Climate justice and litigation in the context of South Africa

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Dissertation accepted in fulfilment of the requirements for the degree *Master of Laws* with Perspectives on Law at the North-West University

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Graduation: June 2025

ABSTRACT

This study interrogates the intersection of climate justice and litigation in the South African context. It addresses the urgent need for legal methods to address the disproportionate impact of climate change on marginalised communities. As climate change has become one of the greatest global challenges, marginalised communities most keenly feel its impacts, particularly those historically disadvantaged by socio-economic inequalities rooted in apartheid. What follows is a critical examination of the most important international climate frameworks, in particular the United Nations Framework Convention on Climate Change (hereinafter UNFCCC) and the Paris Agreement, which have shaped the global discourse on climate change. The increasing recognition of the rights of historically marginalised and vulnerable communities underscores the potential role of climate litigation in achieving climate justice for all by holding both government and corporations accountable for their actions and lack thereof in mitigating climate change. The study examines the South African legal framework and recognises its progressive constitution that guarantees environmental rights. On the other hand, the study highlights significant barriers to effective climate action, particularly for the country's most vulnerable, poor and marginalised populations, who often lack access to legal resources and skills needed for climate action. Using decided climate cases such as *Earthlife Africa v. Minister of Environment*, the study highlights the problems that plaintiffs often face when it comes to proving causation and the need for expert evidence in such litigation. Finally, the study concludes that while climate litigation offer opportunities for climate justice, the challenges identified need to be addressed to ensure the effectiveness of climate processes in achieving climate justice. The study therefore makes recommendations for strengthening legal aid, promoting public climate litigation and improving community capacity. By implementing these recommendations, climate justice will be achieved so that South Africa can effectively utilise climate litigation to demand climate justice for both current and future generations.

ACKNOWLEDGEMENTS

I take this great opportunity to thank Professor C.B. Soyapi, my mentor and supervisor, whose patient advice and unwavering support were crucial to the proper completion of this study. Your prompt responses to my work and your empathetic support have spurred me to excel and thus enriched my study.

I would like to take this opportunity to thank my father, Zebedia Chihombe, and my mother, Enia Chihombe, for believing in me and supporting me on this academic journey. All the love and encouragement have paved the way for me to be strong and overcome all obstacles.

I would like to thank Dr John Mambambo for the linguistic and technical editing of this dissertation.

My special thanks go to my brothers and sisters, Yeukai, Tinei, Ranaganai and Lillian. Their financial and emotional support has made my studies possible. Having them in my life has given me the courage and ability to complete this work.

Lastly, I would like to thank the North West University for the financial support which made this research possible.

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LIST OF ABBREVIATIONS

CBDR-RC	Common but Differentiated Responsibilities and Respective Capabilities
CCA	Climate Change Act
CCS	Carbon Capture and Storage
CIR	Climate Impact Report
COP	Conference of the Parties
ECHR	European Convention on Human Rights
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
FAC	Federal Appeal Court
FSC	Federal Supreme Court
GHG	Greenhouse Gas
IPCC	Intergovernmental Panel on Climate Change
JESA	Journal of Energy in Southern Africa
JWEM	Journal of Wetlands Environmental Management
MEMAQA	National Environmental Management Air Quality Act
NCCRP	National Climate Change Response Policy
NDCs	Nationally Determined Contributions
NEMA	National Environmental Management Act
NEMAA	National Environmental Management Amendment Act
NGO	Non-Governmental Organization
RECIEL	Review of European, Comparative & International Law
SDGs	Sustainable Development Goals
UNCHE	United Nations Conference on the Human Environment
UNFCCC	United Nations Framework Convention on Climate Chang

CHAPTER 1 INTRODUCTION

1.1 Overview of the study

The apartheid regime in South Africa has left behind persistent socio-economic inequalities that exacerbate the vulnerability of poor and marginalised communities to climate change-related disasters such as prolonged droughts, prolonged flooding and rising temperatures.[1] While the global community struggles with the critical and urgent need for climate action, climate justice came as a critical concept for addressing these existing injustices. On this basis, this study seeks to explore the intersection of social justice and climate justice processes in the South African context, focussing on how legal systems can be used to enforce climate justice. As the concept of climate justice recognises that environmental degradation is inextricably linked to issues of equity, human rights, and sustainable economic development[2] and seeks to hold governments and corporations that contribute most to climate change accountable, it is necessary to examine the extent to which the courts can assist in protecting and promoting the rights of marginalised and vulnerable communities.

This dissertation therefore begins with a critical examination of the most important international climate frameworks that have shaped the discourse on climate justice. These include the United Nations Framework Convention on Climate Change (hereinafter UNFCCC) and the Paris Agreement. These frameworks form the basis for understanding the global climate regime's response to the challenges of climate change and concerns about recognising the rights of the most affected communities, particularly those from countries in the Global South such as South Africa. The study then moves on to an examination of the South African climate-related rights landscape. The study then addresses the persistent barriers to effective climate litigation,

1 Murcott 2022 *Transformative Environmental Constitutionalism* 13.

2 A2 of the Paris Agreement (2015) recognises this notion and aims to ensure that economic development and GHG emissions are balanced as a way of ensuring that the rights of present and future generations are safeguarded.

particularly for vulnerable groups, such as the lack of access to legal resources and expertise needed to bring meaningful climate lawsuits.[3]

This study examines pioneering cases of climate litigation in South Africa. It is therefore able to highlight the difficulties in bringing justice to communities directly affected by the negative impacts of climate change. Ultimately, this dissertation aims to make practical recommendations to ensure that South Africa builds its capacity to utilise climate litigation as a tool for achieving climate justice, thereby contributing meaningfully to a more sustainable and equitable future for all citizens, present and future.

In summary, this study not only highlights the urgent need for climate justice in South Africa, but also emphasises the potential of litigation as a powerful tool for enforcing accountability and social redress. By addressing the barriers to climate justice, this study aims to contribute to the broader and ever-growing climate justice movement and ensure that the voices of the most vulnerable and marginalised people are heard and their rights upheld in the face of the worsening climate catastrophe.

1.1.1 Definition of key terms

The following terms are used throughout the study and have the following meanings for this study:

- Adaptation: refers to the process by which societies, economies and ecosystems adapt to the new conditions brought about by climate change, which allows them to co-exist with the impacts.[4]

- Carbon budgets: means the total amount of greenhouse gases that a person or company may legally emit.[5]

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3 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 298-299.

4 Johansen, Busch & Jacobsen *The Law of the Sea and Climate Change* 55.

5 Section 1 of the Climate Change Act 22 of 2024.

- Climate change mitigation: refers to the reduction of the severity, seriousness or painfulness the effects of climate change through adoption of policies and practices like afforestation.[6]

- Climate litigation: refers to legal actions taken to address problems related to climate change. This can include lawsuits aimed at holding governments or companies accountable for their contribution to climate change, enforcing environmental laws or demanding action to mitigate climate impacts.[7]

- Sustainable development: this means development that balances present and upcoming generations' needs. It includes a balanced approach to economic growth, environmental protection and social equality.[8]

1.2 Background to the study

In recent decades, climate change has become one of the most feared dangers for humanity, as it threatens the existence of mankind.[9] In recent years, nations around the world have undergone various legal and political developments as a result of the global environmental damage that began to emerge, particularly after the Second World War.[10] As early as 1972, the United Nations convened the first international conference to discuss environmental issues. Such a conference was convened in Stockholm, Sweden.

Although this conference was not specifically about climate change, it was recognised that protecting the environment is an urgent issue for the whole world.[11] This was partly because environmental problems such as the loss of biodiversity, pollution and the unsustainable management of natural resources had become a living reality,[12] with

6 Johansen, Busch & Jacobsen *The Law of the Sea and Climate Change* 51.
7 Peel and Osofsky 2020 *Annual Review of Law and Social Science* 23.
8 Borowy *Defining Sustainable Development for our Common Future* 1.
9 Caney 2014 *The Journal of Political Philosophy* 127.
10 Boyd *The Environmental Rights Revolution: A Global study of Constitutions, Human Rights and the Environment* 3.
11 A 1(2) of the United Nations Conference on the Human Environment (1972).
12 Corvino and Andina *Global Climate Justice: Theory and Practice* 7.

obvious catastrophic consequences that require urgent collective global action.[13] The extent of the scourge of climate change is best described by the following quote:

> The truth is, on climate change, we know what to do, when to do it, and why. But, for too long, we have looked the other way. We know because the IPCC tells us that breaching the 1.5°C, even temporarily, could be disastrous. Yet temperatures are set to rise 2.8°C by the end of the century if we maintain the present policies. We know that the 1.5°C limit requires halving global emissions by 2030. Yet they are on course to rise 10% by then compared to 2010. We know that a 1.5°C pathway is possible, yet we only achieve it with a quantum leap in climate action globally.[14]

It is widely recognised that the efforts of nations at local and international level are not sufficient to mitigate the negative effects of climate change, as the rate at which greenhouse gas emissions (hereinafter GHG) are increasing is a cause for concern.[15] The reality of climate change is that the world has not yet done enough to achieve the globally set limits in mitigating the negative effects of climate change, as the above quote, delivered during the 2023 Climate Summit, aptly reflects.

Despite the general consensus among scholars and scientists globally that man-made greenhouse gas emissions into the atmosphere are the main cause of climate change,[16] it seems that there is still no generally accepted definition of climate change. According to the Intergovernmental Panel on Climate Change[17] the Intergovernmental Panel on Climate Change (hereinafter IPCC) defines climate change in its fourth assessment report as follows:

> Climate change is a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or *external forcings,* or to persistent *anthropogenic* changes in the composition of the *atmosphere* or in *land use*.[18]

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13 Stephenson, Newman and Mayhew 2022 *Journal of Public Health* 150. See also Stavins *Policy Instruments for Climate Change: How can national governments address a global problem* 7.

14 Guteres as cited in *Mail & Guardian* 2023 https://mg.co.za/environment/2023-05-03-cop28-climate-summit-expectations-high-trust-is-low/.

15 Segger 2016 *Cambridge Journal of International and Comparative Law* 203.

16 Fakana 2020 *Global Journal of Science Frontier Research* 10. See also Boyd *The Environmental Rights Revolution: A Global study of Constitutions, Human Rights and the Environment* 11.

17 Intergovernmental Panel on Climate Change (1996).

18 https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf 78.

On the other hand, climate change is defined as follows according to the United Nations Framework Convention on Climate Change (hereinafter UNFCCC):

> … a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere, and that is in addition to natural climate variability over comparable time periods.[19]

It is clear from these two definitions that the main causes of climate change can be traced back to human activities.[20] It is common knowledge that human activities such as the constant dependence on fossil fuels and industrial processes[21] that emit GHGs contribute the most towards climate change.[22] Worse still, climate change is a global concern[23] whose negative effects are felt disproportionately by different sections of the population with children,[24] women,[25] marginalised and poor communities,[26] and in general, the countries of the global South are the hardest hit.[27] Climate change can therefore rightly be seen as a serious threat to the environment,[28] human rights,[29] and economic development.[30]

South Africa is already suffering from devastating events such as the ongoing floods[31] and extreme rainfall events, such as the record 24-hour rainfall in 2020 that hit the northern parts of the country near the mountains at Tzaneen.[32] Additionally, Ziervogel, New and Archer[33] note that climate change is a "significant problem" for South Africa, as average annual temperatures have increased by at least 1.5 times over the past

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19 A 1(2) of the United Nations Framework Convention on Climate Change (1992).

20 Murombo, Dhliwayo and Dhlakama *Climate Change Law in Zimbabwe: Concepts and Insights*, 1-2.

21 Especially those processes involving the burning of fossil fuels which are said to have contributed about 78% of the total GHG emissions rise between 1970 and 2010. See Fakana 2020 *Global Journal of Science Frontier Research: Environment and Earth Science* 8.

22 Fakana 2020 *Global Journal of Science Frontier Research: Environment and Earth Science* 9.

23 Preamble to the UNFCCC (1992), see also Stavins 1997 *Resources for the Future* 9.

24 Boyd *The Environmental Rights Revolution: A Global study of Constitutions, Human Rights and the Environment* 11.

25 Thompson, Matamale and Kharidza 2012 *International Journal of Environmental Research and Public Health* 832.

26 Dunlap and Brulle 2023 *Climate Change and Society: Sociological* Perspectives 32.

27 Stephenson, Newman and Mayhew 2022 *Journal of Public Health* 150, Banard 2014 *JESA* 29.

28 *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (2) SA 163 (SCA) para 44.

29 Caney 2006 *Canada Journal Law Jurisprudence* 256.

30 *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (2) SA 163 (SCA) para 44.

31 Dyson and Van Heerden 2001 *South African Journal of Science* 84.

32 Dyson and Van Heerden 2001 *South African Journal of Science* 86.

33 Ziervogel, New and Archer 2014 *Wiley Interdisciplinary Reviews Climate Change* 605.

five decades, as in 2014. They also noted that South Africa's per capita emissions are significantly higher compared to other southern African countries and even at a global level.[34]

Satgar[35] argues that South Africa ranks twelfth among the world's largest greenhouse gas emitters. In the same vein, Corvino and Andina[36] believe that climate change is already happening and is likely to continue in the future. This suggests that if the problem of climate change is not addressed urgently, more harm could soon befall the world and cause even more suffering than before.[37] An urgent and rapid reduction in greenhouse gas emissions is therefore required worldwide. This raises the question: have countries done enough?

Since the 1970s, countries around the world have become aware of the urgent need to protect the deteriorating environment.[38] Various conferences and treaties have been concluded to find ways to curb climate change. Since the conclusion of the UNCHE in 1972, a number of other international agreements on climate change have been concluded, such as the UNFCCC, the Paris Agreement[39] and many others, were later concluded specifically to protect the environment from the harsh effects of climate change. However, it should be noted that despite these global efforts to stop climate change, there has been very little success in reducing greenhouse gas emissions through international instruments, as emissions continue to rise.[40]

On the other hand, South Africa has passed a number of laws and national environmental policies, some of which have adopted a number of international environmental law principles. A quick example is the *Constitution of the Republic of South Africa*,[41] (hereinafter the Constitution), which incorporated the principle of sustainable development.[42] Even though South Africa has successfully adopted most

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34 Ziervogel, New and Archer 2014 *Wiley Interdisciplinary Reviews Climate Change* 605.
35 Satgar 2015 *Global Law Journal* 267.
36 Corvino and Andina *Global Climate Justice: Theory and Practice* 7.
37 Corvino and Andina Global *Climate Justice: Theory and Practice* 5
38 Proclamation 3 of the United Nations Conference on the Human Environment (1972).
39 Paris Agreement (2015).
40 Schellnhuber *et al* (eds) *Avoiding Dangerous Climate Change* 8.
41 Constitution of the Republic of South Africa, 1996.
42 Section 24(b) of the Constitution. This principle was adopted from article 2 of the UNFCCC (1992).

of the principles of international environmental law,[43] it is probably no better at mitigating or adapting to climate change than the rest of the world.[44]

As the bitter effects of climate change continue to be felt around the world[45] despite the national and international efforts to mitigate and adapt to the effects of climate change described above, it could well be argued that both international and local efforts to mitigate climate change are inadequate or that there may be insufficient efforts to implement the legal and policy framework. Given such a scenario, it is necessary to provide a brief overview of international and South African climate change laws and policies in order to understand the nature and extent of the problem.

1.2.1 An overview of international and South African climate laws

At the global level, various efforts have been made to mitigate climate change and promote climate justice. UNCHE was a crucial turning point in international efforts to solve environmental problems. While the conference focused on broader environmental concerns such as pollution and resource management, it laid the groundwork for subsequent conferences that focused specifically on climate change mitigation and sustainability. This conference played an important role in raising global awareness of environmental issues and laid an important foundation for future efforts.[46]

Later, in 1992, the UNFCCC was founded. It became the basis for global action on climate change[47] which focused primarily on stabilising greenhouse gas concentrations in the atmosphere and provided a framework to ensure comprehensive international cooperation. It aimed to "prevent dangerous anthropogenic interference with the climate system."[48] However, the UNFCCC's failure to reach consensus on financial

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43 Section 2 of NEMA adopted most of the international principles such as: intergenerational equity, polluter pays, and sustainable development.

44 Satgar 2015 *Global Law Journal* 267.

45 Stephenson, Newman and Mayhew 2022 *Journal of Public Health* 150.

46 Principle 1 provides for the right to 'an environment of a quality that permits a life of dignity and well-being', while Principle 2 provides for intergenerational rights. These two principles were adopted in Article 3(1) of the UNFCCC and can also be found under section 24 of South Africa's Constitution.

47 Okereke and Coventry 2016 *Climate justice and the international regime: Before, during and after Paris Wiley Interdisciplinary Reviews: Climate change 839.*

48 A 2 of the UNFCCC (1992).

commitments and emission reduction targets may have hampered its effectiveness.[49] Another remarkable global effort to mitigate climate change was undertaken with the adoption of the Kyoto Protocol in 1997. It was created to give binding effect to the UNFCCC.[50] Under this agreement, binding greenhouse gas emission targets were set to hold nations accountable for their greenhouse gas emissions.[51] However, some important developing countries such as China and India were excluded from the binding commitments,[52] which is one of this agreement's shortcomings.

These shortcomings appear to have been taken into account and incorporated into future climate agreements, such as the Paris Agreement. The Paris Agreement has received overwhelming global participation, as almost all nations have ratified it.[53] The strength of the Paris Agreement lies in its voluntary emission reduction targets, the so-called Nationally Determined Contributions (hereinafter NDCs), which involve almost all countries in the efforts to combat climate change. On the other hand, despite the overwhelming participation, this voluntary approach raises concerns about the adequacy of collective contributions to achieving the 2°C target set out in the agreement.[54] Furthermore, the lack of binding enforcement mechanisms within the pact is one of its weaknesses.[55]

Despite these global efforts, the problem of climate change continues to escalate,[56] which necessitates the search for alternative remedies beyond international laws. The main obstacle to global efforts appears to lie in compliance and enforcement mechanisms.[57] Exploring other ways to tackle the climate crisis will be crucial.

