had performed their function with reference to such relevant considerations and the information before them (para. 108). Thus, the court balanced its law-making role by showing deference to the executive branch in exercising its remedial powers.

In relation to the planning decisions taken in terms of LUPO, the Campaign alleged (para. 111) that the officials had:

> failed to take into account relevant considerations related to the importance of the [Philippi Horticultural Area] as a dedicated agricultural development zone of horticultural value to Cape Town, the importance of the aquifer and issues of food security.

The Campaign elaborated that the officials who approved rezoning and subdivision applications for the Oakland development had not given proper consideration to the preservation of the natural environment as required by section 36 of LUPO (para. 114). The

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preservation of the natural environment was, according to the Campaign, relevant to issues of food security. Food security is, in turn, influenced by the water security offered by a properly functioning aquifer, particularly significant in a time of climate change (ibid.).

Embracing its duty to engage in transformative adjudication, the court agreed. It found that (para. 130):

> What was required of the relevant decision-makers was a consideration of relevant considerations concerning the preservation of the natural environment and the effect of the application on existing rights … In relation to the aquifer, an assessment of the impact of development on it, having regard to the rights set out in s 24 of the Constitution and the provisions of NEMA and its regulations, required consideration of the impact of the rezoning and subdivision sought in relation to the aquifer as a large underground natural resource, its state, future and impact on issues related to water scarcity and climate change. Had a more recent professional report which focused on the impact of the development on the aquifer been before the decision-makers, the relevant considerations as to the preservation of the natural environment and the effect of the application on existing rights would have been capable of consideration. Putting off an assessment of issues pertinent to the aquifer, when later stormwater plans are considered, ignores the directives principles applicable to considering applications set out in s 36 of LUPO.

This passage illustrates that in exercising its mandate under section 39(2) of the Constitution, the court drew on the environmental right to interpret the obligations of the officials under section 36 of LUPO purposively. In particular, the court clarified that in order to act lawfully and in a manner consistent with the environmental right, the officials were obliged to consider how an urban development would impact water scarcity and climate change. LUPO, an apartheid era planning law, imposed no express legal requirement to do so (Moodley 2022b: 384). The court exercised its transformative law-making power to 'find' this requirement within the legal provision. In future, officials acting under similar circumstances will be required to recognize that such precedent exists (whether binding or persuasive). The effect of this precedent is that should decision-makers rely on outdated studies and fail to consider climate change in planning decisions, their decisions may too be set aside where climate adaptation concerns such as water scarcity are at play.

In its reasoning, the court drew on the precautionary principle entrenched in South African environmental law through the NEMA principles (sect. 2(4)(a)(vii) of NEMA). Section 2(4)(a)(vii) of NEMA expresses that when decisions of the state impact the environment, a 'risk averse and cautious approach [should be] applied which takes into account the limits of current knowledge about the consequences of decisions and actions' (for discussion see Glazewski and Plitt 2015: 215–18). The court found that 'a risk-averse and careful approach' was required of the officials in relation to water scarcity and climate change, 'especially in the face of incomplete information' (para. 130). With reference to this principle, the court interpreted the explicit requirement in section 36 of LUPO to preserve the natural environment and take into account the effects on existing rights implicitly to require consideration of climate impacts. The court ordered that the planning decisions should be reconsidered by the relevant appeal body, taking into account the information relating to the aquifer, which the body had previously deemed irrelevant (para. 135).

In *PHA*, by emphasizing the need for consideration of information relating to water security and the aquifer in relation to both the environmental and planning decisions under scrutiny, the court recognized (albeit implicitly) water scarcity as a climate adaptation issue. The court can also be viewed as adopting a social justice-oriented approach aligned with the Constitution's purpose, given the concern expressed about food security. In our view, the court showed an appreciation of the socio-ecological systems links between the aquifer, the proper functioning of the Campaign's farming activities, water scarcity, and climate change.

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The court viewed these issues as crucial for consideration in order for the environmental and planning decisions related to the Oakland development to be lawful and rational. The court thus introduced a new dimension to the duty to consider climate change (Moodley 2022b: 384). The duty was recognized as applicable in *PHA* beyond the realm of fossil fuel extraction and burning, in the context of environmental and planning decisions relating to an urban development.

