

## **South Africa's Climate Change Legal Regime**

**By Peggy Schoeman**

**Senior Associate, Warburton Attorneys**

**30 August 2019**

Climate change refers to changes in our weather patterns due to an increase in the average global temperature. This increase has been largely caused by heightened greenhouse gas emissions from human activities following the Industrial Revolution in the mid-19<sup>th</sup> century. The bulk of emissions have however occurred in the last 70 years with economic activities (such as burning of fossil fuels) having to meet our ever-escalating population (more than a six-fold increase on 1850 figures). As the name 'greenhouse gas' suggests, these emissions trap heat in the atmosphere, causing global warming. The effects of climate change are well documented and it is widely accepted that no aspect of human life or element of our natural system will be unaffected. To make matters worse, South Africa is particularly vulnerable to these impacts, including more frequent and intense extreme weather events, such as droughts and floods, impacts to our food and water security (bearing in mind that we are already a water-stressed country), as well as impacts to human health and our infrastructure, notably housing. These impacts will moreover disproportionately affect the poor, who don't have the resources to recover from these impacts. Given that South Africa is one of the most unequal countries in the world and more than half of our population live in poverty, climate change for South Africa is indeed a climate crisis. This article looks at what South Africa has achieved from a legal perspective in terms of tackling this crisis.

By way of background, there are six greenhouse gases, namely carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF<sub>6</sub>), which respectively have greater global warming impacts (i.e. methane is worse than carbon dioxide and so on). South Africa's primary emission is carbon dioxide from the burning of coal (a fossil fuel) to make electricity (i.e. Eskom's power plants). To put our emissions into perspective, in terms of global rankings, on a per capita basis, we emit more than China, Brazil or India, and about half of what the US emits.

Before unpacking the various components of South Africa's climate change legal regime, it is important to understand the international regime, which has largely shaped and informed our domestic response. The key international treaty in this regard is the 1994 United Nations Framework Convention on Climate Change (UNFCCC), a framework agreement, which South Africa ratified

in 1997. Under the auspices of the UNFCCC, all signatory countries (called 'Parties') meet annually at a Conference of the Parties (COPs) to further expand on how to reduce global greenhouse gas emissions (referred to as 'mitigation'), as well as to predict, plan for and consequently adequately respond to climate change impacts (referred to as 'adaptation'). The two key agreements reached thus far pursuant to the UNFCCC are the 1997 Kyoto Protocol at the third COP (COP3) and the 2015 Paris Agreement at the fifteenth COP (COP15). South Africa ratified both, in 2002 and 2016 respectively. South Africa's commitments under the UNFCCC generally, and in terms of the Paris Agreement more specifically, are the genesis of and rationale for our domestic legal response.

The Paris Agreement has been particularly heralded as a breakthrough in the international climate change response for two reasons. Firstly, it is binding on both developed and developing Parties (previously only developed countries had binding commitments). Secondly, it has set a common target for all Parties – no more than an average global temperature increase of 2°C above pre-industrial levels. This target, as put forward in 2015 when the Paris Agreement was reached, was set so as to avoid the worst impacts of climate change ('worst' being the operative word). (As a side note, subsequent research has shown that a 1.5°C target would be more appropriate). In order to achieve the common 2°C goal, signatory countries, including South Africa, are obliged to set their own targets (with the overall target in mind) and accordingly measure and report on their emissions. As such, South Africa, a developing country, duly submitted its first target in 2015 (called a 'national determined contribution') and we will submit our next (more ambitious) target in 2020. South Africa further committed to a 'peak, plateau and decline' trajectory where our emissions will peak between 2020 and 2025, plateau thereafter until 2035 and finally decline with the intention of reaching near-zero emissions by 2050. As set out above, these international legal commitments have informed South Africa's domestic response, and I discuss the various key components of this below.