As South Africa suffers from the effects of climate change, urgent action should be taken at national level.[58] South Africa has begun its journey to mitigate climate change

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49 Pottier et al 2017 *International Review of Environmental and Resource Economics* 24.
50 Yamin 1998 *Review of European Comparative, & International Environmental Law* 113.
51 A 3 of the Kyoto Protocol (1998).
52 Annex I and II of the UNFCC (1992).
53 Christoff 2016 *Environmental Politics* 775.
54 A 2(1) of the Paris Agreement (2015).
55 Tingley and Tomz 2022 *The International Organisation* 445.
56 Schellnhuber *et al* (eds) *Avoiding Dangerous Climate Change* 8.
57 Tingley and Tomz 2022 *The International Organisation* 445.
58 Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* 11.

by ratifying various international instruments on climate change, including the UNFCCC, the Kyoto Protocol and the Paris Agreement. To implement these international agreements, South Africa has passed various laws and national policies aimed at mitigating climate change. Among South Africa's laws, the most important is the Constitution.[59] It adopted the principles of intergenerational rights, sustainable development and the right to a clean environment,[60] and incorporated them into its Bill of Rights in Chapter 2.

Furthermore, the *National Environmental Management Act*[61] (hereinafter NEMA), was promulgated to enforce the constitutional right to the environment. NEMA helps to ensure that government agencies and relevant authorities take responsibility for protecting the environment from potentially harmful activities.[62] For example, section 24(2) of NEMA authorises the Minister of Forestry, Fisheries and Environment to issue regulations specifying all environmentally hazardous activities that require an environmental impact assessment (hereinafter EIA) before they can be undertaken. This is arguably a positive way of ensuring that any potentially damaging activities are not carried out without clear mitigation plans.

Various other laws were promulgated.[63] Although some of them were proclaimed without regard to climate change, climate change can be read into these Acts.[64] Consequently, the proposed research will analyse these laws in the South African context to assess their effectiveness and appropriateness in advancing South Africa's efforts to mitigate climate change and achieve climate justice through climate litigation.

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59 The *Constitution of the Republic of South Africa* (1996).

60 Section 24 of the Constitution (1996).

61 *National Environmental Management Act* 107 of 1998.

62 Sections 2(1) (a) and 24(2) of NEMA of 1998.

63 Other Acts such as: National Water Act 36 of 1998, National Environmental Management Waste Act 59 of 2008, National Environmental Management Biodiversity Act 10 of 2004, National Environmental Management Air Quality Act 39 of 2004.

64 For example, the National Environmental Management Air Quality Act 39 of 2004, note that in the case of *The Trustees for the Time Being of Groundwork Trust v The Minister of Environmental Affairs* (unreported) Case number 39724/19 of March 2022, the court had to read in environmental issues into the provisions of this Act, see the arguments in paras 82(3) - 83(4) of the cited case.

1.2.2 Global perspectives on climate justice

Climate Justice is an evolving concept of the 21st century whose origins can be traced back to the concept of environmental justice.[65] According to Hurlbert,[66] climate justice has arisen from the principle of distributive justice. Therefore, he argues, the benefits and burdens of climate change should be shared fairly and equitably, as should the ability to adapt. According to Aitken *et al,*[67] climate justice constitutes four basic aspects which are: "distributive, procedural, recognition and capabilities." He believes that these four components of justice ensure that the burdens and benefits of climate change are shared fairly and equitably and help to include all peoples in climate change decision-making processes while ensuring that all people are able to adapt. Furthermore, Caney[68] argues that justice is supposed to be approached from two angles: "burden-sharing justice and harm-avoidance justice." The justice of harm avoidance, he argues, looks to the future and aims to avoid future harm, while the justice of burden sharing looks to the past to determine who caused the harm and distributes the burdens and benefits accordingly.

This study assumes that climate justice means eliminating the unequal distribution of the benefits and burdens of climate change by ensuring that all people are treated equally and included in the decision-making processes regarding climate change issues.[69]

Over the years, the international climate regime has been praised, and at times derided, for its way of addressing the issue of climate justice.[70] As already mentioned, it includes the principle of common but differentiated responsibilities and capabilities (hereinafter CBDR-RC). This principle is primarily concerned with who has contributed most to climate change and who is able to bear the costs of mitigation and adaptation. The main problem with this approach is that it raises many important but difficult

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65 Dunlap and Brulle 2023 *Climate Change and Society: Sociological Perspectives* 24. See also Abate 2010 *Washington Law Review* 207.

66 Hurlbert 2015 *Environmental Justice* 52.

67 Aitken et al 2016 *Scottish Affairs* 223.

68 Caney 2014 *Journal of Political Philosophy* 126-127.

69 Miekle, Wilson and Jafry 2016 *International Journal of Climate Change Strategies and Management* 493.

70 Okereke 2010 *Wiley Interdisciplinary Reviews: Climate Change* 467.

questions about the allocation of state responsibilities. This seems to have contributed to the low level of international co-operation between states worldwide, as nations tend to pull in different directions, as Dunlap and Brulle[71] point out. While a neutral definition of climate justice might be needed that balances the different perspectives on what is just, such an understanding seems elusive and almost impossible to achieve.[72]

Notwithstanding the above, various principles could fall under the CBDR-RC principle. One example is the causation/responsibility principle. Pottier *et al,*[73] argue that efforts to mitigate and adapt to climate change should be shared in proportion to the responsibilities of states in creating the problem. This principle has been criticised because it does not take into account issues such as the attribution of greenhouse gas emissions to past polluters.[74]

Another perspective could be the principle of the beneficiary. It argues that those who are benefiting from "climate change-inducing activities"[75] should bear the costs of dealing with the negative effects of climate change.[76] This principle is considered an alternative to the polluter pays principle, as it attempts to circumvent the various objections[77] against the polluter pays principle and at the same time preserves the backward-looking aspect.[78] The last perspective on climate justice favours the capabilities principle. This kind of justice is mainly focused on mitigating harm at all costs, "harm avoidance justice,"[79] and is future-orientated. It is not about who caused

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71 Dunlap and Brulle *Climate Change and Society: Sociological Perspectives* 4.
72 Miekle, Wilson and Jafry 2016 *International Journal of Climate Change Strategies and Management* 490.
73 Pottier et al 2017 *Environmental review of Environmental & Resource Economics* 32.
74 Caney 2010 *Critical Review of International, Social and Political Philosophy* 213.
75 Garcia-Portela 2022 *Res Publica* 2.
76 Aitken and Christman 2016 *Scottish Affairs* 6.
77 Such as the excusable ignorance objection which basically says that past polluters were ignorant of the consequences of their GHG emitting actions and thus should not be held accountable.
78 Garcia-Porela 2022 *Res Publica* 2.
79 Caney 2010 *Critical Review of International, Social and Political Philosophy* 213.

the problem, but about who is in a position to pay.[80] It does not look at who caused the problem but rather it looks at who is capable of paying.[81]

The weight of evidence suggests that the lack of a common understanding of climate justice has an impact on international cooperation worldwide. This often leads to other states withdrawing from the global climate agreement if their favoured principles of justice are not taken into account.[82] On this basis, the proposed study examines other alternatives to achieve climate justice for South Africa alongside the global community.

1.3 Motivation

1.3.1 Climate litigation as an avenue to climate justice

According to Setzer *et al*,[83] climate change litigation refers to any legal action brought before judicial bodies, including investigative and administrative authorities, in which issues or legal facts related to climate change, mitigation or adaptation measures and efforts are raised as an important feature or main issue. Litigation is a strategic way to ensure climate justice because it can be used as a "gap-filler"[84] to the international and national efforts to mitigate climate change by leveraging legal frameworks to enforce climate commitments and promote justice.[85]

The international case on climate change: *The State of the Netherlands versus the Urgenda Foundation*[86] serves as a good example. This lawsuit sought to force the state to adopt a more ambitious climate change mitigation plan than the one the state had adopted. It was one of the first successful climate change court cases in the world to be decided on the basis of environmental impact considerations.[87]

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80 Caney 2014 *The Journal of Political Philosophy* 127. See also Schlosberg 2012 *Ethics & Environmental Affairs* 452.

81 Caney 2014 *The Journal of Political Philosophy* 127. See also Schlosberg 2012 *Ethics & Environmental Affairs* 452.

82 Dunlap and Brulle *Climate Change and Society: Sociological Perspectives* 4.

83 Setzer *et al* 2021 *ECB Legal Working Paper Series* 5.

84 Otto *et al* 2022 *Global Policy* 736. See also Peel and Lin 2019 *American Journal of International Law* p 688.

85 Otto *et al* 2022 *Global Policy* 736. See also Peel and Lin 2019 *American Journal of International Law* p 688.

86 *The state of the Netherlands v Urgenda Foundation* ECLI: HR: 2019 (Sup. Ct. Neth.).

87 de Graaf and Jans 2015 *Journal of Environmental Law* 520-521.

In the South African case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs*,[88] the court had to decide on the legality of granting a licence for a coal-fired power plant, while the plaintiffs in *La Rose v Her Majesty, the Queen*[89] took a different approach aimed directly at combating climate change. They turned to the court because the government had failed to protect human rights such as the right to life and liberty in accordance with the Canadian Charter[90] of Rights and Freedoms. The study will analyse these cases and several other South African, international, and regional cases in detail to assess the extent to which climate litigation is being used to achieve climate justice.

1.4 Research question

How could climate litigation vindicate climate justice in South Africa?

1.5 Research aim and objectives

The main objective of the proposed dissertation is to evaluate the extent to which climate litigation could facilitate the vindication of climate justice in South Africa.

To achieve this main objective, the proposed research will pursue the following sub-objectives:

- To understand global perspectives on climate justice.
- To examine and review the extent to which international and South African laws have assisted in mitigating climate change and promoting climate justice.
- To examine Global trends in climate litigation and identify strategies that best promote effective climate litigation.
- To examine and analyse South African perspectives on climate justice.

88 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 ALL SA 519 (GP).
89 *La Rose v Her Majesty, the Queen* T-1750-19.
90 Section 7 of the Constitution Act of Canada (1982).

- To identify the challenges and opportunities for climate litigation as a tool for vindicating climate justice in South Africa.

1.6 Premises, assumptions, and hypothesis

It is assumed that climate lawsuits based on a sound legal framework could be an effective tool to mitigate climate change and promote climate justice at national level.

The inquiry of this study is thus premised on the following assumptions:

- Most climate change lawsuits in South Africa are based on non-climate change laws.

- Litigation could be a useful tool for enforcing global climate targets as against the state.

- Without lawsuits being brought against the government to compel the implementation of policy and law, climate justice remains an elusive concept for South Africa.

1.7 Research method

The study will apply the method of legal doctrinal research. This includes analysing case law, legislation, political documents, textbooks and academic articles.[91] The research is therefore desktop-based. Primarily, a critical discourse analysis approach is used to sift through as much material as possible on climate change, climate processes and climate justice.[92] This includes national, international and regional materials to gain a general understanding of the background and history of global perspectives on climate law.

This is followed by a more nuanced critical review of relevant legislation, international instruments and conventions, guidelines, textbooks, journal articles and other electronic sources. International jurisprudence on climate litigation around the world will be analysed, with a focus on the extent to which its outcomes contribute to climate

91 Jain 1975 *Journal of the Indian Law Institute* 516.
92 Mullet 2018 *Journal of Advanced Academics* 132.

change mitigation and the subsequent achievement of climate justice. This will be necessary to provide the framework within which we can understand the potential challenges and gaps of climate justice in the South African legal and policy framework.

Even if the methodology of this study is not comparative, international and foreign case law can only be used for prescriptive purposes.

1.8 Framework of the study

The study is divided into the following chapters:

Chapter 1: Introduction

Chapter 2: Global perspectives on climate justice

Chapter 3: International and South African climate change laws: An overview

Chapter 4: Global trends in climate justice and litigation

Chapter 5: Climate justice and litigation in South Africa

Chapter 6: Summary, recommendations, and conclusion

CHAPTER 2 GLOBAL PERSPECTIVES ON CLIMATE JUSTICE

2.1 Introduction

Climate change has proven to be one of the deadliest threats facing humanity.[93] It has far-reaching implications that transcend national borders and disproportionately affect the world's most vulnerable populations.[94] Now that the scientific community has reached a consensus on the causes and effects of climate change,[95] the global community has failed to develop a comprehensive action plan.

This chapter looks at the different perceptions and views on climate change and climate justice in different communities around the world. In particular, it focuses on the emerging field of climate justice and how litigation can contribute to such a movement, especially in South Africa. Climate justice is based on the premise that justice, human rights and sustainable development cannot be separated from the causes and effects of climate change.[96]

The chapter examines the guiding ideals, promises and ongoing debates in these international agreements, focusing on the progress and ongoing challenges in efforts to achieve equitable and effective climate action. Most importantly, this chapter radically analyses how the concept of "climate justice" has become mainstream in international discourse and highlights the unfair burden that poor nations, vulnerable groups and future generations have to bear.[97] It takes a closer look at the emerging legal theories and precedents that have sought to assert the rights of these interest groups against governments and corporations, forcing the former to take a more holistic approach to dealing with this climate catastrophe. Finally, this chapter provides an overview of various perspectives on climate change globally, emphasizing the

93 Caney 2014 *The Journal of Political Philosophy* 127.
94 Boyd *The Environmental Rights Revolution: A Global study of Constitutions, Human Rights and the Environment* 11.
95 Fakana 2020 *Global Journal of Science Frontier Research* 10. See also Boyd *The Environmental Rights Revolution: A Global study of Constitutions, Human Rights and the Environment*.
96 Caney 2006 *Canada Journal Law Jurisprudence* 256.
97 Sultana 2022 *The Geographical Journal* 119.

climate justice movement and the effectiveness of legal action as a means for accountability and transformative change.

2.2 Key international climate justice frameworks

According to Beauregard *et al*, the Paris Agreement and the UNFCCC are among the most important international frameworks in the field of climate justice and litigation. In general, global frameworks are impacting the emerging field of climate justice litigation, where affected communities and activists are suing for compensation and accountability for damages resulting from climate change.[98]

2.2.1 The UNFCCC

The UNFCCC sets the framework for international efforts to combat climate change. It seems to take the view that the countries of the world have contributed to climate change to varying degrees and that each nation should therefore make a different contribution in proportion to its contribution.[99] This position underlines that industrialised countries have contributed the most to climate change and should therefore take the lead in minimising its impact.[100] In addition, the global community has agreed within the framework of the UNFCCC that industrialised countries should support developing countries both financially and technologically in their efforts to mitigate and adapt to the negative effects of climate change.[101] This principle is commonly known as the CBDR-RC principle. It illustrates the global view that historical responsibility and respective capacities should determine how the burden of tackling climate change is shared, rather than evenly distributed.[102]

The challenge that has caused much criticism of the CBDR-RC principle lies in determining the responsibility of the individual parties. According to Dunlap and Brulle,[103] this could be the reason why international co-operation between states was

98 Beauregard et al 2021 *Climate Policy* 655.
99 A 3(1) of the United Nations Framework Convention on Climate Change (1992).
100 A 3(1) of the United Nations Framework Convention on Climate Change (1992). See also Baker & Tully 2020 *Climate justice as a framework for achieving the SDGs: Challenges and opportunities* 15.
101 A 4(3) of the United Nations Framework Convention on Climate Change (1992).
102 Okereke & Coventry 2016 *Wiley Interdisciplinary Reviews: Climate Change* 851.
103 Dunlap & Brulle *Climate Change and Society: Sociological Perspectives* 4.

very low, as states were moving in different directions. According to Caney, it took the parties to the UNFCCC around two decades to agree on these conditions.[104] The differing perceptions of climate justice among nations can seriously hinder success in collectively tackling climate change at a global level. To solve this problem, consensus must be reached by developing a universally acceptable definition of climate justice that at least takes into account the views of individual states.

The Conference of the Parties (hereinafter COP) was established as an expression of the global consensus-building process required to address a transboundary issue such as climate change in order to support international negotiations and the creation of a global climate policy.[105]

As for the UNFCCC's contribution to climate justice, it has not been as successful in mitigating the negative effects of climate change because it lacks an enforcement framework.[106] However, the UNFCCC has established key principles that have been adopted in the national constitutions of various countries around the world. In South Africa, the principle of intergenerational rights and sustainable development as well as the right to a clean environment[107] were incorporated into the Constitution.[108] In South Africa, the Constitution[109] has been instrumental in climate change litigation. For instance, in *Earthlife South Africa v Minister of Environmental Affairs*,[110] the plaintiffs claimed that the Minister's decision violated their right to a healthy environment as enshrined in section 24 of the Constitution.[111] Crucially, this section aims to secure environmental protection for the benefit of present and future generations, a principle of intergenerational rights that is one of the key principles of climate justice. The court's decision in this case emphasises the need to consider the impacts of climate

104 Caney 2014 *The Journal of Political Philosophy* 135.
105 Bodansky 2016 *The American Journal of International Law* 319.
106 Tingley & Tomz 2022 *The International Organization* 445.
107 Section 24 of the Constitution (1996).
108 The Constitution of the Republic of South Africa (1996).
109 Particularly section 24 had been the basis of most climate lawsuits including the landmark case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] 2 ALL SA 519 (GP).*
110 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] 2 ALL SA 519 (GP).*
111 Section 24 of the Constitution (1996).

change in environmental impact assessments, thereby bringing national legislation into line with international obligations under the UNFCCC.

According to Peel & Osofsky,[112] the UNFCCC and its guiding principles of climate justice have been used in several well-known climate change lawsuits in South Africa. These lawsuits include:

(i) *Africa Earth Life Minister of Environmental Affairs and Others v. Johannesburg*,[113] in which the environmental licence for a new coal-fired power plant was challenged on the grounds that it violated South Africa's UNFCCC commitments. According to the court, the government had failed to adequately assess the project's impact on climate change.