3.3 *Khanyisa*: consideration of climate change in the context of water licensing for a coal-fired power development

In the same year that *PHA* was decided, a case before the Water Tribunal also raised the need for consideration of climate impacts, *Khanyisa*. The litigation arose following the granting of a water use licence in terms of the Water Act to ACWA Power Khanyisa Thermal Station (RF) (Pty) Ltd, for a proposed new coal-fired power station (para. 1). The Water Tribunal is a quasi-judicial body established and empowered under section 148 of the Water Act to adjudicate appeals against various decisions relating to water uses in South Africa (para. 1). groundWork, a non-profit environmental justice organization, pursued an appeal against the granting of a water use licence (WUL) to Khanyisa as part of a broader movement to resist new coal-fired power production in South Africa (groundWork undated). It did so given the contribution of coal-fired power to climate change (ibid.). groundWork argued that the decision of the Acting Director-General: Department of Water and Sanitation to issue a WUL to the Khanyisa contravened the constitutional rights to an environment not harmful to health or wellbeing (sect. 24), dignity (sect. 10), and equality (sect. 9) (para. 9). Further, groundWork argued that in granting the WUL, the Department had not taken into account all relevant factors as required by section 27 of the Water Act (ibid.).

Climate change impacts are not explicitly listed in section 27 of the Water Act as one of the relevant factors to be considered in the granting of a WUL. The Water Tribunal acknowledged that 'the effects of climate change are a relevant factor to be considered under s 27(1) of the [Water Act]' (para. 20). However, the Tribunal ultimately found that whether or not there was, or ought to have been, a climate change assessment was a matter that a competent environmental authority (the DFFE or the Department of Mineral Resources and Energy) rather than the Department of Water and Sanitation should consider before issuing an environmental authorization (ibid.). This was because: 'an application for environmental authorisation in terms of NEMA must invariably precede, and be submitted with a WUL application' (ibid.). It therefore made sense for the necessity of a climate change assessment to be determined by officials acting in terms of NEMA, as part of the EIA process, rather than as part of the WUL process under the Water Act (ibid.). This was as a matter of good environmental governance and avoiding 'absurdities' and duplication in approval processes, since any activity that requires a WUL is subject to the Environmental Impact Assessment Regulations under NEMA (ibid.). To the extent that the appropriate climate change assessment was not done, an appeal against the environmental authorization would be the correct platform to address the issue (ibid.).

Nevertheless, one of the relevant factors to be assessed in granting a WUL is 'efficient and beneficial use of water in the public interest' (sect. 27(1)(c) of the Water Act). In assessing this issue, the Tribunal noted that it was not in dispute that, regardless of mitigating measures, building a coal-fired power station would increase South Africa's total emissions of GHGs (para. 81). It was also not in dispute that South Africa has committed to reducing the emission of GHGs (ibid.). The Tribunal further recognized that one of the main impacts of climate change in Southern Africa will be water scarcity (ibid.). According to the Tribunal, from a 'water security angle', the Department of Water and Sanitation should have considered whether authorizing water uses for the power station was 'sustainable and in the public interest, considering the basic needs of future generations' (para. 82). The relevant officials had not fully considered this broader perspective of sustainable water use

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(ibid.). The Tribunal's engagement with this context is illustrative of transformative adjudication. Moreover, the Tribunal promoted a culture of justification by demanding that the Department of Water and Sanitation reflect on the links between coal-fired power, climate change, and water scarcity.

The Tribunal went on to find that climate change should have been considered in the assessment of this factor (para. 82). Had climate change been considered with reference to this factor the Department 'could not have concluded that the authorised water uses promoted the beneficial and sustainable use of water in the public interest' (ibid.). Despite this finding, the Tribunal confusingly concluded that the Acting Director-General had taken a reasonable decision to grant the WUL in light of the myriad of factors that must be balanced (para. 107). The appeal against the granting of the WUL was nevertheless successful on a completely different basis: inadequate public participation (para. 142).