Firstly, the Greenhouse Gas Reporting Regulations were promulgated under the National Environmental Management: Air Quality Act in April 2017. These Regulations compel various greenhouse gas-emitting operations to report on their emissions annually. This includes power producers and various industrial operations, such as cement and brick makers. Sister regulations were promulgated shortly thereafter in July 2017, obliging certain of these operations to also compile greenhouse gas reduction plans (called pollution prevention plans). As the old adage goes, if you can't measure it, you can't manage it. In line with this, the reporting of greenhouse gases by individual operations has been implemented to firstly allow operations to gauge their

level of impact and begin transitioning to a lower-carbon model, and secondly, to feed into a carbon tax regime. In this way, the Department of Environmental Affairs, Forestry and Fisheries has received two years' worth of data thus far, which the South African Revenue Service (SARS) will have access to when reviewing operations' carbon tax returns. These reports further supplement South Africa's ongoing national reporting function in terms of the UNFCCC.

The second key component in our domestic response is the Carbon Tax Act, which came into effect in June 2019. This Act taxes greenhouse gas emissions at R120 per ton of CO<sub>2</sub> (or 'CO<sub>2</sub> equivalent', namely what a ton of methane, for instance, equates to in CO<sub>2</sub> terms). The same activities which are reportable under the Greenhouse Gas Reporting Regulations are eligible to pay tax under the Carbon Tax Act. There are various tax-reducing measures (called 'allowances') catered for, including a basic tax-free allowance of 60% and an offset allowance between 5 and 10% (investments in projects which reduce greenhouse gases, such as a public transport or reforestation scheme). There have further been related amendments to tax legislation to bring the carbon tax under the banner of an environmental levy (an existing tax mechanism), with the first payments due in July 2020. Unfortunately, some parts of the carbon tax regime are absent or still in draft form, and there is further uncertainty regarding what reductions would (still) apply after 2023 (the second phase of the tax). Notably though, the tax rate is set to stay the same (with adjustments for inflation). The Carbon Tax Act, despite its anticipated teething problems, aims to change behaviour by, quite simply, taxing businesses and consumers alike into a less carbon-intensive way of operating.

The third main piece of legislation is the Climate Change Bill. The first draft of the Bill was gazetted in June 2018, with the second draft currently being discussed at the National Economic Development and Labour Council (NEDLAC). The Climate Change Bill sets an ambitious framework for an integrated and coordinated climate change mitigation and adaptation response across national, provincial and municipal government and the various sectoral departments. Once promulgated, it is expected that the Greenhouse Gas Reporting Regulations and associated regulations currently housed under the Air Quality Act will be moved across to the Climate Change Act. When a final Act is promulgated, by all accounts, the scale and breadth of efforts mandated to mitigate and adapt will require significant political will and work.

There are further two key policy documents which have played, and will continue to play, critical roles in South Africa's climate change response. Firstly, South Africa's Climate Change Response White Paper of 2011 is our overarching policy document, and has set a roadmap for climate

change mitigation and adaptation until 2050, notably also informing our commitments in terms of the Paris Agreement. The second pivotal policy document is our Integrated Resources Plan (IRP), which sets out the country's energy mix going forward, critically whether and how we transition away from a coal-based economy. In this respect, the 2018 IRP, which is yet to be published in final form, has the potential to advance or inhibit South Africa's climate change response. In terms of the former, unsurprisingly renewable energy is mooted as the long-term panacea. That being said, deciding on our future energy mix is understandably a political hot potato for government, which has to balance very real climate change demands with very real socio-economic demands, principally keeping the lights on and retaining jobs.

Over and above our legislation and policy, our courts have also had opportunity to add value to our climate change discourse. In the High Court judgment of *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, which was handed down in March 2017, the court held that climate change impacts were relevant factors in the consideration of an environmental authorisation for a coal-fired power station in terms of the National Environmental Management Act, our umbrella environmental Act. This finding, in the context of a different governing Act, has meaningfully contributed to a more holistic domestic response.

The above represents the matrix of key South African legislation, policy and jurisprudence which together make up our climate change legal regime. Although it remains somewhat of a fragmented regime (with various governing Acts and multiple regulators), significant strides have been made in the last few years. In my view, the strongest mechanism in terms of combatting climate change is the IRP (to the extent it includes a solid renewable energy focus), followed by the greenhouse gas reporting function coupled with the carbon tax. To the extent these measures change behaviour and enable a transition to a low-carbon economy, there is tremendous potential for South Africa to make a valuable contribution to the global climate crisis response. Given the enormity of the task that lies ahead, and the dire consequences should we fail, one seriously hopes that government, civil society, corporations and ordinary people alike will rise to the challenge.