(ii) *Minister of Environmental Affairs and Others v. Trustees for the Time Being of the Groundwork Trust and Others*.[114] This case challenged the government's inability to implement appropriate measures to mitigate climate change. The plaintiffs alleged that the government's behaviour was in breach of both its constitutional and UNFCCC climate change obligations. The court ruled in favour of the plaintiffs in this case.[115]

(iii) *Uzani Environmental Advocacy CC v. BP Southern Africa (Pty) Ltd*.[116] In this case, the common but differentiated obligations of the UNFCCC were used to target the impact of a major oil company on climate change. The court's decision to uphold BP's conviction confirmed that the UNFCCC framework can be lawfully applied in private climate disputes, reinforcing the idea that corporate actions must be scrutinised in the context of climate justice and environmental rights.

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112 Peel & Osofsky 2018 *Transnational Environmental Law* 58.

113 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 ALL SA 519 (GP) para 91.

114 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs & Others ZAGPPHC 725 (2022).* para 11.

115 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs & Others ZAGPPHC 725 (2022).* para 241.

116 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* [2019] 2 All SA 881 (GP) para 130.

(iv) These cases show how South African plaintiffs are using the UNFCCC and its climate justice principles to hold public and private organisations accountable for their actions - or lack thereof - in relation to climate change.

While the UNFCCC itself has not succeeded in achieving universal cooperation, it has paved the way for governments to reduce their carbon footprint and ensure climate justice for present and future generations. It also provided an opportunity for climate justice through litigation, as mentioned earlier.

2.2.2 The Paris Agreement and the quest for climate justice

The Paris Agreement[117] was ratified in 2015 under the auspices of the UNFCCC and marked a decisive turning point in the global fight against climate change and for greater climate justice. This pact sought to limit the rise in global temperatures to 1.5°C and aims to keep it well below 2°C above pre-industrial levels. The adopted target reflects the growing international consensus that robust action is needed to reduce the negative impacts of climate change, as reaffirmed by United Nations Secretary-General Antonio Guterres during the COP28 climate summit in 2023.[118]

The Paris Agreement includes the concept of "loss and damage", which recognises the inevitability of the effects of climate change.[119] This perspective is more concerned with the harm or adverse effects caused by climate-related disasters and is more relevant in the context of climate justice where marginalised and vulnerable communities, particularly in the global South, are disproportionately affected by climate change, even though they have contributed the least to it.[120] To monitor progress and compliance, all Parties to the Agreement are required to submit Nationally Determined Contributions (NDCs) outlining each country's strategy to reduce greenhouse gas emissions and respond to climate change.[121] Given the global scale of

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117 Paris Agreement (2015).

118 Guterres as cited in *Mail & Guardian* 2023 https://mg.co.za/environment/2023-05-03-cop28-climate-summit-expectations-high-trust-is-low/. In this article, Guterres emphasized the urgent need to act against climate change, the seriousness of the consequences of failure to act and nature of action that is required as shown earlier in the quote in chapter 1 above.

119 Osofsky (2016) *Harvad Environmental Law Review* 123.

120 Schlosberg & Collins 2014 *Environmental Politics* 65.

121 A 4(16) of the Paris Agreement (2015).

the climate crisis, this decentralised model allows for greater flexibility and the participation of a wide range of nations and stakeholders.[122]

The link between human rights and the impacts of climate change is emphasised by the human rights-based approach to climate justice. According to this viewpoint, the fundamental rights and well-being of marginalised and vulnerable people are disproportionately threatened by the negative impacts of climate change, such as rising sea levels, harsh weather and resource scarcity.[123] The human rights-based approach to climate justice emphasises that climate change should be recognised as a human rights issue that must be addressed within the framework of universal human rights principles, such as the right to food, water, life, health and a safe environment.[124] In the South African context, almost all court cases related to climate justice contained elements of human rights. This is illustrated by the following quote:

> These cases illustrate the use of climate change and human rights arguments in a subtle but effective way. Reading these cases as simply being administrative law applications obscures the influence of human rights protection on the development of domestic law. Such a framing also overlooks the ways in which human rights protection has influenced the scope of the relevant duties. An alternative reading demonstrates the capacity of courts to develop the law to protect rights through administrative determinations.[125]

This tactic emphasises the duty of states and the international community to uphold and protect fundamental human rights in the face of climate catastrophe.[126] There is a global consensus that meaningful participation of people who are historically marginalised and disproportionately affected by the impacts of climate change, particularly in the Global South, is necessary to achieve climate justice.[127]

2.2.2.1 Loss and damage

It has become obvious that the idea of "Loss and Damage" is essential for international climate justice frameworks. This concept describes the unavoidable impacts of climate change that certain nations and peoples face, despite their best efforts to reduce the

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122 Dimitrov 2016 *Global Environmental Politics* 11.
123 Caney 2010 *Oxford Journal of Legal Studies* 177.
124 Knox 2019 *The Human Rights Quarterly* 78.
125 Bouwer 2022 *Journal of Human Rights and the Environment* 173.
126 Duyck, Jodoin & Johl 2018 *Routledge handbook of human rights and climate governance* 45.
127 Klein 2015 *Climate Policy* 725.

impact of climate change and adapt to the changing environment.[128] Loss and damage around the world shows the unequal distribution of the burden of climate change, as the nations and populations that have contributed the least to the problem often feel the worst effects.[129]

The Global South has suffered irreversible losses, such as the loss of cultural heritage, displacement and the loss of biodiversity, which cannot be adequately addressed by traditional adaptation measures alone.[130] The realisation that the actions and efforts of marginalised communities to mitigate and adapt to climate change alone are not sufficient to address the scale of climate change impacts is the motivation for the global campaign to include loss and damage in climate negotiations.

The international call for climate justice underlines the need for the global community to recognise and address these unavoidable losses and damages. As a result, the Warsaw International Mechanism for Loss and Damage[131] was established during the COP19 climate summit with the aim of facilitating the understanding, mitigation and support of loss and damage associated with the unfavourable impacts of climate change.[132] However, as the wealthy nations were not prepared to bear the financial burden of the effects of climate change, the adoption and financing of this process encountered considerable obstacles.[133] Addressing loss and damage is seen as a crucial part of the broader pursuit of climate justice, which requires an international, co-operative and fair strategy.[134]

2.2.2.2 Indigenous rights frameworks

Recognising and upholding the rights of Indigenous Peoples is an essential part of international frameworks for climate justice. With their traditional knowledge and sustainable practises, indigenous communities around the world have long been at the

128 González 2019 *Environmental Justice* 45.
129 Schäfer, Künzel & Bals 2018 *Climate Policy* 567.
130 Cohen 2020 *Harvad Environmental Law Review* 88.
131 Warsaw International Mechanism for Loss and Damage (2013).
132 Roberts & Parks 2007 *Global Environmental Change* 210.
133 Okereke & Coventry 2016 *Climate Policy* 89.
134 Huq, Roberts & Fenton 2013 *Nature Climate Change* 949.

forefront of efforts to mitigate and adapt to the impacts of climate change.[135] Globally, the inclusion of indigenous peoples' rights in the climate justice framework reflects the growing realisation that addressing the climate catastrophe requires a focus on the experiences and voices of indigenous peoples.[136]

By including Indigenous Peoples' rights in climate justice efforts, global strategies and programmes have been developed that respect the inclusion of Indigenous communities in decision-making processes. In addition to financial and technical support for Indigenous-led climate action, this inclusion includes the creation of processes to integrate traditional knowledge into climate science and policy making.[137]

Nevertheless, there have been various hurdles in realising the rights of Indigenous peoples in the context of climate justice. Due to the effects of climate change and the lack of political will on the part of governments and companies, many indigenous groups continue to be affected by marginalisation, displacement and the destruction of their traditions.[138] Therefore, addressing these structural injustices and ensuring that the rights and interests of indigenous peoples are adequately respected and protected in all climate-related policies and activities are critical components of the global call for climate justice.[139]

In summary, the Paris Agreement is a clear testimony to the fact that the global community has recognised the need to apply the principle of inclusiveness in the fight against climate change, despite the different views on the distribution of burdens and benefits of climate justice. The Paris Agreement epitomises the urgency of climate change and the need to actively participate in combating and preventing its damage. It has attracted almost all nations and is seen as one of the agreements that will have a far-reaching impact on global climate action.[140]

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135 Schroeder 2018 *Global Environmental Policies* 186.
136 Reimerson 2021 *Climate Policy* 74.
137 Tsosie 2021 *Environmental Law* 42.
138 Whyte 2013 *Environmental Philosophy* 64.
139 Vierros, Cisneros-Montemayor, Aximu & Iro 2020 *Ecosystem Services* 12.
140 Christoff 2016 *Environmental Politics* 775.

2.3 Climate justice from the Global South perspective

The Global South's perspective on climate justice tends to focus on the disproportionate burden that developing countries and marginalised communities experience from the negative impacts of climate change. This perspective is based on the realisation that the countries that contribute the least to global greenhouse gas emissions often suffer the most severe consequences, such as rising sea levels, extreme weather events and the destruction of natural resources.[141]

From the perspective of the Global South, climate justice is not just about reducing emissions and adapting to climate change, but also about eliminating the historical and current injustices that have led to this situation.[142] This includes the legacy of colonialism, the unequal distribution of wealth and power and the disproportionate influence of the global North in shaping international climate policy and framework conditions.[143]

2.3.1 Historical responsibilities and the call for reparations

The idea of historical responsibility is a fundamental part of the Global South's stance on climate justice. According to this concept, the fossil fuel-driven development of the industrialised North is the main culprit of the climate catastrophe, as it has been the dominant source of anthropogenic greenhouse gas emissions in recent centuries.[144] According to this view, the global South is currently suffering severe impacts due to the excessive and unsustainable use of the global commons by the global North, which has led to the accumulation of an "ecological debt".[145]

The demand for climate reparations arises directly from this view of historical guilt. Proponents claim that the nations and people in the global South who are most affected by climate change should receive compensation from the global North for its activities.[146] To help vulnerable communities build resilience and recover from climate-

141 Sealey-Huggins 2017 *Climate and Development* 604.
142 Patel, Schlosberg & Carmin 2020 *Environmental Politics* 23.
143 Ajl 2021 *Socialist Register* 142.
144 Chakravarty & Ramana 2017 *Climate Change* 368.
145 Warlenius 2018 *Ecological Economics* 9.
146 Roberts & Parks 2019 *Global Environmental Politics* 201.

related disasters, this compensation could take the form of financial support for adaptation and mitigation initiatives, technology transfer or other types of assistance.[147]

Worldwide, the quest for climate reparations has gained popularity in recent years. A number of nations and groups in the Global South are pushing for this demand to be included in international climate frameworks.[148]

The need for a more equitable and inclusive strategy to address the global issues raised by climate change is emphasised by the fact that this has contributed to ongoing tensions and power imbalances in international climate discussions.[149] The biggest challenge with this approach, however, is that it is difficult to assign responsibility to the individual nations of the Global North.[150]

2.3.2 Right to development and the need for climate finance

The "right to development"," which states that poor countries should have the opportunity to develop their economies and improve the living standards of their citizens, is closely linked to the Global South's position on climate justice.[151] According to this view, the development paths of the global South have been successfully limited by the global North's historical responsibility for climate change, leaving these nations to deal with the consequences of disasters they did not cause.[152]

Advocates claim that substantial climate finance from the global North must be made available to the global South in order to protect the right to development and ensure climate justice. With this financial support, poor countries could invest in renewable energy infrastructure, pursue low-carbon and climate-resilient development policies and develop adaptation plans to protect vulnerable populations from climate change.[153]

147 Sealey-Huggins 2017 *Climate and Development* 611.
148 Hoffmeister et al 2019 *Environmental Science and Policy* 18.
149 Roberts & Parks 2019 *Global Environmental Politics* 233.
150 Caney 2010 *Critical Review of International, Social and Political Philosophy* 213.
151 Usman 2021 *International Development Policy* 84.
152 Sealey-Huggins 2017 *Climate and Development* 607.
153 Pickering, Jotzo & Wood 2021 *Climate Policy* 16.

However, the Global South has noted with concern the lack of transparency and inequitable distribution of available climate finance, as well as the delayed progress in fulfilling this commitment.[154] To ensure a more reliable and regular flow of resources, the Global South has also advocated for the creation of new and additional sources of climate finance, for example by taxing emissions from shipping and international aviation.[155]

2.3.2.1 Adaptation and loss and damage in the Global South

The Global South's perspective on climate justice is deeply concerned with the urgent need to adapt and cope with loss and damage related to the impacts of climate change. These countries, often the most vulnerable to the effects of a warming planet, face major challenges in their efforts to protect their populations and ensure their right to development.[156]

From the perspective of the Global South, adaptation is a critical priority as these countries need to develop strategies to strengthen their resilience and prepare their communities for the inevitable consequences of climate change. This may include investment in infrastructure development such as flood defences, drought-resistant agriculture and early warning systems, as well as efforts to strengthen the adaptive capacity of vulnerable populations.[157] However, the Global South has emphasised that the responsibility for financing these adaptation measures should not rest solely on its shoulders, given its limited resources and historical contribution to the problem.[158]

In addition, the Global South has called for the international community to address the issue of loss and damage – the irreversible damage and impacts that cannot be avoided by adaptation measures alone. This includes the loss of human life, livelihoods, cultural heritage and biodiversity, as well as damage to critical infrastructure and economic disruption caused by climate-related disasters.[159] The Global North, on the other hand,

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154 Grasso 2021 *Climate Policy* 205.
155 Huq, Roberts & Fenton 2013 *Nature Climate Change* 949.
156 Sealey-Huggins 2017 *Climate and Development* 601.
157 Hoffmeister et al 2019 *Environmental Science and Policy* 24.
158 Huq, Roberts & Fenton 2013 *Nature Climate Change* 951.
159 Germanwatch Report 2020 *Global Climate Risk Index* 08.

is reluctant to fully embrace the concept of loss and damage, fearing that it could open the door to liability and compensation claims. This has led to tensions and deadlock in international climate negotiations, while the Global South continues to push for the recognition and operationalisation of loss and damage as a critical component of climate justice.[160]

2.4 Emerging trends and debates in climate justice discourse

As climate justice aims to link environmental issues with social justice, it advocates for the equitable treatment of all communities affected by climate change, especially in regions such as South Africa where historical injustices and socio-economic inequalities exacerbate the effects of climate change.[161] As the impacts of climate change are increasingly felt around the world, several new trends and debates have emerged in the climate justice dialogue.

2.4.1 Climate justice and intersectionality

The most notable trend in the discourse on climate justice is the focus on intersectionality. This concept assumes that people such as people of colour, women and low-income communities experience interdependent and intersecting systems of discrimination. Due to widespread inequalities, they often bear the greatest burden of climate change. [162] A good example of this trend can be found in the United States of America. The aftermath of Hurricane Katrina in 2005 is a good example of intersectionality in climate justice. The response to the disaster was marked by significant racial and economic inequalities, with marginalised communities suffering the most from the lack of adequate evacuation plans and recovery efforts. The debates surrounding this event have spurred a dialogue about how climate policy should consider intersecting identities to ensure that the most vulnerable populations receive adequate support and all necessary resources.[163]

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160 Grasso 2021 *Climate Policy* 213.
161 Schlosberg 2004 *Environmental Politics* 527.
162 Djoudi et al. 2016 *Ambio* 262.
163 Belle 2006 *Analyses of Social Issues and Public Policy* 143.

In South Africa, the same trend is evident in the 2015-2018 water crisis in Cape Town. As a result of the severe drought, low-income communities experienced the worst effects of water scarcity and often had to rely on unreliable water sources.[164] According to Shiriyedete, Khan and Ehiane, there was differentiated treatment between the marginalised communities and the affluent in the government's response to the water scarcity. This is clearly captured in the quote:

> The injustices of the past have contributed to Cape Town's water phenomenon. Racial inequality created during the apartheid era from 1948–1994 exists in the city. Political priorities, which had historically catered for the interests of rural commercial white farmers, have continued to date in a democratic government. Cape Town's service delivery was highly differentiated and mainly catered for white South Africans. Less priority was directed towards developing townships and informal settlements where most blacks and people of colour lived. Residents in informal settlements of both Northern and Southern suburbs concurred in arguing that:
>
> "…the apartheid era scenario is still with us, and our new government did very little to change our lives, specifically when it comes to basic services. Nobody can hear us. Just look at our living conditions and compare them with those in affluent white suburbs; it is very unfair. Imagine the distance we walk to access water at a community tap, yet others have many taps in one yard."
>
> Presently, the municipality generally struggled with a much weaker tax base, overcrowded neighbourhoods, resource mismanagement and corruption to speedily transform the colonial legacy. When a disaster occurs, the marginalized are the most hit, and recovery takes time due to their high level of vulnerability, deepening their poverty status.

As in the case of the United States of America, the government's response focused primarily on wealthy neighbourhoods, highlighting existing socio-economic inequalities. This crisis triggered a debate on how national climate policy should address the needs of the most vulnerable groups, strongly emphasising the need to take socio-economic factors into account.[165]

2.4.2 Integrating Indigenous knowledge in climate action

Another important trend in the field of climate justice is the growing focus on the contribution of indigenous and local knowledge to combating climate change.[166]

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164 Shiriyedete, Khan and Ehiane 2024 *Environment and Social Psychology* 12.
165 Shiriyedete,Khan and Ehiane 2024 *Environment and Social Psychology* 1.
166 Nakashima et al. 2021 *Climate and Development* 34.