Regardless of the basis upon which groundWork's appeal to the Water Tribunal was successful, the normative value of *Khanyisa* in the context of this article is that a responsibility to consider climate change was read into section 27(1)(c) of the Water Act through transformative adjudication. The ideas of intergenerational equity and sustainability in section 24 of the Constitution stretched the band of section 27(1)(c) of the Water Act to require the consideration of climate change. Of particular interest is the Tribunal's reasoning in linking the consideration of climate change with the requirement to assess sustainable use of water in the public interest (para. 79). The Tribunal remarked:

> Since the decision to authorise the water uses is also a decision contemplated in section 2 of NEMA that may significantly affect the environment, any consideration of the public interest must include a consideration of whether or not the decision is consistent with the public's right to have the environment protected and the need to secure ecologically sustainable development, with particular reference to the effect of the decision on water resources.

The Tribunal's reasoning was informed by the constitutional protection of the environment, including the environmental right's commitment to intergenerational justice, which hinges on sustainable use of natural resources (Vinti 2022: 136).

Another notable feature of *Khanyisa* is its treatment of *Thabametsi*. Acknowledging that 'the effects of climate change are a relevant factor to be considered' under the Water Act, the Tribunal cited *Thabametsi* (para. 20, footnote 28) and viewed climate change as something that officials are obliged to consider under NEMA. In other words, the Tribunal viewed *Thabametsi* as having created a duty, illustrating the 'dialogic' relationship between the judiciary and the executive branch.

3.4 *Sustaining The Wild Coast*: consideration of climate change in granting a right to explore for oil and gas

The last climate case we discuss, *Sustaining The Wild Coast*, was decided in 2022. It introduced a responsibility to consider climate change under the MPRDA, legislation aimed at promoting equitable access to South Africa's mineral and petroleum resources. The litigation was brought primarily by and on behalf of indigenous communities in response to the granting (and extension) of an right to explore for oil and gas along South Africa's Wild Coast. Exploration would entail, among other things, a seismic survey (para. 1). The exploration right was granted (and extended) by the Department of Mineral Resources and Energy in terms of the MPRDA, read with relevant regulations (para. 18). Shell Exploration and Production South Africa BV as well as Impact Africa Ltd were the beneficiaries of the exploration right (para. 16).

A seismic survey, which involves using powerful airguns to map out oil and gas reserves within the seabed, was to take place as part of the exploration (para. 23). When notice

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was given that a seismic survey was to be conducted along the Wild Coast there was widespread public opposition given concerns about environmental and cultural impacts (Wege et al. 2021). The exploration right was alleged to have been granted without a proper public participation process having taken place, nor an environmental authorization, and without a full assessment of cultural and environmental impacts. Accordingly, indigenous communities instituted litigation (para. 31). It was argued that the decision-makers did not properly consider climate change (para. 32). In December 2021, the communities sought and obtained an interim interdict preventing the seismic survey from proceeding pending administrative law judicial review proceedings to review and set aside the granting and renewal of the exploration right.[5] The communities were successful in the judicial review, including on the basis that the decision-maker had not adequately considered anticipated harm to marine and bird life, impacts on the communities spiritual rights, nor climate change impacts (paras 107–132).

A careful reading of the judgment reveals that the environmental right offered an interpretive lens. In framing the judgment, the court noted that the dispute concerned a 'scramble for the utilisation of our coastal waters', foreshadowed by the environmental right (para. 4). The court went on to reference the right and its call to balance ecological, social and economic considerations in environmental decision-making (ibid.). The court quoted the Constitutional Court's oft cited pronouncement in *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* concerning sustainable development as a feature of the environmental right (ibid.). The court rejected Shell's blunt claim that "there was no evidence of harm" to the livelihoods of indigenous communities dependent on a well-functioning coastal environment (para. 117–19). The court found it troubling that in granting an exploration right, decision-makers did not appear to have considered remedial measures alleged to have been put in place by Shell to protect the environment (para. 119). In addition, the court highlighted that the state is the public trustee of coastal public property, an idea that derives from the National Environmental Management Integrated Coastal Management Act 24 of 2008, legislation giving effect to the environmental right (para. 126). Further, in the face of disagreement among the parties' experts as to the nature and extent of environmental harm, the court reasoned 'it would have been incumbent on the decision-maker to invoke the precautionary principle' (paras 108–9). This principle is incorporated in NEMA (sect. 2), legislation giving effect to the environmental right.

