

Shell shock: reversal of landmark Dutch ruling holds lessons for South African climate change litigation

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The 2021 decision of a Dutch district court in *Milieudefensie v Royal Dutch Shell*^[1] was widely regarded as an inflection point in global climate litigation. In its judgment, the district court ordered Shell plc (“**Shell**”) to reduce its global CO₂ emissions by at least net 45% by 2030, relative to their 2019 level. The imposition of a concrete obligation on a corporate entity to reduce its emissions marked a decisive development in climate change jurisprudence, which up to that point had focused on the responsibilities of States to protect environmental rights. Shell appealed against the judgment and sought a reversal of the district court’s order. On 12 November 2024, the Dutch Court of Appeal handed down a decision^[2] (“**Appeal Decision**”) which overturned the order binding Shell to the 45% reduction standard, but affirmed the obligation resting on corporations like Shell to limit their CO₂ emissions to counter the harmful effects of climate change.

The appeal court’s finding that failure by Shell to adhere to a particular reduction standard would not constitute an “unlawful act” under Dutch law was grounded in the concept of the “unwritten social standard of care” contemplated in the Dutch Civil Code. Much like the wrongfulness element in the South African law of delict, this standard of care is “interpreted as much as possible on the basis of objective starting points, such as legislation, general legal principles, fundamental rights, case law and/or expert reports”.^[3] The appeal court considered these sources in turn.

Article 2 and Article 8 of the European Convention on Human Rights have been interpreted to impose positive obligations on States to take measures to protect the rights to life and private/family life, respectively, including preventing the harmful effects of climate change. Additionally, several reports and resolutions of the United Nations affirm that protection from these harmful effects is a human right. The appeal court recognised that fundamental rights, and the values they embody, may have “horizontal effect” and impact private-law relationships by giving substance to open standards and general concepts such as the “social standard of care”. From a South African perspective, environmental rights are explicitly enshrined in section 24 of the Constitution of the Republic of South Africa, 1996 (“**Constitution**”), and the horizontal application of fundamental rights, particularly by way of their influence on the common law, has long been recognised as a hallmark of South Africa’s culture of transformative constitutionalism.

The court in the Appeal Decision found that no direct reduction obligations or commitments arise from the various pieces of European Union (“**EU**”) and Dutch legislation that regulate the climate-related obligations of corporations. Whilst not exhaustive, companies’ obligations under existing legislation must be taken into account when assessing the fulfilment of any duty of care owed by those companies to the public at large. The regulatory framework presently in place in the EU contemplates the use of price incentives to curb emissions and leaves companies free to adopt their own approaches to reducing emissions in line with the targets set by the Paris Agreement.^[4]

South African climate legislation bears resemblance to EU law, whilst differing in certain respects. The Climate Change Act 22 of 2024 (“**Climate Change Act**”), the commencement date of which has yet to be proclaimed, contemplates the allocation of a “carbon budget” to any person conducting an activity which emits, or has the potential to emit, one or more of the greenhouse

gases^[5] that the minister responsible for environmental affairs (“**Minister**”) reasonably believes causes or is likely to cause or exacerbate climate change.^[6]

A carbon budget must have a duration of at least three successive five-year periods and specify the maximum amount of greenhouse gas emissions that may be emitted during the first five-year period. A person to which a carbon budget has been allocated must prepare and submit to the Minister for approval a greenhouse gas mitigation plan which describes the measures that it proposes to implement to remain within its carbon budget. The approved plan must be implemented, and progress in this regard must be monitored, evaluated and reported on annually by that person. Should such reporting indicate that a person has failed, is failing or will fail to comply with its carbon budget, it must provide a description of measures that it will implement in order to remain within its carbon budget.

Alongside carbon budgets, the mitigation system envisaged in the Climate Change Act includes the determination of sectoral emissions targets (“**SETs**”) for certain sectors and sub sectors identified by the Minister.^[7] These targets will include “*quantitative and qualitative greenhouse gas emission reduction goals*”.^[8] The ministers responsible for the administration of the relevant sectors and sub-sectors will be tasked with developing and implementing policies and measures to ensure that the targets are not exceeded.