Indigenous groups have established sustainable practises over generations and often have a strong understanding of their local environment based on their location.[167] It was recognised that the integration of these knowledge systems into climate change solutions is essential to ensure more effective and equitable responses to climate change.[168] Indigenous communities continue to fight for their climate rights, as demonstrated by the 'Standing Rock Sioux Tribe's protests against the Dakota Access Pipeline, which characterise the fight for indigenous rights in the context of climate justice. This movement drew global attention to the importance of respecting indigenous sovereignty and recognising the need for greater inclusion of Indigenous perspectives in climate policy.[169]

2.4.3 Technological intervention and the climate justice debate

As the world turns to technology to find solutions to climate change, debates have arisen about the equity implications of such solutions. Innovations such as carbon capture and storage (CCS), geoengineering and renewable energy technologies are often seen as the best solutions to the challenges of climate change. However, there are a number of concerns about their potential to exacerbate existing inequalities. For example, solar energy is often recognised as a clean and sustainable alternative to fossil fuels. Nevertheless, access to solar technology in low-income communities is very limited due to the high upfront costs and lack of infrastructure. Policies and programmes aimed at increasing the uptake of solar energy must consider equity to prevent only wealthy communities from benefiting from renewable energy technologies.

In the South African context, the implementation of technological interventions such as Carbon Dioxide Removal geoengineering methods has raised climate justice concerns. According to Burns, Dana and Nicholson, technologies such as Bioenergy with Carbon Capture and Storage and Direct Air Capture have the possibility of worsening the existing social inequalities by causing increased land grabbing and competition for resources. This is so concerning in South Africa where vulnerable

167 Whyte 2013 *Environmental Science and Policy* 581.
168 Thornton & Comberti 2017 *Climatic Change* 18.
169 Gingrich 2022 *Public Interest Law Reporter* 42.

communities are already facing severe impacts of climate change due to economic and social inequalities. It is therefore very important to incorporate human rights considerations into the governance of geoengineering to prevent further marginalization and violations of community rights. Any implementation of these technologies should be evaluated through a human rights framework to ensure that climate justice is attained.[170]

This perspective has sparked a debate on how to design inclusive policies that ensure all communities have equal access to and benefit from greener technologies.[171]

2.4.4 Historical responsibilities and apportionment challenges

Another ongoing debate in the discourse on climate justice centres on the question of responsibility for climate change. The industrialised countries, which have historically contributed the most to greenhouse gas emissions,[172] are often seen as having a moral obligation to take the lead in efforts to mitigate climate change and to help developing countries adapt to the effects of climate change.[173] The establishment of the Green Climate Fund,[174] the fact that the UN has already made commitments to support developing countries in adapting to and mitigating climate change shows just how complex this debate is. Despite pledges by industrialised countries to provide financial support to developing countries, the practical implementation of these pledges has often fallen short. This has led to discussions about accountability, transparency and the effectiveness of climate finance mechanisms. Developing countries argue for a fairer distribution of resources, while industrialised countries often emphasise the need for local governance and capacity building.[175]

Finally, a growing global solidarity movement to bring communities and activists together in the pursuit of immediate action and climate reparations has emerged as a

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170 Burns, Dana ana Nicholson (eds) *Climate Geoengineering: Science, Law and Governance* 15-19.
171 Markkanen & Anger-Kraavi 2019 *Climate Policy* 832.
172 Baker & Tully 2020 *Sustainable Development* 15.
173 A 4(3) of the United Nations Framework Convention on Climate Change (1992).
174 The Green Climate Fund (GCF) was established under the United Nations Framework Convention on Climate Change. It was created by the decision of the 17th Conference of the Parties (COP 17), which took place in Durban, South Africa, in 2011.
175 Baker & Tully 2020 *Sustainable Development* 15.

key feature of the climate justice discourse. This includes grassroots projects that centre the voices and experiences of the most affected populations, as well as youth-led campaigns such as the 'Fridays for Future strikes' that began in 2018, demanding immediate and effective action from political actors to combat climate change.[176]

2.5 Chapter summary

The analysis of the different global positions on climate change in this chapter has highlighted the importance of the climate justice movement in determining how the world responds to this deadly challenge. The need to address the disproportionate burden borne by marginalised populations, developing countries and future generations has become all the more urgent as the impacts of global warming become more catastrophic. The discussion also highlighted the challenges faced by marginalised communities due to corruption and discrimination. The chapter explored the growing popularity of the concept of climate justice in the global debate, which challenges the conventional interpretation of climate change as an exclusively environmental issue. The climate justice movement aims to reframe the narrative and advocate for more inclusive and equitable solutions by recognising the deep connections between the climate catastrophe and broader issues of human rights, justice and sustainable development. What becomes clear in this chapter is that there are still serious challenges regarding the way different communities and stakeholders view climate justice. This has contributed greatly to the failure of most international efforts to collectively tackle the scourge of climate change. This shows that the quickest solutions for climate justice should be sought domestically rather than internationally.

176 Martiskainen et al. 2020 *Sustainability* 123.

CHAPTER 3 INTERNATIONAL AND SOUTH AFRICAN CLIMATE CHANGE LAWS: AN OVERVIEW

3.1 Introduction

The clearer the impact of climate change becomes[177], the more important it is to have a solid and effective legal framework for environmental protection at both global and national level.

From the analysis of the different perspectives on climate justice at the global level in the previous chapter, it is clear that there is no consensus on the definition of climate justice. This makes it very difficult to find a universal solution to the global crisis of climate change. This chapter provides an overview of the two most important international treaties and conferences on climate change and the environment. These include the UNFCCC, the Paris Agreement and the Kyoto Protocol, as well as South African climate change laws and policies, emphasising how they are designed to combat the negative effects of climate change and achieve climate justice.

A critical analysis of these laws is carried out in order to examine how the courts interpreted and implemented them in their decision-making processes. By examining and analysing the relationship between the global obligations, national frameworks and court rulings on climate change, this chapter will shed light on the ways in which South Africa and the global climate regime can pursue climate justice through litigation.

Finally, the chapter will lay the groundwork for understanding how effective these laws and policies are in achieving climate justice and accountability in the South African climate landscape.

[177] Obani 2024 Climate *Litigation in South Africa and Nigeria: Legal Opportunities and Gender Perspectives* 295.

3.2 Key international climate laws and agreements

International laws and agreements on climate change have become increasingly important as the effects of climate change become more apparent and influence national responses.[178]

These international frameworks not only provide South Africa, a nation vulnerable to the negative impacts of climate variability, with a roadmap for mitigation and adaptation, but they also have implications for local policy and legal frameworks. The relevance of key international climate agreements to South Africa's climate governance, which include the Kyoto Protocol, the Paris Agreement and the UNFCCC, is explored in this section. In addition to outlining the prospects for South Africa to improve its climate resilience and sustainable development goals, it also emphasises the crucial role of international cooperation in addressing the complex problems of climate change.

3.2.1 The UNFCCC

The UNCHE, which took place in 1972, was a milestone that can be seen as a turning point in the integration of environmental issues into the international discourse, as they are considered essential for human rights and sustainable development.[179] UNCHE is celebrated as one of the first international conferences held exclusively to discuss general environmental issues. It established the recognition of the right to a healthy environment,[180] which laid the foundations for future environmental agreements such as the UNFCCC.[181] This conference provided the impetus for international cooperation and inspired subsequent agreements on climate change.[182] A few years after the UNCHE, one of the most important international agreements to combat climate change, the UNFCCC, was signed in 1992. In contrast to the UNCHE,

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178 Okereke 2010 *Wiley Interdisciplinary Reviews: Climate Change* 465.

179 This has been enshrined in section 24 of the Constitution of the Republic of South Africa (1996) and the preamble of the Climate Change Act 22 of 2024. It should be noted that these incorporations were not directly inspired by the UNCHE but can be traced back to it since these principles are mentioned in principles 1 and 2 of UNCHE.

180 Principle 1 of the United Nations Conference on the Human Environment (1972).

181 Bratspies 2021 *Geogia Journal of International and Comparative Law* 760.

182 Bratspies 2021 *Geogia Journal of International and Comparative Law* 757.

which dealt with general environmental problems, the UNFCCC was mainly concerned with climate change. Its subsequent contribution to the Kyoto Protocol and the Paris Agreement, among other agreements, emphasises its importance. The UNFCCC has significantly influenced national laws and policies on climate change in various countries that have acceded to it, including South Africa.[183]

A good practical example of the implementation of the UNFCCC in South Africa is the National Climate Change Response Policy,[184] which was developed in South Africa as a result of the country's commitment to the UNFCCC. Its objectives are to mitigate climate change and improve adaptive capacity.[185] The UNFCCC has given South Africa the institutional and legal framework it needs to develop plans to reduce greenhouse gas emissions and improve climate resilience. The objectives of the UNFCCC are to combat climate change and promote sustainable development in line with this policy framework.

The UNFCCC called on its member states to participate in the global discourse and co-operation on climate issues, of which South Africa is a signatory. South Africa's participation in the UNFCCC discussions has enabled the country to articulate its interests as a developing country and make contributions to the development of global climate policy that are relevant to the demands of most developing countries.[186] In addition, the UNFCCC has led to climate issues being incorporated into several areas of South African governance, such as the need for a unified strategy for climate action between government and non-governmental organisations.[187]

However, despite its contributions to various climate change laws and policy development in the Parties, the UNFCCC had its own challenges. The biggest shortcoming of this international agreement was the lack of binding commitments for the Parties. The UNFCCC has often been criticised for being non-binding. Despite setting broad goals, there are no specific targets for countries to fulfil. This has led

183 Savaresi 2016 *Journal of Energy and Natural Resources Law* 25.
184 National Climate Change Response White Paper (2011) 12.
185 A 2 of the UNFCCC (1992).
186 Dube and Oelofse 2018 *Environmental Law Journal* 162.
187 Nyamukondiwa and Zulu 2023 *Journal of Climate Policy* 308.

to varying levels of commitment and action among nations, undermining collective efforts to combat climate change worldwide.[188]

According to Savaresi, the UNFCCC suffered from inadequate enforcement mechanisms, which led to it failing to achieve its objectives. This has led to a situation where countries can make pledges without facing significant consequences if they fail to honour them, undermining the effectiveness of the framework.[189]

By providing a platform for marginalised voices, particularly in developing countries, to advocate for equitable climate policies and financial support, the UNFCCC facilitates international dialogue and cooperation which helps in the pursuit of climate justice at a global level.In summary, the UNFCCC can be seen as the first international treaty to address climate change with the aim of stabilising greenhouse gas concentrations in the atmosphere at a level that prevents dangerous human interference with the climate system.[190] However, it was not without flaws, as it was not as successful in attracting international coordinated efforts due to a lack of enforcement mechanisms and binding commitments.

3.2.2 The Kyoto Protocol and its impact

As already mentioned, the UNFCCC had various weaknesses that made it less effective in achieving its objective. In 1997, the Kyoto Protocol was created to improve and address the problems observed by its predecessors. The main purpose of the Kyoto Protocol was to give the UNFCCC a binding effect.[191] It introduced emission reduction frameworks that influenced later agreements such as the Paris Agreement. It occupies a very important place in shaping the global discourse on climate justice. It sets targets for greenhouse gas emissions and introduces the concept of accountability between states.[192]

In the Kyoto Agreement, the above-mentioned emission targets were linked to specific time periods. The first commitment period, for example, was from 2008 to 2012, during

188 Maslin, Lang & Harvey 2023 *UCL Open Environment* 2.
189 Savaresi 2016 *Journal of Energy and National Resource Law* 21.
190 A 2 of the United Nations Framework Convention Climate Change (1992).
191 Yamin 1998 *Review of European Comparative, & International Environmental Law* 113.
192 A 3 of the Kyoto Protocol (1998), Asadnabizadeh & Moe 2024 *Frontiers in Environmental Science* 3.

which the industrialised countries legally bound by the agreement had to ensure that they reduced their emissions by an average of 5% below 1990 levels.[193] However, the agreement triggered several dialogues, particularly on developing countries, as it only set targets for developing countries.[194]

Though the Protocol recognized the principle of "common but differentiated responsibilities," it excluded developing countries from binding emission reduction targets, which has led to criticisms about its overall effectiveness in addressing global emissions.[195] According to Maamoun, the Kyoto Protocol has been successful in reducing emissions, but other scientists have come to different conclusions. The main criticism of the Kyoto Protocol is that, due to its selective approach to setting targets, it has not been successful in reducing emissions,[196] key players and major emitters such as the USA withdrew in 2001 because advanced developing countries such as China and India were not given targets.[197]

Although the Kyoto Protocol has made remarkable progress in mitigating climate change and set the stage for the Paris Agreement, it is still criticised by some scientists for setting inadequate targets for reducing greenhouse gas emissions. According to Okereke, the main reason the US withdrew from the Kyoto Protocol in 2001 was because it felt that major developing countries such as China and India could not adequately reduce global greenhouse gas emissions.[198]

To summarise, the Kyoto Protocol has been a success to some extent and has paved the way for subsequent agreements, which is a very positive contribution to the global climate regime's efforts to mitigate climate change. There is also empirical evidence of its success, and on the other hand, other scientists present empirical evidence of its failure, which complicates matters somewhat.[199] The introduction of greenhouse gas emission targets is sometimes attributed to the NDCs of the Paris Agreement.

193 Asadnabizadeh & Moe 2024 *Frontiers in Environmental Science* 3.
194 Okereke 2010 *Wiley Interdisciplinary Reviews: Climate Change* 465-467.
195 Bassetti 2022 *Foresight* https://www.climateforesight.eu/articles/success-or-failure-the-kyoto-protocols-troubled-legacy/.
196 Ziervogel, New and Archer 2014 *Wiley Interdisciplinary Reviews Climate Change* 605.
197 Okereke 2010 *Wiley Interdisciplinary Reviews: Climate Change* 467.
198 Okereke 2010 *Wiley Interdisciplinary Reviews: Climate Change* 467.
199 Maamoun 2019 *Journal of Environmental Economics and Management* 255.

This view is supported by Kim, Tanaka and Matsuoka, who argue that although the Kyoto Protocol achieved a reduction in greenhouse gas emissions, it had an impact on the economic growth of the countries involved, which is why the Paris Agreement took a different approach to promote global co-operation. All in all, it can therefore be concluded that the Kyoto Protocol contributed to a certain degree of global climate protection measures and also served as a basis for future agreements, which also contributed to their success.

Unlike the UNFCCC, the Kyoto Protocol represents a significant step towards addressing climate justice through the establishment of legally binding emissions reduction targets for developed countries. It aims to hold historically responsible nations accountable for their contributions to climate change which promotes a sense of equity in the global climate efforts.

3.2.3 The Paris Agreement and the global climate governance landscape

The Paris Agreement adopted in 2015 represents a significant change in global climate policy and builds on the foundations laid by the Kyoto Protocol. In contrast to the Kyoto Protocol, which only imposed binding emission reductions on industrialised countries, the Paris Agreement takes an all-encompassing and flexible approach. It calls on all countries to set their NDCs to limit global warming to well below 2 degrees Celsius in order to keep it below 1.5 degrees.[200] This approach recognises the different capacities and responsibilities of nations while promoting a collective commitment to tackling climate change.

The most important feature of the Paris Agreement is its emphasis on transparency[201] and accountability.[202] Countries are required to report on their emissions and progress in implementing their NDCs, creating a framework for international scrutiny. This mechanism is intended to strengthen trust between nations and encourage more ambitious climate action over time. In addition, the agreement includes a mechanism for incremental improvement that requires parties to progressively improve their

200 A 2 of the Paris Agreement (2015).
201 A 13 of the Paris Agreement (2015).
202 A 15 of the Paris Agreement (2015).

commitments every five years to promote a dynamic and evolving climate governance landscape while supporting sustainable development.

The Paris Agreement has had a notable impact on South Africa's climate policy, such as the NDCs, which set out the country's targets for reducing greenhouse gas emissions. The agreement has provided South Africa with a formal framework to align its climate policy with global norms and promote commitment to resilient development and adaptation to climate change.[203] In addition, the Paris Agreement has strengthened co-operation between the public, business and civil society by promoting stakeholder engagement at different levels. The Paris Agreement explicitly mentions the need for co-operation between parties and allows them to cooperate voluntarily to achieve their NDCs. This creates a collaborative framework that encourages businesses and civil society to participate alongside governments in climate action initiatives.[204] This inclusivity has improved South Africa's climate governance by enabling more thorough and interactive methods of policy formulation.[205]

The impact of the agreement on the integration of climate change considerations into South Africa's national development policy emphasises the importance of climate resilience in socio-economic planning.[206]

Despite significant progress in global climate policy through the promotion of broad participation and flexible commitments, the Paris Agreement has notable weaknesses that hamper its success, particularly for countries such as South Africa. A major criticism is that the agreement relies heavily on voluntary NDCs, which may result in countries not making a sufficient contribution to achieve the 2 degrees Celsius target. South Africa, for example, has committed to significantly reducing greenhouse gas emissions by 2025.[207] However, the country faces the challenge of reconciling these

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203 Makhubela & Tewari 2021 *African Journal of Environmental Science and* Technology 55.
204 A 6 of the Paris Agreement (2015).
205 Dube & Oelofse 2018 *Climate change and the implications for South African law* 165.
206 Nyamukondiwa & Zulu 2023 *Assessing the impact of international climate agreements on South African policy frameworks* 310.
207 Ross & Winkler 2021 *Journal of Energy in Southern Africa* 15.

goals with economic realities, particularly its heavy dependence on coal for energy production.

3.3 South Africa's climate change legal framework and policy

As a country vulnerable to the harsh effects of climate change, South Africa has made efforts to develop a comprehensive package of laws and policies to address the country's pressing environmental challenges. Several strategic measures, such as the National Climate Change Response Policy (hereinafter NCCRP),[208] the Nationally Determined Contributions under the Paris Agreement and other sector-specific legislation were adopted by South Africa in response to its awareness of its vulnerability to climate impacts. This section analyses South Africa's policy and legal framework in relation to climate change. It emphasises the interactions between national legislation and global agreements and assesses their effectiveness in achieving climate justice.