Among the applicants were two intervening parties, Natural Justice and Greenpeace Environmental Organization NPC, both civil society organizations who joined the litigation in the public interest (paras 43–52). They raised the argument that the decision to grant the exploration right fell to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA as a result of a failure by relevant officials to consider climate change impacts (para. 32). Before exercising its powers, the Department was required to consider an environmental management programme report (EMPr). An EMPr must include information about the environmental impacts of a proposed activity; in this case the need and desirability of exploring for oil and gas (para. 18, footnote 23). However, there is no explicit requirement in the regulations under the MPRDA that an EMPr must address climate impacts (ibid.). Nevertheless, the court found that climate impacts were relevant, and a failure to assess them rendered the granting of the exploration right unlawful (paras 120–25, 132). The court thus followed and extended the *ratio* in *Thabametsi* (ibid.). Engaging in transformative adjudication by promoting a culture of justification, the court referred to and legitimized expert evidence introduced by the intervening parties to the effect that:

5 The interdict was granted in *Sustaining The Wild Coast NPC v. Minister of Mineral Resources and Energy* (2021) ZAECGHC 118, High Court, South Africa.

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- 'most of the discovered reserves of oil and gas cannot be burnt if we are to stay on the pathway to keep global average temperature increases below 1.5 degrees Celsius' (para. 121); and
- 'Authorising new oil and gas exploration, with its goal of finding exploitable oil and/or gas reserves and consequently leading to production, is not consistent with South Africa complying with its international climate change commitments' (ibid.).

Adopting a social justice-oriented approach aligned with the purpose of the Constitution, the court also engaged in transformative adjudication by recognizing and legitimizing the experiences of marginalized indigenous communities (para. 117), taking seriously their evidence that:

> they are already seeing signs of climate change in his area: their agriculture is becoming more challenging as they experience much more unpredictable weather patterns and more extreme weather events such as more droughts and heavier downpours of rain. Their livestock is sick more often.

The court acknowledged that the granting of an exploration right is linked to subsequent extraction and burning of fossil fuels. Adopting a social justice-oriented approach, and showing concern for those most vulnerable in society, the court noted (para. 123) that:

> the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food.

Building on *Thabametsi* the court found (para. 125) that it was 'clear' that:

> had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate change and *the right to food perspective*, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable (our emphasis).

This passage demonstrates that the court viewed climate change as a human rights issue, linking access to food to a stable climate. The right to access to food is protected in section 27 of the Constitution.

The court concluded that the failure to consider climate impacts as well as other relevant considerations when granting the exploration right was 'fatal', and reviewable as a matter of administrative law in terms of section 6(2)(e)(iii) of PAJA (para. 132). The court set aside the decision to grant the exploration right (para. 139). In our view, the court's interpretation of the MPRDA has the effect of making law by introducing a duty on the part of decision-makers in the Department of Mineral Resources in future to consider climate change before granting exploration rights for new fossil fuel developments, if they are to act lawfully.

3.5 Defining features of *Thabametsi*, *PHA*, *Khanyisa*, and *Sustaining The Wild Coast*

In this section, we summarize some defining features of the cases discussed. First, each case reveals the absence of an explicit legislative duty imposed on the executive branch to consider climate change impacts in South Africa when new developments are approved. Put differently, the case law reveals a gap in the law. The legislative duties mentioned and interpreted (that is under NEMA, LUPO, the Water Act, and the MPRDA) are aimed at environmental protection more generally. Officials in the executive branch could, in

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theory, implement these duties by taking into account climate impacts and ensuring that appropriate adaptation and mitigation measures are in place. However, the case law illustrates a reluctance on their part to do so. As such, the courts have been approached to promote accountability and protect the climate system. Practicising transformtaive adjudication, the courts have shown a willingness to read in a responsibility on the part of the executive branch to consider climate change in varying contexts. The courts have done so through rights-based and contextual interpretations of the law required by South Africa's constitutional project. The cases discussed show how legislative gaps relative to climate action can be filled by judicial (or quasi-judicial) interpretation of existing legal provisions to conceive additional climate change obligations, as Setzer and Benjamin (2020: 58) contend. Nevertheless, a criticism of *Thabametsi*, *PHA*, and *Sustaining The Wild Coast* is that although they interpreted legislation with reference to the environmental right, the courts did not meaningfully engage with or develop the content of South Africa's environmental right. This is a feature of a wider trend in environmental litigation in South Africa (Murcott 2022b: 113–26). For instance, the courts could have grappled with what it means for the legislative measures they were interpreting to 'secure ecologically sustainable development' and 'promote justifiable economic and social development' as required by section 24 of the Constitution. Doing so could have strengthened the precedent set and would align with transformative environmental constitutionalism (Murcott 2022b: 155–58).

Second, the cases discussed reveal that a duty to consider climate change has not emerged by virtue of *direct* reliance on the South African environmental right, but rather as a result of reliance on this right as an interpretive tool, alongside other rights and values, as well as through the use of section 39(2). This feature of the case law reveals the important role of the broader transformtive constitutional architecture within which human rights operate in South Africa.

We do not assert that a *general* duty to consider climate change has emerged. Rather, one has been developed in the specific context of each case, with *PHA*, *Khanyisa*, and *Sustaining The Wild Coast* each applying and extending the precedent set in *Thabametsi* in different ways. Further, the precedent established by *Earthlife*, *PHA*, and *Sustaining The Wild Coast* is, strictly speaking, only binding in three of South Africa's nine provinces (Gauteng, the Western Cape and the Eastern Cape, respectively), and merely persuasive elsewhere. However, in practice it is treated as binding across the country. In our view, the various contexts in which the executive branch has been required to consider climate change (environmental authorizations, a planning decision, water use licensing, and an exploration right) suggest that the duty will continue to expand to give effect to the environmental right as a result of the interpretive approach and role of judges in South Africa's constitutional order.

4. Conclusion

In this article we have engaged with the transformative constitutional architecture that empowers judges to make law in South Africa, including values, rights, interpretive and other judicial powers, and the conceptualization of separation of powers. We have argued that a judge-made 'duty' to consider climate change has emerged and evolved from *Thabametsi*, *PHA*, *Khanyisa*, to *Sustaining The Wild Coast* as a result of transformative adjudication. In *Thabametsi*, adopting the interpretive approach mandated by section 39(2) of the Constitution, the court found that NEMA required consideration of climate issues in the context of approving a coal-fired power station development. The court did so with reference to the environmental right (sect. 24) and the right to administrative justice (sect. 33), both entrenched in the Constitution. In addition, the court's reasoning was informed by the values of the rule law and constitutional

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supremacy, as well as the broader social and environmental context. Similarly, in *PHA*, the court viewed climate change as relevant in decision-making about an urban development under NEMA and LUPO. In *Khanyisa*, which concerned water use needed for a coal-fired power station development, the Water Tribunal found that climate change was a relevant factor in decision-making under the Water Act. In *Sustaining The Wild Coast*, the court adopted a similar line of reasoning to find that climate change was relevant in decision-making under the MPRDA. Climate change had to be considered in order lawfully to grant an exploration right to Shell to explore for oil and gas along South Africa's coastline. Our discussion on the role of the judiciary reveals that the interpretive approach adopted ought not to be viewed as inappropriate law-making. It is envisaged by the rights and values emerging from South Africa's supreme Constitution and rules of interpretation. It is further consistent with South Africa's normative conceptualization of the separation of powers.

Thus, while no explicit statutory duty to consider climate impacts is provided for in existing or proposed legislation aimed at environmental protection in South Africa, such a duty can be viewed as having been introduced through legal interpretation. As Humby (2018: 152–53) points out:

> Courts meaningfully contribute to climate change jurisprudence when they order 'a reluctant or prevaricating executive' to make climate change mitigation or adaptation decisions, or when they order the private sector to comply with laws advancing these objectives.

Thabametsi, *PHA*, *Khanyisa*, and *Sustaining The Wild Coast* have contributed in this way. Our analysis illustrates that the power of judiciary in South Africa to respond to the myriad human rights and justice implications of the climate crisis derives not only from constitutionally entrenched human rights. Equally important are the mechanisms within the broader transformative architecture of the constitutional order. Of course, requiring the consideration of climate impacts in environmental governance does not guarantee that climate harms (and the human rights implications thereof) will be averted. Such consideration can, however, facilitate improved environmental governance that is more cognisant of the devastating consequences of the ongoing climate crisis, particularly for the most vulnerable in society.

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References

Albertyn, C., and D. Davis. 2010. Legal Realism, Transformation and the Legacy of Dugard. *South African Journal on Human Rights* 26(2): 188–216.