In the context of South Africa, the strategy for a just transition to a sustainable low-carbon economy is grounded on the principles of climate justice, recognizing the socio-economic disparities that worsen vulnerability to climate impacts. The country's framework emphasizes the inclusive stakeholder engagement approach, particularly involving communities that were historically reliant on fossil fuel industries to ensure that their needs and rights are prioritized in the transition process. This strategy seeks to create green jobs and promote skills development thereby addressing inequalities while advancing resilience to climate change.[209]The National Climate Change Response White Paper

Motivated by the international principles of climate justice, such as equity and the CBDR-RC principle, South Africa's National Climate Change Response Policy (hereinafter NCCRP), which was adopted in 2011, can be seen as the basis for the national climate change mitigation and adaptation strategy. It demonstrates the country's efforts to harmonise national climate policy with international laws such as the UNFCCC and to ensure that South Africa achieves equity for its diverse

208 National Climate Change Response White Paper (2011).
209 Meyer, Luthuli and Nkosi 2020 *Environmental Science & Policy* 48-50.

communities.[210] The NCCRP is therefore a comprehensive framework for reducing the impact of climate change and promoting adaptation that supports the country's Sustainable Development Goals (SDGs) and is in line with international agreements such as the UNFCCC and the Paris Agreement.[211]

As a white paper, the NCCRP provides guidance for reducing greenhouse gas emissions and promoting sustainable growth in all sectors. The strategy incorporates climate risk assessments into national planning processes[212] and sets defined targets for reducing emissions.[213] It also helps to improve resilience and ensure that development activities do not exacerbate climate vulnerability.

The NCCRP promotes cooperation in the areas of governance and stakeholder engagement by ensuring collaboration between different sectors, such as the public and private sectors and civil society.[214]

This inclusive strategy is crucial for the implementation of successful climate plans that take into account the different needs of the various South African communities.[215] In addition, sector-specific initiatives such as the procurement programme for independent power producers from renewable energy sources have been launched to increase the capacity of renewable energy sources and reduce dependence on fossil fuels.[216]

According to Chikozho, Dube and Makhubela,[217] the creation of several laws related to climate change, including the Carbon Tax Act, which aims to incentivise the reduction of emissions in the economy, can be directly attributed to this policy. The resulting legislative framework is critical to accelerating the transition to a low-carbon economy.

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[210] National Climate Change Response White Paper (2011) 12.

[211] On page 12 of the White paper, the same climate justice principles adopted by the various international agreements like the Paris Agreements are explicitly mentioned as the key principles guiding the formulation of the policy for example, the principle of equity.

[212] National Climate Change Response White Paper (2011) 21.

[213] Makhubela, Tewari & Nyamukondiwa 2022 *African Journal of Environmental Law* 115.

[214] National Climate Change Response White Paper (2011) 38-39.

[215] Dube, Oelofse & Smit 2020 *Journal of Environmental Law* 48.

[216] Nyamukondiwa & Zulu 2023 *Journal of Climate Policy* 311.

[217] Chikozho, Dube & Makhubela *African Journal of Environmental Science and Technology* 2019 70.

The NCCRP also emphasises the importance of monitoring and reporting processes to assess progress and maintain accountability in climate governance.[218] This emphasis on transparency ensures public trust and promotes long-term commitment to climate targets.[219]

However, the NCCRP can be criticised on several grounds. Although the focus is on rigorous evaluation and monitoring to ensure accountability, this seems to be an elusive goal as the paper does not specify the accountability mechanisms for the different actors. Without a clear definition of duties and responsibilities, it is very difficult to fully implement the programme.[220] Another cause for concern regarding the effectiveness of the NCCRP is the lack of concrete strategies to ensure that marginalised communities and groups can actively participate in the monitoring and evaluation of climate-related measures. This can be attributed to the lack of sufficient funding.[221] Without meaningful public engagement, policy implementation and the needs of affected communities remain disconnected, reducing accountability to the communities that bear the brunt of climate change. This in turn perpetuates existing inequalities in relation to the impacts of climate change on different groups of people.

3.3.1 Climate change-related legislation

In addition to the NCCRP, there are several legislative measures that South Africa has taken to reduce greenhouse gas emissions into the atmosphere and ensure a safe environment for all. in 1996, South Africa took a remarkable step towards environmental protection by including the right to a healthy environment in the Bill of Rights, in particular in Section 24 of the Constitution.[222]

As already mentioned, several laws were later enacted to give effect to the rights enshrined in the Constitution. One of the most important of these laws is the NEMA.[223] This Act was introduced in response to a number of factors, most notably the mandate

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218 National Climate Change Response White Paper (2011) 47.
219 Dube, Oelofse & Smit 2018 *Environmental Law Journal* 170.
220 Averchenkova, Gannon & Curran 2019 *Grantham Research Institute on Climate Change and the Environment Policy Report* 4.
221 Averchenkova, Gannon & Curran 2019 *Grantham Research Institute on Climate Change and the Environment Policy Report* 4.
222 Constitution of the Republic of South Africa (1996).
223 National Environmental Management Act 107 of 1998.

created by the Constitution.[224] NEMA has changed South Africa's environmental legal framework and shows some commitment to environmental protection and respect for human rights.

Most of the international principles of climate justice, such as intergenerational equity and the polluter pays principle, are enshrined in this legislation.[225] The NEMA demonstrates its commitment to ensuring climate justice by providing detailed guidelines for involving the public in the environmental impact assessment process and ensuring environmental justice. This includes identifying and notifying interested and affected parties, providing them with relevant information and giving them the opportunity to comment on environmental impact assessments.[226] It also lays down principles aimed at promoting justice. For example, section 2(2) of the NEMA requires that environmental management must be people-centred, while section 2(4)(c) requires the equitable sharing of the benefits and burdens of climate change without discrimination for environmental protection.

However, the NEMA also has its weaknesses, such as vague provisions that allow for different interpretations. According to Lemine, section 28(1) uses the phrase "substantial pollution", while the term "pollution" is very broad and includes "any alteration". This creates a subjective standard that makes it difficult for the complainant to prove that the pollution is 'significant'[227] - the principles of sustainable development and equitable access can be interpreted in different ways.

An important legislative measure aimed at lowering GHG emissions through the introduction of a carbon tax is the Carbon Tax Act (hereinafter CTA).[228] This Act encourages companies to adopt more environmentally friendly practises and technologies, which can be achieved by taking environmental and climate concerns into account in all economic decision-making processes. This is done by providing tax incentives as a reward for the efficient use of energy and the use of green energy

224 Section 24 of the Constitution of the Republic of South Africa (1996).
225 Section 2 of the National Environmental Management Act 107 of 1998.
226 Section 24 of the National Environmental Management Act 107 of 1998.
227 Lemine 2023 *JWEM* 24, Section 28(1) of National Environmental Management Act 107 of 1998.
228 Carbon Tax Act 15 of 2019, Dube, Oelofse, & Smit 2020 *Journal of Environmental Law* 49.

sources and technologies.[229] On the contrary, the CTA[230] has its weaknesses, for example, section 2 limits its application to domestically produced goods, while section 4 specifies how the amount of tax levied is to be determined. The CTA aims to reduce the emission of GHG by various economic actors by levying a tax proportional to their own emissions, thus incorporating the polluter pays principle.[231] Critics argue that the imposition of a tax does not hinder or reduce emissions, but rather increases the price of products, as manufacturers can simply pass this obligation on to their customers. As a result, the most vulnerable and marginalised will be further marginalised, affecting their constitutional rights such as the right to a clean environment and the right to food, as pollution will continue to increase while the poor will not be able to afford the increased food prices and general cost of living.[232]

A landmark development in South Africa's climate justice landscape is the passing of the Climate Change Act (hereinafter CCA) on 23 July 2024. A few days before the signing of the new law, the President of the Republic of South Africa, Mr Ramaphosa, gave a powerful speech on the worsening effects of climate change and the extent of the country's "extreme vulnerability" to climate change. He mentioned that South Africa aims to achieve "net zero" emissions" by 2050.[233] The CCA represents a progressive legislative effort by the Republic of South Africa to address climate change and promote sustainable development while ensuring climate justice.

The best-known provision of the CCA is Section 5, which introduces a framework for carbon budgets.[234] This means that each emitter of greenhouse gases is allocated a carbon budget that limits the amount of greenhouse gases it can legally emit for a given period of time. This framework sets limits on the total amount of greenhouse gases that can be emitted within a country over certain periods of time. If implemented effectively, it can make the 2050 'net zero' target achievable as the government now has a structured and accountable system for reducing emissions. This is a very

229 Section 13 of the Carbon Tax Act 15 of 2019.
230 Section 4 of the Carbon Tax Act 15 of 2019.
231 Section 4 of the Carbon Tax Act 15 of 2019.
232 Nemavhidi and Jegede *Environmental Law Journal* 21.
233 South African Government 2024 https://www.gov.za/news/speeches/president-cyril-ramaphosa-climate-resilience-symposium-2024-15-jul-2024
234 Section 5 of the CCA 22 of 2024.

important step forward from the previous policy, which lacked clear targets.[235] Compared to previous policies, which lacked specific objectives, this is a great improvement.

Although the creation of carbon budgets is an impressive step, the CCA is criticised for not having an enforcement clause for this obligation. The Act is silent on the consequences of failing to meet the established carbon budgets, which makes the provision weaker than it should be in terms of reducing greenhouse gas emissions.[236]

The CCA[237] formalised the establishment of the Presidential Climate Commission (hereinafter PCC),[238] which was created by the President in 2020. Its responsibilities include advising the government, coordinating the nation's response to climate change, monitoring developments and advising on available best practises for climate-related matters. Effective collaboration between the various government agencies is critical to a comprehensive climate action plan and centralising efforts by giving the Commission legal authority will enable this. This change gives the PCC the legitimacy and power it needs to fulfil its mission.

Section 15 also provides for the PCC to report to the government and for these reports to be made available to the public. This approach promotes accountability and transparency.[239]

According to Bacomb,[240] the CCA has been praised for its robust approach to adaptation[241] and mitigation strategies and its emphasis on cooperative governance.[242] This law stipulates that the public must be involved in all decision-making processes related to climate change in order to allow the most vulnerable and marginalised communities to have a say in all policy decisions on climate change. However, the CCA

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235 Evans 2024 https://www.dailymaverick.co.za/article/2024-07-23-climate-change-bill-into-is-now-law-6-things-that-are-set-to-change-legally/?form=MG0AV3.

236 Evans 2024 https://www.dailymaverick.co.za/article/2024-07-23-climate-change-bill-into-is-now-law-6-things-that-are-set-to-change-legally/?form=MG0AV3

237 Section 10 of the Climate Change Act 22 of 2024.

238 Section 15 of the Climate Change Act 22 of 2024.

239 Evans 2024 https://www.dailymaverick.co.za/article/2024-07-23-climate-change-bill-into-is-now-law-6-things-that-are-set-to-change-legally/?form=MG0AV3.

240 Bascomb 2024 https://news.mongabay.com/short-article/south-africa-adopts-a-new-climate-change-law/.

241 Section 19 Climate Change Act 22 of 2024.

242 Section 2(a) Climate Change Act 22 of 2024.

has been criticised for not providing strict penalties for non-compliance, which could seriously hamper its effectiveness in tackling climate change.[243] Section 35(1) of the CCA makes it an offence not to provide certain information or to provide false or inaccurate information. However, non-compliance with emissions targets has not been criminalised.[244] This is one of the weaknesses of this Act.[245]

To summarise, the CCA came at the right time for South Africa as the country struggled to adapt to climate change. The robust approach to climate change mitigation and adaptation is commendable. Various gaps in the previous laws governing environmental issues have been addressed by the Act, such as the requirement for a holistic approach to climate change mitigation at all levels of government and the imposition of various requirements on all stakeholders, such as the formulation of climate change mitigation strategies by emitting companies. However, some points need attention, such as the lenient penalties for non-compliance with the law and the lack of consequences for non-compliance with the allocated carbon budget.

3.4 Chapter summary

This chapter has highlighted several developments in international climate change legislation, from the UNFCCC to the Paris Agreement. There have been tireless efforts to ensure that the issue of climate change and climate justice has been adequately addressed. However, on the international front, it was realised that global cooperation was a major challenge. Efforts have been met with varying degrees of resistance from different actors, sparking debates on which path to take and which policies to apply to achieve climate justice.

In South Africa, several efforts have been made to harmonise national laws with international ones, starting with the inclusion of key environmental principles in the Bill of Rights[246] which then led to the passing of various climate-related laws such as the

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243 Bascomb 2024 https://news.mongabay.com/short-article/south-africa-adopts-a-new-climate-change-law/.

244 Section 35(1) of the Climate Change Act 22 of 2024.

245 Thorne 2024 https://businesstech.co.za/news/government/784466/what-south-africas-new-climate-change-laws-mean-for-businesses/.

246 Section 24 Constitution (1996).

Carbon Tax Act, the NEMA and the more recent CCA, as well as several other laws. The national laws have proven to be progressive, although some weaknesses have been identified.

CHAPTER 4 GLOBAL TRENDS IN CLIMATE LITIGATION

4.1 Introduction

While the preceding chapter highlighted global and local efforts in the pursuit of climate justice, these initiatives have increasingly led to a surge in climate litigation globally. Litigation is now being utilized as a mechanism to achieve climate justice by enforcing climate justice principles and regulations. This trend reflects the growing recognition of the legal system's role in holding governments and corporations accountable thereby advancing the quest for climate justice at both local and global scales.

This new trend in the global fight against climate change underscores the growing recognition of the potential of justice systems in addressing the worsening climate catastrophe. This chapter analyses various global climate cases to understand how climate litigation has evolved, and the strategies and approaches adopted by different jurisdictions around the world. As courts grapple with the complexities of climate law, their interpretation and application of existing policies and frameworks have significant implications for shaping climate policy and practise.

This chapter will focus on climate cases decided in both the global South and North, which demonstrate the diversity of socio-economic environmental contexts that characterise the terrain of global litigation. A careful analysis of these climate cases will provide insight into issues of standing in the different jurisdictions as well as the innovative strategies employed in bringing claims before the courts of the different jurisdictions. This analysis will shed light on the differences in approach around the world and highlight the various challenges and opportunities faced by claimants that may be relevant to the South African context.

The main objective of this chapter is to highlight the opportunities that climate processes present for South Africa and to identify the challenges that may hinder effective process governance. Understanding these dynamics is critical to formulating recommendations to improve South Africa's approach to climate change to ensure that the law and justice are fully utilised in combating this ongoing challenge.

4.2 An overview of climate litigation

Climate litigation is a powerful tool in the global fight against climate change. They give individuals, organisations and governments the opportunity to seek redress for the harm caused by different actors, not just to force authorities to implement laws and policies. This summary demonstrates how climate litigation can be used as an instrument for change and an excellent tool for enforcing responsibility and accountability in climate policy to promote a more sustainable future for present and future generations. This is achieved by critically analysing the approaches and trends of various global cases that highlight the importance of climate processes in shaping effective climate governance and promoting sustainable climate practises at the global level. According to Bauer *et al*, by legally challenging inadequate climate policies, climate litigation incentivizes stronger actions and raises public awareness about climate issues. Additionally, successful cases can set important legal precedents, while mobilizing affected communities in advocating for their rights.[247]The number of high-profile cases has increased globally in recent years and is spreading rapidly across jurisdictions. This global trend demonstrates the urgency of civil societies to address climate change through the legal system. This often leads to very important court decisions that have an impact on both national and global climate policy.[248] These legal battles are helping to raise public awareness of the feasibility of achieving climate targets through litigation and the urgency of climate action and holding responsible parties to account. According to Setzer and Higham, the number of climate-related cases brought to court worldwide has increased. Most of these were filed after 2015 and account for around two thirds of the total number of cases recorded.[249]

4.2.1 Defining climate litigation and its significance

As various scholars are still debating what should be labelled as 'climate litigation', particularly in relation to what should be considered, i.e. whether the case raises

[247] Bouwer *et al Climate Litigation and Justice in Africa* 56-60.
[248] Dube & Oelofse 2020 *Journal of Environmental Law* 36.
[249] Setzer & Higham 2023 *Grantham Research Institute on Climate Change and the Environment* 2.

climate change issues directly or the central issue is directly related to climate change, Peel & Osofsky conclude that:

> …climate change litigation may extend beyond cases that are centrally "about" climate change to ones where climate change is one of many issues in the litigation, or where addressing climate change is a clear motivation for, or consequence of, bringing a case but is not part of the legal arguments put to the court.[250]

From this perspective, it is widely recognised that climate change litigation is not strictly limited to cases in which climate change is the central issue but can also be extended to cases in which general environmental arguments are made with the intention of preventing climate damage, including cases in which climate issues are only a peripheral issue.

However, Setzer & Higham[251] take a different view and consider only a limited definition of climate cases and exclude cases where the law and science of climate change are not at the centre. Interestingly, they acknowledged that most cases from the Global South often indirectly involve climate issues, so this exclusion would lead to a bias against climate litigation in countries of the Global North.[252] In view of the above, this study uses the broader definition, which seems to be more relevant for South Africa, a country of the Global South, as the narrow definition would exclude almost all domestic cases from the scope of climate processes.[253]

Climate processes play a very important role in bridging the gap between policy creation and its implementation, especially when there is a lack of political will to enforce or implement existing laws or policies.[254] In many cases, governments tend to develop ambitious climate policies but lack the zeal to implement them effectively. A practical example can be deciphered from the case of *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others*,[255] in

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250 Peel & Osofsky 2020 *Annual Review of Law and Social Science* 23.
251 Setzer & Higham 2023 *Grantham Research Institute on Climate Change and the Environment* 8.
252 Setzer & Higham 2023 *Grantham Research Institute on Climate Change and the Environment* 8.
253 Setzer & Higham 2023 *Grantham Research Institute on Climate Change and the Environment* 8.
254 Aristova & Lim *Climate Litigation in Europe Unleashed: Catalysing Action Against States and Corporations* 10-15.
255 *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2022] ZAGPPHC 208, para 241.

which the Minister of the Environment, acting under the National Environmental Management: Air Quality Act (hereinafter NEMAQA)[256] to draft regulations unduly delayed this. The plaintiffs had to enforce the existing law by legal action. Consequently, the court found that the Minister had indeed neglected the duty imposed on him by the Act and ordered him to comply with the Act within twelve months of the date of the judgement.