Ashukem, J. 2017. Setting the Scene for Climate Change Litigation in South Africa: *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others* [2017] ZAGPPCH 58 (2017) 65552/16. *Law, Environment and Development Journal* 13(1): 35–43.

Baboolal-Frank, R. 2019. *A Critical Analysis of Tribunals in South Africa to Create a Harmonised Tribunal System*. LLD thesis, University of Pretoria.

Battersby-Lennard, J., and G. Haysom. 2012. Philippi Horticultural Area - A City asset or potential develop-mnet node? https://afsun.org/wp-content/uploads/2013/09/Philippi-Battersby-LennardandHaysom.pdf (referenced 30 October 2023).

Botha, C. 2012. *Statutory Interpretation: An Introduction for Students*. Cape Town: Juta.

Bouwer, K. 2022. The Influence of Human Rights on Climate Litigation in Africa. *Journal of Human Rights Practice* 13(1): 157–77.

Bouwer, K., and T. Field. 2021. Editorial: The Emergence of Climate Litigation in Africa. *Carbon and Climate Law Review* 15(2): 123–8.

Centre for Environmental Rights. 2020. Celebrating a Major Climate Victory: Court Sets Aside Approval for Thabametsi Coal Power Plant. 1 December 2020. https://cer.org.za/news/celebrating-a-major-climate-victory-court-sets-aside-approval-for-thabametsi-coal-power-plant (referenced 26 February 2023).

Chamberlain, L. 2023. The Value of Litigation to Women Environmental Human Rights Defenders in South Africa. In C. Albertyn, M. Campbell, H. Alviar García, S. Freedman, *et al.* (eds), *Feminist Frontiers in Climate Justice: Gender Equality, Climate Change and Rights*, 213–45. Cheltenham: Edward Elgar.

Chamberlain, L., and M. Fourie. 2024. Using Climate Litigation to Strengthen Advocacy Strategies: The Life After Coal Campaign in South Africa. *Journal of Human Rights Practice* 16(1): 248–57.

Currie, I., and J. De Waal. 2013. Application of the Bill of Rights. In I. Currie, and J. De Waal (eds), *The Bill of Rights Handbook* (6th ed.), 29–71. Cape Town: Juta.

Department of Forestry, Fisheries and Environment. 2021. Consultation on Intention to Publish the National Guideline for the Consideration of Climate Change Implications in Applications for Environmental Authorisations, Atmospheric Emission Licenses and Waste Management Licenses. *Government Gazette*. 44761 25 June 2021. https://www.gov.za/sites/default/files/gcis_document/202106/44761gon559.pdf (referenced 27 October 2023).

Devenish, G. 2007. The Doctrine of Precedent in South Africa. *Obiter* 28(1): 1–22.

Du Plessis, L. 2008. Interpretation. In S. Woolman, and M. Bishop (eds), *Constitutional Law of South Africa* (2nd ed.), 32/1–32/193. Cape Town: Juta.

Earthlife Africa. Undated. https://earthlife.org.za (referenced 26 February 2023).

Fish Hodgson, T. 2018. The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Towards a Distinctly South African Doctrine for a More Radically Transformative Constitution. *South African Journal on Human Rights* 34(1): 57–90.

Glazebrook, S. 2020. The Role of Judges in Climate Governance and Discourse. *Waikato Law Review* 28: 3–24. http://www.nzlii.org/cgi-bin/LawCite/?cit=2020+WkoLawRw+2

Glazewski, J., and L. Plitt. 2015. Towards the Application of the Precautionary Principle in South African Law. *Stellenbosch Law Review* 26(1): 190–219.

groundWork. Undated. Coal Campaign. https://groundwork.org.za/the-groundwork-coal-campaign/ (referenced 26 February 2023).

Hargreaves, S. 2016. Extractivism, its Deadly Impacts and Struggles Towards a Post-Extractivist Future. In M. Swilling, J. Musango, and J. Wakeford. (eds), *Greening the South African Economy: Scoping the Issues, Challenges and Opportunities*, 145–60. Cape Town: UCT Press.

Hoexter, C. 2008. Judicial Policy Revisited: Transformative Adjudication in Administrative Law. *South African Journal on Human Rights* 24(2): 281–99.

Hoexter, C., and G. Penfold. 2021. *Administrative Law in South Africa* (3rd ed.). Cape Town: Juta.

Humby, T. 2018. The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg v. Minister of Environmental Affairs. *Journal of Environmental Law* 30(1): 145–55.

Huizenga, D. 2021. The Right to Say No to Imposed Development: Human Rights Vernacularization in Reverse in South Africa. *Journal of Human Rights Practice* 13(2): 205–24.

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Isilow, H. 2022. South African Court Stops Oil Giant Shell from Seismic Survey along Wild Coast. *Anadolu Agency*. https://www.aa.com.tr/en/africa/south-african-court-stops-oil-giant-shell-from-seismic-survey-along-wild-coast/2674627# (referenced 26 February 2023).

Joubert, L. 2021. Fossil Fuel's Killer Air Pollution: South Africa's Death Toll. *Heinrich Böll Stiftung*. https://za.boell.org/en/2021/04/28/fossil-fuels-killer-air-pollution-south-africas-death-toll (referenced 26 October 2023).

Kotzé, L., and A. du Plessis. 2020. Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent. *Environmental Law* 50(3): 615–63.

Langa, P. 2006. Transformative Constitutionalism. *Stellenbosch Law Review* 17(3): 351–60.

Liebenberg, S. 2010. *Socio-Economic Rights Adjudication under a Transformative Constitution*. Cape Town: Juta.

Maree, P. 2021. Administrative Authorities in Legal Context. In G. Quinot (ed.), *Administrative Justice in South Africa: An Introduction*. Oxford: Oxford University Press.

Moodley, P. 2022. The Tide of Climate Litigation is upon Us in Africa. In C. Garavito (ed.), *Litigating the Climate Emergency*, 376–86. Cambridge: Cambridge University Press.

Mukwevho, N. 2022. The Evolution and Development of the Principle of Free, Prior and Informed Consent in South Africa. *South African Journal on Human Rights* 38(1-2): 144–62.

Murcott, M. 2022a. Emerging Climate Law and Governance Measures in South Africa: A Clash Between Policy and Practice? *IUCN AEL Journal of Environmental Law* 12: 76–89.

Murcott, M. 2022b. *Transformative Environmental Constitutionalism*. Leiden: Brill.

Murcott, M. 2018. The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa. In E. Daly and J. R. May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges*, 193–208. Cambridge: Cambridge University Press.

Murcott, M., and E. Webster. 2020. Litigation and Regulatory Governance in the Age of the Anthropocene: The Case of Fracking in the Karoo. *Transnational Legal Theory* 11(1-2): 144–64.

Murcott, M., and M. A. Tigre. 2024. Developments, Opportunities, and Complexities in Global South Climate Litigation: Introduction to the Special Collection. *Journal of Human Rights Practice* 16(1): 1–24.

Murove, M. 2004. An African Commitment to Ecological Conservation: The Shona Conceptions of Ukama and Ubuntu. *Mankind Quarterly* 45(2): 195–215.

Okoth, M., and M. Odaga. 2021. Leveraging Existing Approaches and Tools to Secure Climate Justice in Africa. *Carbon and Climate Law Review* 15(2): 129–38.

Peel, J., and J. Lin. 2019. Transnational Climate Litigation: The Contribution of the Global South. *American Journal of International Law* 113(4): 679–726.

Schneider, S. 2015. The Heavy Toll of Coal Mining in South Africa. *Aljazeera*. https://www.aljazeera.com/features/2015/4/2/the-heavy-toll-of-coal-mining-in-south-africa# (referenced 26 October 2023).

Setzer, J., and L. Benjamin. 2019. Climate Litigation in the Global South: Constraints and Innovations. *Transnational Environmental Law* 9(1): 77–101.

Setzer, J., and L. Benjamin. 2020. Climate Change Litigation in the Global South: Filling in Gaps. *AJIL Unbound* 114: 56–60. https://www.cambridge.org/core/journals/american-journal-of-international-law/article/climate-change-litigation-in-the-global-south-filling-in-gaps/3A50045D80FCA2B898CDF89D4B391494

Sibanda, S. 2020. When do you Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism. *Law, Democracy and Development* 24(1): 384–412.