In other words, climate litigation provides organisations, citizens and other stakeholders with mechanisms to hold government agencies or officials accountable and ensure that commitments made in policy documents are brought to life.[257] By suing for inaction or inadequate action, plaintiffs can force authorities to fulfil their legal obligations and thus promote a more robust framework for climate policy.[258] This can apply to countries such as South Africa, which can contribute to achieving climate justice for current and future generations in the long term.

In addition to domestic application to enforce national laws, climate litigation is an effective mechanism for enforcing both international and national climate change laws. By utilising legal frameworks, plaintiffs can challenge violations of climate agreements and national laws, thereby strengthening the rule of law in climate policy. For example, in the case *Urgenda Foundation v. State of the Netherlands*,[259] the plaintiffs in this case successfully challenged the government for acting unlawfully by failing to fulfil its international and national climate obligations, in particular under the European Convention on Human Rights (hereinafter ECHR)[260] and the UNFCCC.[261] This assertiveness is essential for promoting the responsible use of resources and ensuring sustainable economic development practises.

Climate processes have the potential to shape the landscape of climate justice and promote a more equitable and sustainable approach to resource management that

256 Section 20 National Environmental Management: Air Quality Act 39 of 2004.
257 Savaresi & de Vilchez 2021 *Yearbook of International Environmental Law* 3-19.
258 Setzer & Vanhala 2019 *Environmental Research Letters* 1.
259 *The state of the Netherlands v Urgenda Foundation* ECLI: HR: 2019 (Sup. Ct. Neth.).
260 A 8 European Convention on Human Rights (1950).
261 *The state of the Netherlands v Urgenda Foundation* ECLI: HR: 2019 (Sup. Ct. Neth.) para 8.

benefits both present and future generations.[262] In climate litigation, international agreements, existing environmental laws and constitutional rights are often used to justify alleged inadequacies in climate change mitigation.[263] Such cases are becoming increasingly common, indicating that the way climate issues are dealt with in legal contexts is shifting from purely political and scientific discussions to judicial disputes aimed at enforcing solutions.

In addition, climate litigation is an important tool to ensure compliance and accountability of various actors, including public and private entities. When companies or governments are sued for failing to meet their climate commitments, it is a clear sign of the importance of environmental compliance. This legal review encourages compliance and promotes a culture of accountability in which stakeholders are more aware of their responsibility for climate protection.[264] Therefore, climate processes can drive meaningful change by motivating actors to harmonise their practises with existing climate laws and policies.[265]

4.2.2 Historical context and evolution

The historical development of global climate litigation shows how the legal system is increasingly recognised as a tool to combat climate change and how different actors are held accountable. This development can be traced through a series of main phases, each characterised by notable changes in the legal environment.[266]

As the international climate regime, civil society and individuals sought legal means to protest government inaction on climate issues, climate litigation began to take shape in the early 2000s. According to Setzer & Vanhala, the first notable cases were mostly about upholding existing environmental regulations and principles.[267] These early

262 Aristova & Lim *Climate Litigation in Europe Unleashed: Catalysing Action Against States and Corporations* 12.
263 González 2021 *Climate Policy Journal* 45.
264 Aristova & Lim *Climate Litigation in Europe Unleashed: Catalysing Action Against States and Corporations* 8.
265 Dutta 2022 *Environmental Law Review* 221.
266 Setzer & Higham 2023 *Environmental Law Review* 6.
267 Setzer & Vanhala 2019 *Environmental Research Letters* 03.

attempts laid the groundwork for later legal challenges by highlighting the inadequacies of national policies in dealing with rising greenhouse gas emissions.

Climate litigation reached a decisive turning point in 2007 with the historic judgement in *Massachusetts v. Environmental Protection Agency*[268]. The U.S. Supreme Court declared that the Environmental Protection Agency (hereinafter EPA) has the mandate to regulate greenhouse gases under the Clean Air Act,[269] created a legal precedent that authorises states and individuals to challenge their respective governments for inaction on climate change.[270] This case highlights the role of the courts in climate policy, which has triggered similar legal initiatives around the world.

In this case, the collaborative litigation strategy used by the litigants had some positive outcomes. The joint efforts of the litigants being comprised of both individuals and the state played a pivotal role in circumventing the legal complexities of environmental law. This approach did not only enhance their chances of success but also highlighted important legal principles regarding legal standing. The case sailed through even though the individual litigants had failed on the legal standing hurdle.[271] This approach meant that the applicants could easily form a united front against the EPO. This allowed them to share costs, which gave them a head start in terms of legal research, financial resources and the cost of legal expertise. In this way, they gave the audience a broader view of the extent to which people's interests are affected by greenhouse gases, which also strengthened their case in the eyes of the court.[272]

According to Kurz, the Massachusetts decision in this case shaped case law and created a new doctrine known as special solitude', which grants states more favourable standing than individuals, even though it was difficult for individuals to establish standing. The court thus recognised that states have more interests to protect than individual citizens.[273]

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268 *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).
269 Clean Air Act, 42 U.S.C. 7401 et seq. (1970).
270 González 2021 *Climate Policy Journal* 47.
271 Kurz 2008 *Nebraska Law Review* 565.
272 Cassey 2008 *International Business and Law Review* 5.
273 Kurz 2008 *Nebraska Law Review* 565.

Despite the strategic advantages that resulted from the co-operation, the plaintiffs faced major challenges. The dissenting judges were highly sceptical about Massachusetts' standing to sue, particularly on the question of whether the harms alleged were due to EPA's inaction. Another judge held that Massachusetts had to prove certain claims just like the other petitioners.[274] This clearly reflects the ongoing debate about standing in climate litigation.

The challenge of scientific uncertainty, which the EPO cited as justification for its inaction, was another notable hurdle in the plaintiffs' path. However, the court ruled that the EPA's argument that its inaction was based on scientific uncertainty must be clearly based on evidence and not speculation. This approach by the court has helped to reinforce the need for transparency in the decision-making processes of government agencies.[275]

Since 2015, that is, after the Paris Agreement, cases targeting businesses and governments alike became more common as climate change litigation gained international momentum. A good example is the 2019 case *of Milieudefensie et al v. Royal Dutch Shell plc.*[276] In this case, the plaintiffs sought an order of the court to compel Shell company to reduce its GHG emissions by 45% by the year 2030 relative to 2019 levels which the court granted in 2021.[277] The court's ruling depicts the broader trends in climate litigation regarding establishing legal standing, especially in the Global North where the courts are biased towards collective claims. The same principles applied in the present case were also applied in the previously decided case of *Urgenda Foundation v. The Netherlands*.[278] The court here also recognised that it is the responsibility of governments and businesses to tackle the burdens of climate change under human rights law.[279] These set precedents will likely make establishing legal

274 Kurz 2008 *Nebraska Law Review* 567.
275 Cassedy 2008 *Journal of International Business and Law* 7.
276 *Milieudefensie et al v. Royal Dutch Shell plc District Court of The Hague*, ECLI:NL:RBDHA:2021:5337, 26 May 2021.
277 *Milieudefensie et al v. Royal Dutch Shell plc District Court of The Hague*, ECLI:NL:RBDHA:2021:5337, 26 May 2021 para 2-5.
278 Warnock & Preston 2023 *Journal of Environmental Law* 52.
279 Menéndez 2024 https://www.uria.com/en/publicaciones/8984-landmark-climate-change-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc.

standing as an individual very difficult when it comes to climate litigation, it is actually a barrier to individual claims in future.

The period after the adoption of the Paris Agreement in 2015, was marked by a notable global surge in the number of climate change cases fashioned against both businesses and governments alike.[280] This visible increase in climate action in the legal terrain indicates the growing realisation that power of environmental laws and policies lies in the judiciary, especially where governments are either unwilling to implement or enact climate change laws.

One of the most important of these cases is the *Urgenda v. State of the Netherlands,*[281] since some scholars say it is the first case to order a government to reduce GHG emissions.[282] In this case, according to Mayor, the Dutch court ordered the government to reduce GHG emissions by 25% by 2020 comparable to 1990 levels.[283] This ruling highlighted the extent of the judiciary's power to compel action on climate responsibilities and set a significant precedent for future like cases. In addition to this, this case highlights the need for governments to honour their commitments under the Paris Agreement, especially with respect to NDCs.

An increasing number of climate cases and a change in judicial tactics point to a shift in direction towards a more proactive involvement of the judiciary in climate policy. As courts increasingly interpret legislation in a way that favours climate action, it is foreseeable that this ongoing trend will have a significant impact on national and international climate policy.[284]

4.3 Key global cases in climate litigation

Climate change litigation is taking place around the world in both national and international legal systems. In 2014, the International Bar Association stated that:

280 Preston 2021 *Journal of Environmental Law* 1-2.
281 *The state of the Netherlands v Urgenda Foundation* ECLI: HR: 2019 (Sup. Ct. Neth.).
282 Mayor 2023 Journal *of Environmental Law* 168.
283 Mayor 2023 Journal *of Environmental Law* 167-168.
284 Leal-Arcas et al. 2021 *Environmental Law and Policy Review* 150.

> where political action has not been forthcoming, a number of groups have sought to effectuate climate change adaptation and mitigation through litigation.[285]

In recent years, climate change law and litigation has changed significantly, with governments, with few exceptions, almost always being the defendants in climate change litigation. Government defendants have been asked to defend both large and small judgements. Global climate demonstrations have drawn attention to the inadequacies of government action and prompted lawyers to consider how they can use the legal system to advocate for change.[286]

4.3.1 Notable cases from the Global North

4.3.1 The terrain of climate processes in the Global North has changed considerably over the years, with most global climate-related cases originating from this region.[287] 4.3.1 The outcomes of historical cases, such as *Urgenda v. State of the Netherlands*, have set precedents that inspire subsequent litigation in various jurisdictions. These cases often force governments to make significant efforts to tackle climate change and bring their national policies in line with international commitments as set out in the Paris Agreement. The case of *R (brought by Friends of the Earth Limited) v Secretary of State for International Trade and others*[288] in the UK illustrates this trend, as the court had to assess the consistency of the government's funding decisions with international climate commitments.

In the case of *Juliana v. United States*,[289] a number of young plaintiffs who claimed that the federal government's inaction on climate change violated their constitutional rights to life, liberty and property. The plaintiffs based their case on the public trust doctrine and the government's obligation to protect the environment for future generations.

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285 Alogna Bakker & Gauci 2021 *Climate change litigation: global perspectives* 5.
286 Averchenkova Fankhauser & Finnegan 2021 *Climate Policy* 263.
287 Peel & Lin *Environmental Law Review* 10-12.
288 *R (on the application of Friends of the Earth Limited) v Secretary of State for International Trade/UK Export Finance (UKEF)*, [2023] EWCA Civ 14 (13 January 2023).
289 *Juliana v. United States* 217 F. Supp. 3d 1224 (D. Or. 2016), 947 F.3d 1159 (9th Cir. 2020).

The district court made a landmark ruling, finding that the plaintiffs had asserted valid constitutional claims.[290] However, on appeal to the Ninth Circuit Court of Appeals in 2020, the district court's decision was dismissed due to the plaintiffs' lack of standing.[291]

The court in this case made an interesting argument that the relief sought fails because of the requirement of relief.[292]

The court held that the plaintiff's claim could not be addressed by the Article III courts because it would require a judicial evaluation of the government's climate response. This would subsequently mean that the court would have to review compliance with the government's orders, which would require extensive policy decisions and monitoring of government actions, a task that is not within the court's jurisdiction.[293] This case highlights the challenges that individuals face in establishing standing in climate litigation. The judgement has implications for future climate litigation calling on governments to act on climate change.[294] On 12 September 2024, an appeal was recently filed with the Supreme Court against the Ninth Circuit Court's decision.

In yet another recent landmark case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,*[295] the plaintiffs sued the government for failing to take adequate measures to mitigate the effects of climate change, as quoted below:

> 25. The applicants further explained that they considered the current domestic emissions reduction targets insufficient, unconstitutional, and incompatible with the Convention and international law. They also considered the mitigation measures taken by the authorities to be insufficient. In their view, the authorities had no justification for their inaction in the field of climate change.[296]

The Federal Appeal Court (hereinafter, FAC),[297] which was the court of first instance, held that the individuals had no legal standing to bring the case, which was also upheld

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290 *Juliana v. United States* 217 F. Supp. 3d 1224 (D. Or. 2016) para 238.

291 *Juliana v. United States* 947 F.3d 1159 (9th Cir. 2020) para 5.

292 Lifson, Bustos & Brunstein 2020 *Redressability of Climate Change Injuries after Juliana. Legal Planet.* https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/.

293 https://harvardlawreview.org/print/vol-134/juliana-v-united-states/.

294 Lifson, Bustos & Brunstein 2020 *Redressability of Climate Change Injuries after Juliana. Legal Planet.* https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/.

295 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20.

296 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20 para 25.

297 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20 para 42.

by the Federal Supreme Court (hereinafter, FSC).[298] After appealing to the European Court of Human Rights (hereinafter ECHR), the appellants were successful, as the ECHR found that they had standing to bring an action and that Switzerland had violated the European Convention on Human Rights, in particular Article 8, by failing to take sufficient measures to combat climate change. This case highlights another important aspect of global climate litigation, in which governments can be accused of violating international agreements.[299]

In this case, the primary approach was the plea for human rights, in particular Articles 2 and 8 of the ECHR, which provide the rights to life and respect for private and family life.[300] The plaintiffs' argument was essentially based on the inadequacy of climate policy, which threatens their health and well-being, particularly in the case of older people who are more vulnerable to climate impacts such as heatwaves.[301] To support this legal strategy, the plaintiffs presented concrete scientific evidence in favour of their claims. Through this combination of legal strategies, they were able to link the increased temperatures to the high mortality rates in the elderly population and thus substantiate their argument that the policy was inappropriate.[302] Apart from the fact that this approach views climate change as a human rights issue, it also emphasises the state's obligation to protect its citizens from environmental damage.

The case of *Massachusetts v. Environmental Protection Agency*[803] was an important development in the landscape of climate litigation in the United States. It brought together the concerns of the states and the federal government in the fight against climate change. In this case, Massachusetts joined other states in suing the Environmental Protection Agency (hereinafter EPA) for failing to regulate greenhouse gas emissions as required by the Clean Air Act.[304]

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298 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20 para 52.
299 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20 para 657.
300 A 2 of the European Convention on Human Rights
301 Žatková & Pal'uchová 2024 *Bratislava Law Review* 229.
302 Žatková & Pal'uchová 2024 *Bratislava Law Review* 230.
303 *Massachusetts v. Environmental Protection Agency* 549 U.S. 497 (2007).
304 Clean Air Act 42 U.S.C. §§ 7401–7671 (1970).

The Supreme Court's decision was remarkable. It recognised the states' right to sue the federal government, which can be seen as an important affirmation of their role in protecting the environment.[305] In its interpretation of the Clean Air Act, the court affirmed that the EPA has the right to regulate greenhouse gas emissions and emphasised the federal government's obligation to effectively curb climate change. In its decision, the court recognised the dangers that climate change poses to public health and welfare.[306] Compared to the individual claims in *Juliana v. United States*, a different approach to standing was taken here. The present case emphasised the collective responsibility of the states and the federal government in the fight against climate change.[307]

It is clear from the above cases from the Global North that courts have dealt with the issue of standing in different ways and that judges of the same court come to different views in most cases. A good example is the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*. There was a dissenting minority judgement on the standing of the complainants/applicants by Judge Eicke.[308] This underlines the complexity of determining the standing of parties in climate change cases and highlights the challenges faced by individuals compared to organisations.

The main approach taken by the plaintiffs in the cases discussed is the invocation of human rights. This strategy provides plaintiffs with a basis to assert a direct interest in bringing the action, which is one of the most important prerequisites for a successful climate action.[309] Moreover, it has been held that the production of concrete evidence is essential to claims in climate litigation, as illustrated by the *Massachusetts v. EPA* case cited above, in which the EPA's argument of scientific uncertainty failed. The court ruled that the EPA should back up its argument with solid scientific evidence.[310] The

305 Harrison 2008 *Havard Environmental Law Review* 45.
306 Bennet 2008 *Environmental Law: A Conceptual Approach* 67.
307 Glicksman 2008 *Environmental Law* 102.
308 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [2024] ECHR 53600/20 para 233.
309 Bennet 2011 *Harvard Environmental Law Review* 70-76.
310 Cohen & Heller 2020 *Environmental Law Reporter* 10165.

combination of these strategies is crucial for success in climate processes and can be applied to the South African context.[311]

4.3.2 Climate change litigation and the Global South

Climate processes among the countries of the Global South have developed into an important instrument for coping with the escalating climate catastrophe. They have become much more important in recent years, especially after the historic *Urgenda* case in the Netherlands. This case set a precedent for holding governments accountable for their greenhouse gas emissions and inspired similar lawsuits around the world. Despite the increasing momentum in climate litigation, there is a significant disparity in the number of climate lawsuits between the Global North and the Global South.[312]

This chapter examines the changing aspects of climate processes, particularly in the Global South, which are comparable to the South African context. By analysing these cases, this section will shed light on the role of litigation as a tool for environmental protection and the importance of an integrative approach to climate governance, particularly for South Africa.

One of the earliest global south climate-related cases is the case of *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*.[313] In this case, Mr Felix Gbemre, a community leader, filed a lawsuit on behalf of the Iwherekan community in the Niger Delta against Shell Petroleum Development Company and the Nigerian government. He claimed that Shell's gas flaring violated their right to life, to a healthy environment and to dignity, as enshrined in the Nigerian constitution and international human rights principles. The plaintiffs demanded compensation for the environmental damage caused. They also demanded an order to stop the flaring of gas.[314]

311 Bennet 2011 *Harvard Environmental Law Review* 70-82.
312 Setzer & Higham 2023 *Grantham Research Institute on Climate Change and the Environment* 2.
313 *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*. [2005] NGFHC 144.
314 *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*. [2005] NGFHC 144. Para 1.

The Federal High Court of Nigeria recognised Gbemre's standing to sue on behalf of the community without dwelling much on the issue.[315] The court recognised the community's legitimate interest in protecting their environment and found that gas flaring posed a direct threat to their livelihood and health. The court ruled in favour of Gbemre and the community of Iwherekan.[316] It was held that gas flaring is unconstitutional and violates the Iwherekan community's rights to life, a healthy environment and dignity. The court also ordered the Nigerian government to implement environmental laws and regulations to protect the rights of the community.[317]

The significance of this case lies in the realisation of the importance of protecting people's rights, especially their right to dignity and a healthy environment. According to May and Dayo,[318] that this was the first case in the world in which a damaged environment was found to violate the right to dignity. They also pointed out that despite this landmark judgement, gas flaring continues in Niger, which poses another challenge for most developing countries, namely the recognition, enforcement and implementation of decisions.[319]

In determining Gbemre's standing, the court considered issues of causation and liability. Both the lower and higher courts ruled that he had standing to sue in his capacity and on behalf of the community because he had a legitimate cause of action.

In a landmark climate change case of *Leghari v. Federation of Pakistan*,[320] in Pakistan, a farmer filed a lawsuit against the government for failing to implement the country's 2012 national climate policy.[321] After the court ruled in favour of the petitioner, a Climate Change Commission was set up to monitor the proper implementation of the policy. [322] Nevertheless, Pakistan passed a new law on climate change before the trial

315 *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*. [2005] NGFHC 144.Para 1
316 *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd.* [2005] NGFHC 144. Para 6.
317 *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd.* [2005] NGFHC 144 para 6.
318 May & Dayo 2019 *Widener Law Review* 271.
319 May & Dayo 2019 *Widener Law Review* 272.
320 *Leghari v. Federation of Pakistan,* W.P. No. 25501/2015 (Lahore High Court, September 4, 2015).
321 National Climate Change Policy of Pakistan (2012).
322 Barritt & Sediti 2019 *King's Law Journal* 210.

was finalised, which shows that climate processes have an impact on climate justice.[323] The court recognised that individuals have standing to sue when their fundamental rights are threatened, particularly in matters that impact the environment and public health. Pakistan's approach to public interest litigation makes establishing standing easier compared to northern countries.

Another notable case from the Global South is the Colombian case of *Future Generations v Minister of Environment & Others.*[324] This case was brought by a group of young people on behalf of future generations. They argued that the government had violated their constitutional rights to a healthy environment, health and life.[325] The court was persuaded by the plaintiffs' argument that deforestation has an impact on climate change, resulting in serious damage to the environment and human health. The court ruled against the federal government and emphasised the concept of intergenerational justice. The duty of today's generations to preserve the environment for future generations was also emphasised.[326] The court granted the appellants standing without much argument and dismissed the lower court's decision with the following words:

> In the first ruling, the District Court argued that the tutela was not an adequate mechanism to file this particular action because of the collective nature of the problem. However, a tutela can be filed as long as it i) shows the connection between the violation of collective and fundamental or individual rights, ii) the person filing the tutela is he person directly affected, iii) the violation of a fundamental right is not hypothetical but fully proved, and iv) the judicial order must be oriented towards restoring individual rights, and not collective ones.[327]

The above quote shows that courts in Colombia take a less relaxed stance on the issue of *locus standi* than courts in the United States. The common trend in almost all of the cases discussed above is the invocation of human rights to enforce environmental rights and force governments to take action on climate change. In this case, the

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323 Pakistan Climate Change Act (2017).
324 *Future Generations v. Minister of Environment & Others* STC4360-2018.
325 *Future Generations v. Minister of Environment & Others* STC4360-2018 para 1-5.
326 *Future Generations v. Minister of Environment & Others* STC4360-2018 para 14.
327 *Future Generations v. Minister of Environment & Others* STC4360-2018, p 13.

appeals court ruled in favour of Future Generations and the government was ordered to take action to stop deforestation in the Amazon.[328]

4.4 Chapter summary

Even though the worst impacts of climate change are borne by the countries of the Global South, global trends in climate litigation show that most climate change lawsuits are centred on the countries of the Global North.[329] These lawsuits are often aimed at holding companies accountable for their greenhouse gas emissions and forcing governments to act against climate change in accordance with national and international laws, as seen in the cases mentioned above. On the other hand, the Global South is slowly following suit. The number of climate lawsuits is increasing, some with a unique approach to climate justice in the sense that most of these lawsuits aim to force governments to enforce existing laws, as opposed to the cases of the Global North, where the lawsuits essentially aim to require governments to step up their efforts by adopting progressive policies.[330] In Nigeria, long before the landmark *Urgenda v Netherlands* case, attempts were made to hold multinational companies in the mining sector accountable for their past and present greenhouse gas emissions, and this can be a lesson for the future. In South Africa, the most common defendants in climate cases are government agencies. All of these developments indicate that the impacts of climate change, particularly on vulnerable populations, are increasingly being recognised and that there is the potential for legal remedies to address climate-related challenges.

This chapter has shown that the legal frameworks of most countries in the Global South, including South Africa, contain permissible provisions for establishing standing in climate cases, while in the Global North, establishing standing is a difficult task, especially for individual plaintiffs. However, there is a consistent global trend in climate litigation strategies. In almost all cases, plaintiffs use the human rights approach to assert their claims in court. In addition, this chapter has also addressed the strategy

328 *Future Generations v. Minister of Environment & Others* STC4360-2018, p 45.
329 Tigre & Wewerinke-Singh *RECIEL* 10.
330 See the case of *Earthlife Johannesburg* compared to the *Urgenda* case as an example.

of co-operation in climate litigation. However, the chapter shows that it is difficult for the most vulnerable to bring climate litigation to court due to a lack of resources.

To summarise, this chapter has highlighted the different litigation strategies and challenges faced by litigants in climate change litigation. It has emphasised the importance of scientific evidence in climate change litigation and the different approaches taken by courts in interpreting climate change or environmental law in general.

CHAPTER 5 CLIMATE JUSTICE AND LITIGATION IN SOUTH AFRICA

5.1 Introduction

The concept of climate justice has emerged as the central ideology linking climate change and social justice.[331] This came at a crucial time when the global community is trying to make efforts to tackle the worsening problem of climate change, which is now a living reality that is expected to continue in the future if not given enough attention, as is currently the case.[332] Despite its wealth of natural resources, South Africa is one of the developing countries with serious social inequalities, the main cause of which dates back to the apartheid era,[333] need to pursue climate justice as its priority.

In such a scenario, climate litigation has proven to be a formidable tool in South Africa's fight for climate justice. The country's progressive constitution and ambitious legal framework[334] guarantee the right to a healthy environment,[335] the creation of a legal basis for organisations and individuals to challenge inadequate government action on climate change. Against this backdrop, this chapter, which has looked at global trends in climate change litigation, will take a closer look at South Africa's approach in this area. A critical analysis of selected climate cases relevant to the South African climate change terrain will be undertaken. This is done with the aim of identifying the potential challenges and opportunities in the area of climate processes in South Africa.

5.2 Key climate litigation cases in South Africa

Since the judgement in the *Urgenda v the Netherlands* in the period after the Paris Agreement, South Africa has experienced several climate lawsuits to date. The first cases from that period include landmark cases such as the *Earthlife Africa*

331 Dunlup and Brulle *Climate Change and Society: Sociological Perspectives* 7.
332 Guteres as cited in *Mail & Guardian* 2023 https://mg.co.za/environment/2023-05-03-cop28-climate-summit-expectations-high-trust-is-low/.
333 Makgetla 2020 *Trade and Industry Policy Strategies* 30.
334 Section 24 of National Environmental Management Act 107 of 1998.
335 Section 24 Constitution (1996).

Johannesburg v Minister of Environmental Affairs,[336] *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs,*[337] among several other cases.

The highly publicised South African climate cases concerned the implementation of environmental regulations. In *Earthlife Africa Johannesburg v Minister of Environmental Affairs,*[338] the plaintiffs challenged the Minister of the Environment's decision to authorise a 1200 MW coal-fired power plant in the interests of environmental protection. They argued that the Minister had failed to consider the climatic impact of the proposed project as there had been no proper environmental impact assessment.[339] Apart from the challenge on the authorisations, Earthlife raised important issues relating to climate change effects as follows:

> 25 …Coal is an emissions-intensive energy carrier and coal-fired power stations emit significant volumes of GHGs, which cause climate change. Coalfired power stations are the single largest national source of GHG emissions in South Africa. South Africa is therefore particularly vulnerable to the effects of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events will be consequential for society as a whole. South Africa is moreover a water-stressed country facing future drying trends and weather variability with cycles of droughts and sudden excessive rains. Coal-fired power stations thus not only contribute to climate change but are also at risk from the consequences of climate change…[340]

In this case, the court carefully considered the importance of a climate impact assessment for projects like Thabametsi before they can be authorised. The court ruled in favour of the plaintiffs and referred the matter back to the Minister to reconsider his decision. In its decision, the court emphasised the need for proactive measures to combat climate change and recognised the interdependence between environmental and human rights including the effects of climate change such as the changing weather patterns. It remarked thus:

> 91 In conclusion, therefore, the legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorization process, and that consideration of such will best be accomplished by

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336 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 ALL SA 519 (GP).

337 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 725 (19 March 2022).

338 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* 2017 2 ALL SA 519 (GP).

339 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 2017 2 ALL SA 519 (GP) para 2.

340 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 2017 2 ALL SA 519 (GP) para 25.

> means of a professionally researched climate change impact report. For all these reasons, I find that 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 granting environmental authorisation.[341]

This approach to climate related cases by the court shows the willingness of the judiciary in tackling climate change and ensure climate justice. The court effectively introduced the requirement of climate impact assessment which was not provided in NEMA which only provided for EIA.

The outcome of this case gave most South Africans hope for a greener future, as it served as proof that the government could be successfully challenged in court. However, the court's decision had no direct impact on the implementation of the policy, as had been expected by the plaintiffs. Despite the landmark judgement in the case, the Minister of Environment continued to grant approval for the Thabametsi project, even though a Climate Impact Report (CIR) indicated that the potential greenhouse gas emissions of the project are significant, apart from the enormous social costs it would cause.[342] It is interesting to note that one of the reasons stated in the Minister's appeal decision, justifying granting the authorization was a desire to meet energy demand[343] and reliance on the Integrated Resource Plan for Electricity 2010-2030 (hereafter, IRP) which allows for the establishment of electricity generation from coal up to 6.3GW.[344] In reality, the expert scientific research conducted by the University of Cape Town revealed that Thabametsi and Khanyisa were unnecessary to ensure energy security.[345] This is the same trend observed in *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs*.

It is noteworthy that both Earthlife and Groundwork Trust have used the court proceedings and the outcome to buy time and employ various other strategies to ensure that the project does not materialise. According to Chamberlain and Fourie, these organisations put so much pressure on the financiers of the project that they

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341 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*, 2017 2 ALL SA 519 (GP) para 91.
342 https://cer.org.za/news/thabametsi-coal-plant-given-go-ahead-despite-staggering-climate-impacts.
343 Para 4.7 Appeal Decision LSA 142346 (2018).
344 Para 4.9 Appeal Decision LSA 142346 (2018).
345 Chamberlain & Fourie 2024 *Journal of Human Rights Practice* 252.

pulled out.[346] On the other hand, Chamberlain and Fourie pointed out that after various strategies and further threats to appeal the decision to grant the permits, the government, Groundwork and Earthlife settled the case out of court and agreed to the cancellation of the permit. The power plant project was finally cancelled in 2020.[347]

The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs,[348] the plaintiffs sued the Minister of Environmental Affairs for non-compliance with the National Environmental Management Air Quality Act (hereinafter NEMAQA),[349] which mandates her to introduce regulations to combat air pollution in the Highveld Priority Area.[350] It was undisputed in these proceedings that air pollution in the area exceeded national standards. Therefore, the court held that this was *prima facie* a violation of the right to a safe environment in Section 24(a) of the Constitution. The court had to decide whether Section 20 of NEMAQA gives the Minister a mandate to issue regulations or whether it is discretionary, as the Act uses the word "may", which the plaintiffs argued should be read as "must". The court also had to determine whether the right in section 24(a) of the Constitution is immediately enforceable or a progressive right.

The case raises important climate issues in an indirect manner by challenging and demanding the reduction in pollution levels, which is the highest source of GHGs, this would mean that a successful challenge would achieve the reduction of GHG emissions which have broader implications on climate change mitigation. Reliance was also placed on section 24 of the Constitution, the right to a healthy environment. The issues were raised under the NEMAQA challenging the Minister's failure to enact regulations to control air pollution which they alleged was causing health hazards:

> [23] As such in brief it is the applicants' case that:

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346 Chamberlain & Fourie 2024 *Journal of Human Rights* 251-255.

347 Chamberlain & Fourie 2024 *Journal of Human Rights* 251.

348 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 725 (19 March 2022).

349 Section 20 National Environmental Management Air Quality Act 39 of 2004.

350 The Highveld Priority area was declared in 2007, and the Highveld plan was supposed to be reviewed every five years which was not done for more than nine years. due to the voluntary nature of the plan, only 8% of the highest polluters submitted emissions reduction plans by 2011. See *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 725 (19 March 2022) para 19.

> 23.1 First, the unsafe levels of ambient air pollution in the Highveld Priority area are an ongoing breach of residents' section 24(a) constitutional right to an environment that is not harmful to health or well-being.[351]

The court acknowledged the impact on the environment caused by the Minister's failure to promulgate Regulations and found that it amounts to a breach of section 24(a) of the Constitution. It even a mile further and found that this right is "unqualified":

> In the present matter, this wording of section 24(a) is similar to the wording employed in section 29(1)(a). It is for this reason that I am inclined to agree with the reasoning of the Constitutional Court in the *Juma Masjid*-decision that concluded that the right in section 24(a) is immediately realisable.[352]

The court's finding that the right to a safe environment is immediately realisable is strange. In reality, it is not practically possible to provide a safe environment immediately. It takes time to achieve such right. What it could mean is that as soon after the court order, the government must restore the pollution levels back to the national standards which is not possible.

The outcome of this type of litigation contribute to the climate change mitigation efforts and have the broader implication of ensuring climate justice. The court in this case highlighted the importance of protecting the environment for the benefit of all generations, current and upcoming.

According to Bega,[353] the Minister did not finalise the regulations, but appealed the High Court's decision in 2023. The appeal was heard in 2024, and the judgement was deferred. It can be concluded that despite progressive legislation, the government's efforts to tackle climate change are being hampered by a lack of political will to implement existing laws and policies. This is a serious threat to the realisation of climate justice in South Africa as the law in force will not take the desired effect due

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351 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 725 para 23.

352 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 725 para 163.

353 Bega 2024 *Mail & Guadian* https://mg.co.za/news/2024-08-27-landmark-deadly-air-case-heads-to-supreme-court-of-appeal/.

to lack of implementation. Meanwhile, the country is struggling to fulfil its commitments to reduce global emissions.[354]

This trend explains Satgar's assertion that South Africa has not yet achieved its emissions targets.[355] Although South Africa has a solid framework for environmental protection, it still faces a challenge in implementing its laws and policies, as these two cases show. Mere legislation followed by a sound court judgement but without implementation is useless in the face of the worsening effects of climate change. This explains why climate litigation in the Global South is mostly about forcing governments to enforce existing laws.[356] The sad thing is that the potential greenhouse gas emissions from projects like the Thabametsi, if approved, will further impact the health and well-being of the most vulnerable populations, exacerbating already existing inequalities and making climate justice an elusive concept.

The same trend can be found in a more recent case of *Sustaining the Wild Coast NPC & Others v. Minister of Mineral Resources & Energy and Others*.[357] In this case, several individuals and non-profit organisations jointly applied to the court to obtain an injunction against the Minister of Mineral Resources and Shell from conducting a seismic survey under Exploration Law No. 12/3/252. In their submissions to the court, they questioned the adequacy and integrity of the public consultation process conducted in granting the licence and also alleged that their constitutional rights had been violated. They requested an injunction to stop the seismic survey until the matter is fully resolved.

The case *of Earthlife Johannesburg v. Minister of Environmental Affairs* heard way back in 2017 ought to have sent a strong message to the various government agencies, the importance of carrying out adequate environmental impact assessments and climate change impact assessments before authorisations are granted, especially for those who are entrusted with tasks related to climate change.

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354 Satgar 2015 *Global Labour Journal* 268.
355 Satgar 2015 *Global Labour Journal* 268.
356 Setzer & Benjamin 2020 *Transnational Environmental Law* 80.
357 *Sustaining the Wild Coast NPC & Others v. Minister of Mineral Resources & Energy and Others* [2022] 1 ALL SA 796 para 2.

However, a persistent challenge still highlights shortcomings in the behaviour of various government agencies expected to be at the forefront of ensuring compliance with government policies to mitigate climate change. More than four years after the landmark judgement, the courts are still being asked to rule on similar issues. The repetition of such cases demonstrates the importance of effective administration and transparency in the enforcement of environmental laws.