Sonday, N. 2021. Lockdown validated 10 years of PHA Food and Farming Work. *IOL*. 11 January 2021. https://www.iol.co.za/capeargus/opinion/lockdown-validated-10-years-of-pha-food-and-farming-campaign-work-25b327aa-4d18-41ee-ba09-fd2bfd9c93dd (referenced 27 February 2023).

Thabo, M., and K. Odeku. 2021. Separation of Powers, Checks and Balances and Judicial Exercise of Self-Restraint: An Analysis of Case Law. *Obiter* 42(3): 547–60.

Vinti, C. 2019. The Right to Mine in a 'Protected area' in South Africa: Mining and Environmental Justice Community Network of South Africa v. Minister of Environmental Affairs. *South African Journal on Human Rights* 35(3): 311–22.

Vinti, C. 2022. *Hydrocolonisation in the Lesotho Highlands Water Project Treaty: Legitimate Treaty or Murky Waters?* PhD Thesis, Wits University.

Wege, M., B. Frederik Erasmus, C. Hansen, and E. Vermeulen. 2021. Planned Seismic Survey by Shell has Kicked up a Storm in South Africa Here's an Explainer. *Daily Maverick*. https://www.dailymaverick.co.za/article/2021-12-17-planned-seismic-survey-by-shell-has-kicked-up-a-storm-in-south-africa-heres-an-explainer/ (referenced 27 February 2023).

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Cases

Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others (2004) ZACC 15, Constitutional Court, South Africa.

Earthlife Africa Johannesburg v. Minister of Environmental Affairs (2017) ZAGPPHC 58, High Court, South Africa.

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (1996) ZACC 26, Constitutional Court, South Africa.

Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another (2002) ZACC 6, Constitutional Court, South Africa.

Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others (1998) ZACC 17, Constitutional Court, South Africa.

Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province (2007) ZACC 13, Constitutional Court, South Africa.

Glenister v. President of the Republic of South Africa and Others (2011) ZACC 6, Constitutional Court, South Africa.

Groundwork Trust v. Acting Director-General: Department of Water and Sanitation (2020) ZAWT 1, Water Tribunal, South Africa.

Iswelethu Cemforce CC v. Trustees for the time being of the National Education Collaboration Trust and Another (2023) ZAGPPHC 720, High Court, South Africa.

Matiso v. Commanding Officer, Port Elizabeth Prison (1994) South-Eastern Cape Local Division 1683/94, High Court, South Africa.

Minister of Water and Sanitation and Others v. Lotter N.O. and Others; Minister of Water and Sanitation and Others v. Wiid and Others; Minister of Water and Sanitation v. South African Association for Water Users Associations (2023) ZACC 9, Constitutional Court, South Africa.

National Council of the Society for Prevention of Cruelty to Animals v. Minister of Environmental Affairs and Others (2019) ZAGPPHC 367, High Court, South Africa.

Philippi Horticultural Area Food and Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape (2020) *ZAWCHC 8, High Court, South Africa.*

President of the Republic of South Africa and Others v. South African Rugby Football Union and Others (1999) ZACC 11, Constitutional Court, South Africa.

Road Accident Fund v. Mdeyide (2010) ZACC 18, Constitutional Court, South Africa.

S v. Makwanyane (1995) ZACC 3, Constitutional Court, South Africa.

South African Association of Personal Injury Lawyers v. Heath and Others (2000) ZACC 22, Constitutional Court, South Africa.

South Durban Community Environmental Alliance and Another v. Minister of Forestry, Fisheries and The Environment and Others (2022) ZAGPPHC 741, High Court, South Africa'

Sustaining the Wild Coast NPC v. Minister of Mineral Resources (2022) ZAECMkHC 55, High Court, South Africa.

Sustaining The Wild Coast NPC v. Minister of Mineral Resources and Energy (2021) ZAECGHC 118, High Court, South Africa.

Thungela Operations (Pty) Ltd v. Chief Director, Water Use License Management: Department Of Water And Sanitation and Others (2023) ZAWT 1, Water Tribunal, South Africa.

Union of Refugee Women v. Director: Private Security Industry Regulatory Authority (2006) ZACC 23, Constitutional Court, South Africa.

Zimnat Insurance Co Ltd v. Chawanda (1991) (2) SA 825 (ZSC), Zimbabwean Supreme Court, Zimbabwe.

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