In this case, the applicants used a different approach from the other cases in seeking to protect their environment against the threats brought by seismic surveys by Shell company. According to du Toit, Soyapi and Kotzé, the Shell case is the first case in South Africa to invoke Indigenous rights and knowledge as its basis for their climate claims since the courts has shown a willingness to listen to the Indigenous peoples' concerns in climate litigation. They further remarked that this approach has the potential to advance climate litigation in the future.[358]

> …It is considered very important by members of the Amadiba traditional community not to disturb these ancestors through pollution or other disturbances. That belief should not be difficult to comprehend by those who do not share the customs of the Amadiba traditional community if regard is had to the fact that graves on land are not easily disturbed or moved…[359]

Apart from the court's inclination towards Indigenous People's rights, the court also consider expert evidence seriously in climate litigation case. In this present case, the applicants' success can also be attributed to their ability to adduce convincing scientific expert evidence as highlighted in the paragraph below:

> [64] As pointed out above, Shell has, despite the massive body of expert evidence on the threat of harm to marine life, not adduced any expert evidence to neutralise the applicants' evidence in that regard. The opinions expressed by the above experts are based on objective facts contained in their reports or affidavits. There is no reason not to accept their evidence. That evidence establishes that, without intervention by the court, there is a real threat that the marine life would be irreparably harmed by the seismic survey. Against the acceptance of the body of expert evidence, Shell's denial that its activities will have an adverse impact on marine life cannot be sustained.[360]

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358 du Toit, Soyapi and Kotzé 2024 RECIEL 329-334.

359 *Sustaining the Wild Coast NPC & Others v. Minister of Mineral Resources & Energy and Others* [2022] 1 ALL SA 796 para 14.

360 *Sustaining the Wild Coast NPC & Others v. Minister of Mineral Resources & Energy and Others* [2022] 1 ALL SA 796 para 64.

Like the case of *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs*, the Minister and other respondents filed an appeal in 2023 under the case of *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others*.[361] The defendants lost the case with costs. Considering these cases together, one can reasonably conclude that the decision to defend decisions that are inconsistent with the law, particularly Section 24 of the Constitution and Section 24 of NEMA, is either due to a lack of understanding of climate change laws and the urgency of the problem, or a lack of political will on the part of government authorities to take the necessary action on climate change, which then exacerbates the marginalisation and suffering of vulnerable communities.[362]

Most importantly, the courts in the above cases have demonstrated a consistent approach to the interpretation and implementation of climate change laws and policies, which is a significant advantage. This consistency has the potential to have a positive long-term impact by promoting a robust legal framework for dealing with climate change and ensuring the accountability and transparency of government agencies and other actors.[363]

In the recent case of *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries and the Environment & Others*,[364] the plaintiffs challenged the decisions of the regional manager and the minister to grant the other defendants' permission to operate an opencast coal mining project near Landgoed's commercial farm in Mpumalanga. They argued that the decisions were unlawful and irrational as they failed to adequately assess the environmental impact of the proposed project. The applicant argued that an agronomic assessment was necessary to assess the impact of the proposed mine on the surrounding agricultural land, which had not been carried out prior to the granting of the licence.[365]

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361 *The Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2024] ZASCA 84 (3 June 2024).

362 Setzer & Benjamin 2020 *Transnational Environmental Law* 88.

363 Peel & Osfosky *Transnational Environmental Law* 37.

364 *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries and the Environment & Others* [2023] ZAGPPHC 658 (19 June 2023).

365 *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries and the Environment & Others* [2023] ZAGPPHC 658 (19 June 2023) para 7.

In this case, the court had to determine the legality of the decisions of the Regional Manager and the Minister in relation to NEMA.[366] The court pointed out that legality and rationality go hand in hand in administrative decisions. The court noted that conducting environmental impact assessments based on the available information, combined with a deeper understanding of the role of an agronomic assessment report, is very important for assessing the impact of mining activities on the environment. The court found that the contested decisions were unlawful.[367]

The South African courts play a crucial role in enforcing climate change policy and legislation. There is now a wealth of precedent that emphasises the need for a comprehensive assessment of a project's potential impact on the environment before approvals can be granted.[368] In most of these cases, the courts reaffirmed the importance of respecting procedural fairness and the substantive requirements of environmental laws.

Almost all of the complaints in these cases revolve around the adequacy or availability of environmental impact assessments and the obligation of decision-makers to consider all relevant factors before granting authorisations.[369] The *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries and the Environment & Other* cases emphasise the role of the judiciary in ensuring transparent and accountable environmental policies that demonstrate a broader commitment to sustainable development and the protection of the environment.

5.3 Climate Litigation Strategies Employed in South Africa.

5.3.1 Utilisation of constitutional rights in climate litigation in South Africa

5.3.1 The provisions of Section 24 of the Constitution grant "every person" the right to a healthy and safe environment. These rights are among the fundamental human

366 Section 24 of the National Environmental Management Act 107 of 1998.
367 *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries and the Environment & Others* [2023] ZAGPPHC 658 (19 June 2023) paras 26-42.
368 Kotze and Du Plessis 2020 *Environmental Law* 642.
369 Setzer and Higham *Global trends in climate litigation: 2023 snapshot* 2.

rights enshrined in the Bill of Rights of the South African Constitution. It reads as follows:

> 24. Environment
>
> Everyone has the right–
>
> (a) to an environment that is not harmful to their health or well–being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that–
>
> (i) prevent pollution and ecological degradation:
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[370]

Various groups and individuals have successfully used this provision to support their climate change claims in the courts. A good example is *The Trustees for the Time Being of Groundwork Trust v. The Minister of Environmental Affairs*.[371] In this particular case, the applicants claimed that the government had breached their right to a healthy environment, as provided in section 24 of the Constitution. The court recognised that air pollution that exceeds national standards is *prima facie* a violation of the law. This right provided a solid legal basis for the plaintiffs to challenge the government's failure to implement climate policy and reduce air pollution.

The most common strategy utilising constitutional provisions in climate change litigation in South Africa is the invocation of section 24 to challenge government decisions that may lead to environmental degradation. For example, if a government agency approves a coal-fired power plant without considering the likely environmental impacts of such a project, affected communities and individuals can argue that the decision violates their constitutional right to a healthy environment.

The South African courts have been called upon in various cases in which applicants have challenged the granting of licences, particularly for coal-fired power plants without proper environmental impact assessments. In most of these cases, the courts

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370 Section 24 of the Constitution (1996).

371 *The Trustees for the Time Being of Groundwork Trust v. The Minister of Environmental Affairs* [2022] ZAGPPHC 725 (18 March 2022) para 8.

have recognised the importance of Section 24 of the Constitution, for example, in the groundbreaking case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs*. In this case, it was held that the Minister's failure to adequately consider the environmental impact of the proposed power plant violated the plaintiff's rights under section 24 of the Constitution. The courts have adopted a broad interpretation of what constitutes a "healthy environment", which is not limited to physical health but also include social, economic and cultural dimensions.[372]

The formulation of Section 24 of the Constitution is in the context of the public interest, which allows plaintiffs such as organisations or activists to represent marginalised communities, and underlines that the protection of the environment is not just an individual right but a collective societal obligation.[373] In the case of *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others,* the court was seized by environmental activists, non-profit companies and individuals who sought an injunction against the defendants to prevent them from conducting a seismic survey on public interest grounds and who also objected to the violation of human rights.[374] This is a clear indication that there is a growing trend towards rights-based processes in South Africa.[375]

5.3.2 Public interest litigation in South Africa

The other common strategy used by litigants in most climate-related disputes is to sue in the public interest.[376] This legal strategy allows individuals or organisations to take legal action on behalf of the general public or a specific affected community in matters relating to the environment. In South Africa, where the majority of people live in poverty and there are financial barriers to bringing cases before the courts,[377] most climate litigation is driven by NGOs and philanthropists who offer financial and technical expertise to enable climate litigation.[378] In such cases, the organisations rely

372 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* para 126.
373 Setzer and Higham *Global Trends in Climate Litigation: 2024 Snapshot* 27.
374 *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others* [2022] 1 ALL SA 796 para 2-5.
375 Setzer and Higham *Global Trends in Climate Change Litigation 2023 Snapshot* 19.
376 Setzer and Benjamin 2020 *Transnational Environmental Law* 83.
377 Setzer and Benjamin 2020 *Transnational Environmental Law* 88.
378 Setzer and Benjamin 2020 *Transnational Environmental Law* 94.

on public interest claims to establish standing, based primarily on section 32(1)(d) of NEMA, which grants standing to individuals or groups on the basis of public interest or environmental necessity.[379]

The wording of section 32 of the NEMA shows that this provision is meant to protect the rights of the public, especially the rights of vulnerable and marginalised communities who have no meaningful legal recourse. This can be inferred from the wording of this section, for example, by the use of words such as "on behalf of a person who for practical purposes is unable to..."[380] This section allows groups of people to represent another person or community, as some are unable to approach the courts on their behalf due to poverty and other reasons.[381]

5.4 Challenges in climate litigation in South Africa

Although it has been established that South Africa has an advanced framework to support climate processes,[382] there are still challenges that plaintiffs often face when bringing climate-related cases to court. These challenges include the lack of clarity in the law and financial challenges, to name but a few.

The other major challenge faced by plaintiffs in climate cases is financial constraints. This challenge is particularly acute in the marginalised communities of South Africa, where people live in poverty.[383] This challenge is an obstacle that discourages individuals or communities from bringing cases to court due to the prohibitive cost of litigation. According to Obani, there has not been a single case related to climate change brought to court by women, even though children and women are the most affected by the impacts of climate change.[384] Kotze and Du Plessis noted that climate cases are usually technical in nature and require the testimony of experts in order for

379 Section 32(1)(d) and (e) NEMA 107 of 1998.
380 Section 32(1)(b) of NEMA 107 of 1998.
381 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 298.
382 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 300.
383 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 298.
384 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 298.

claimants to prove their claims, for example in the Earthlife case.[385] Although South Africa grants legal aid to those who cannot afford legal representation, Obani said,[386] this aid is mostly focused on criminal cases, which makes it difficult for poor and marginalised communities to access such funding for climate action. According to Chamberlain & Faurie, in the case of Earthlife, the applicants had to enlist the help of the then Energy Research Centre at the University of Cape Town to model the impact of the construction of the Thabametsi and Khanyisa projects and their significance.[387] This extensive research cannot be afforded by an ordinary villager with financial problems. It is therefore necessary to empower marginalised communities when it comes to climate processes.

South African climate legislation aims to achieve the inclusion of marginalised communities in decision-making processes on environmental issues that affect them.[388] Despite these legislative efforts, the most marginalised communities that are most affected may still not be included due to the means of communication used such as the government gazette or newspapers. The poor still do not have access to newspapers, the internet or even mobile phones and computers, which means they will never know about the announced consultations. This is a common reason why most people from vulnerable backgrounds live in utter poverty and may not have access to these facilities, as Obani points out.[389]

5.5 Chapter summary

This chapter has noted that climate change litigation is developing at a reasonably steady pace and the number of cases being brought to court is increasing. The earliest cases such as the *Earthlife Johannesburg v. Minister of Environmental Affairs and Others* received global attention and set precedents in the field of climate law. The

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385 Kotze and Du Plessis 2020 *Environmental Law* 637.

386 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 299.

387 Chamberlain & Faurie 2024 *Journal of Human Rights Practice* 252.

388 Section 32 Climate Change Act 22 of 2024, Section 24(7)(d) National Environmental Management Act 107 of 1998.

389 Obani *Climate litigation in South Africa and Nigeria: Legal opportunities and gender perspectives* 298.

usual approach to climate litigation today still follows the strategies used in this case, especially the human rights approach to climate litigation. Almost all South African climate litigation is about forcing the government to implement existing laws and policies. This is a common trend in most jurisdictions in the Global South, in contrast to cases in the Global North, where most lawsuits are aimed at forcing governments to adopt more progressive policies than the current ones. It is noteworthy that the judiciary has taken a consistent stance in the interpretation and application of climate change and has gradually implemented the law. In some cases, the court has developed the law to effectively protect the environment, such as in the case mentioned above, where the court introduced the need for a climate impact assessment, which is not directly provided for in the legislation. Finally, barriers to climate litigation, such as poverty, lack of awareness and lack of political will to implement the law, have been identified and need to be addressed to improve the legal pathway to climate justice.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This chapter summarises the findings of the study, which focused on the feasibility of litigation as a tool to achieve climate justice in South Africa. To this end, the study utilised the doctrinal research method to gain useful insights into how South Africa can use litigation to achieve climate justice in South Africa. By analysing various legal frameworks and case studies, the study has highlighted the potential of litigation in addressing the pressing issues arising from climate change and social inequalities in South African communities and ensuring that responsible authorities are held accountable for their environmental duties.

This study has offered important perspectives regarding effective approaches to climate litigation to attain climate justice. The study reveals that by employing strategic legal measures, communities and individuals can successfully claim their rights and pursue remedies for climate change. This chapter will, therefore, consider these important insights and provide valuable suggestions and recommendations for South Africa.

6.2 Main findings

6.2 The main objective of the study was to assess the extent to which climate litigation could facilitate the enforcement of climate justice in South Africa. However, in order to reach this conclusion, various sub-objectives were pursued. The results of each of these sub-objectives are presented below:

6.2.1 Understanding of the global perspectives on climate justice.

The study found that there is still no complete consensus on what climate justice is and how it can be achieved at a global level. This challenge was found to have a negative impact on the effectiveness of international efforts to tackle the deadly challenges of climate change.[390]

[390] See para 2.5 above.

6.2.2 Examination and review of the extent to which international and South African laws have assisted in mitigating climate change and promoting climate justice.

The study found that international agreements such as the UNFCCC and the Paris Agreement, among others, have made a notable contribution to shaping the global response to climate change. It was noted that while these international laws have not been able to directly achieve climate jjustice, they have been a point of reference in some climate cases discussed in the discourse, such as the *Urgenda v. Netherlands* case, in which the court referred to the UNFCCC and the ECHR.

In South Africa, the available framework was found to support climate litigation, particularly section 24 of the Constitution, which formed the basis of most climate cases. Cases such as the *Earthlife Africa Johannesburg v. The Minister of Environmental Affairs and Others* and *Trustees for the Time Being of Groundwork Trust and Another v. Minister of Environmental Affairs and Others* both invoked Section 24 of the Constitution was successfully enforced. However, researchers have found that although South Africa is still one of the 12th largest greenhouse gas emitters in the world, it is disproportionately affected by the effects of climate change.[391]

6.2.3 Global trends in climate litigation and identifying strategies that best promote effective climate litigation.

The analysis of global climate processes has shown that the same strategies are used in climate processes worldwide and in South Africa. The common approaches are the human rights-based approach, co-operative litigation and the use of scientific evidence to support claims. However, the number of cases from South Africa and the Global South is still very low, despite being severely affected by the impacts of climate change. In addition, scientific evidence is required to prove causality and is expensive to obtain.[392]

391 See section 4.3.2 above.
392 See section 4.4 above.

6.2.4 South African perspectives on climate justice

The study found that the South African perspective on climate justice is strongly based on the polluter pays principle, as is clear from laws such as the recently enacted CCA and the CTA. This principle is generally accepted by most countries in the Global South. In addition, the principles of CBDR-RC, sustainable development and intergenerational rights are key aspects of South Africa's position on climate justice. These principles are all enshrined in the Constitution.[393]

6.3 Recommendations

This section will rely on the outcomes of this research to make recommendations. The researcher found that South Africa is the 12th largest emitter of greenhouse gases in the world but has only a few climate cases and yet is disproportionately affected by the impacts of climate change. The following part discusses the recommendations that can be taken to ensure that the legal process is fully utilised to achieve justice.

6.3.1 Improve transparency and public awareness

The researcher found that one of the challenges faced by the marginalised communities is due to corruption among public officials. This causes the vulnerable communities to experience unequal treatment in case of climate emergency.[394] To solve this problem, the researcher recommends the government to strengthen oversight and accountability in the management of public resources allocated to provide relief in cases of emergency, for instance, in the 2015-2018 Cape Town water crisis mentioned earlier.[395] This can be done through the following:

- Creation of anonymous whistleblower platforms for reporting instances of corruption.
- Public awareness regarding their environmental rights and to approach the courts to seek redress.

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393 See section 3.3.2 above.
394 See section 2.4.1 above.
395 See section 2.4.1 above.

6.3.2 Provide education for lawyers and judicial officers

Climate litigation is a technical field which requires a deep understanding of the aspects of science and law. The research found that some judicial officers and lawyers struggle to comprehend issues relating to climate change.[396] On this basis, the researcher recommends that the government offer special training to judicial officers and lawyers to ensure that they can advance sound arguments and judgments that will promote justice.

6.3.3 Impose strict penalties for non-compliance

One of the challenges that the study identified was the lack of political will to implement climate policies and laws.[397] The research recommends the government to penalise government officials for failure to comply with the requirements of the law. For example, failure to fulfil an obligation to promulgate regulations under any law should attract penalties.

6.3.4 Further recommendations

- Based on the findings, it was established that effective climate litigation can be achieved through adducing elaborate scientific evidence and expert testimony, the researcher recommends environmental activist organisations, NGOs and environmental law practitioners to partner with universities and establish environmental research centers that provide accessible scientific knowledge and evidence to aid in their climate litigation efforts. These collaborations could help in the formulation of effective litigation strategies and inform policy reform recommendations.

- The Department of Environmental Affairs must partner with legal aid organizations and willing NGOs and form Climate Litigation Initiatives aimed at providing technical and legal assistance to marginalised communities. Such programs will mobilise and capacitate communities to hold carbon majors accountable for their emissions through providing them with scientific evidence

396 See para 5.2 above.
397 See para 5.2 above.

and legal resources. This will create a culture of environmental stewardship and responsibility among the historically disadvantaged communities.

- Recommend the Department of environmental affairs to set up a unit for climate change litigation which is entirely dedicated to providing legal support and resources to climate cases. The unit should comprise of environmental legal experts and scientists who offer *pro bono* legal services in the form of advice or representation to poor communities in climate cases. This department should also create a database to track and continually monitor cases brought under its initiative and recommend policy reforms where necessary.

6.4 Conclusion

By implementing the above recommendations, the government could create an environment where climate justice is actively pursued through effective litigation, which results in enhanced protection of vulnerable communities' rights and, ultimately, the attainment of climate justice through litigation. In addition, the successful implementation of these recommendations could ensure that South Africa meets its commitments and targets under the Paris Agreement's NDCs.

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