The implementation of SETs was initiated with the approval of the SET Framework by Cabinet in November 2021. This was followed by the publication of the Draft SET Report on 26 April 2024,^[9] which sets out the proposed SETs to be adopted by sector departments, including the energy sector.^[10] The oil and gas sector is not specifically mentioned, although it is recorded that the draft SETs will be refined following public consultation before being recommended to Cabinet for allocation to the relevant departments. Whilst Shell has announced its intention to divest from its downstream South African operations as part of its “*commitment to simplification, performance, and discipline*”,^[11] those corporations which do operate in the oil and gas sector in South Africa are likely to be expected to comply with more stringent regulation and scrutiny from an emissions perspective in the near future.

It is clear from the foregoing that the Climate Change Act, like EU law, provides for the allocation of emission allowances to designated emitters,^[12] emissions “*targets*” and “*goals*” for designated sectors, and requirements for emitters to report on their emissions and implement mitigation plans, but stops short of imposing binding emissions standards. The approach adopted in the Climate Change Act thus, on its face, accords with the court’s finding in the Appeal Decision.

In the latter part of its judgment, the appeal court focused specifically on Shell’s obligation to reduce its scope-three emissions, being those indirect emissions generated in its value chain, including from the use or consumption of products it supplies to third parties, such as the combustion of Shell’s fossil fuel products by end users. The court recognised the consensus amongst climate scientists that, in order to limit global warming to 1.5°C, reduction pathways must be chosen in which CO₂ emissions are reduced by a net 45% by the end of 2030. These pathways, however, involve a *global* reduction representing an average for all sectors, places and greenhouse gases. Applying the 45% reduction standard to Shell is thus insufficiently case specific and ignores the details of Shell’s supply portfolio. Additionally, no unequivocal conclusion could be drawn from the sources presented to the court regarding the required reduction in emissions from the oil and gas sector in particular on which to base an order against any specific company. Finally, it was not firmly established by the respondents that limiting Shell’s resale of fossil fuels purchased from third parties would be effective in reducing its scope-three emissions.

Despite the appeal court’s finding that corporations could not be held to binding emissions reduction standards, the Appeal Decision is far from a death blow to climate litigation. The court (i) strongly suggested that corporations have an obligation to reduce their scope-three emissions, and (ii) recognised that foundations or associations have standing to bring claims for the protection of sufficiently similar environmental interests of other persons.

South Africa’s transformative Constitution, with its explicit protection of environmental rights and broad approach to standing, is ripe ground for climate change litigation, particularly in light of the impending coming into force of the Climate Change Act. Whether this litigation will track the trajectory of the Shell saga, or chart its own course, remains an open question.

[1] Case number C/09/571932/HA ZA 19-379.

[2] Under case number 200.302.332/01.

[3] Paragraph 7.2 of the Appeal Decision.

[4] Paragraph 7.56 of the Appeal Decision.

[5] “Greenhouse gases” are defined in section 1 of the Climate Change Act as “*gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation*”, and include CO₂, methane and ozone.

[6] Section 27(1) of the Climate Change Act, read with sections 26(1) and 26(2), requires the Minister to publish, by notice in the *Government Gazette*, a list of (i) the gases which the Minister reasonably believes causes or is likely to cause or exacerbate climate change, and (ii) the activities that emit, or have the potential to emit, one or more of these gases. We note that as at the date of this article no such list has been published.

[7] Section 25(1) and 25(3) of the Climate Change Act.

[8] Section 25(4)(a) and (c) of the Climate Change Act.

[9] Accessible at https://www.gov.za/sites/default/files/gcis_document/202404/50571gon4763.pdf (accessed on 21 November 2024).

[10] The Draft 9th National Greenhouse Gas Inventory Report, published by the Minister on 2 May 2024, identifies the energy sector as a sector that accounts for a substantial portion of South Africa’s total emissions. Furthermore, oil and natural gas is identified as a “*key category*” with a “*significant influence*” on the country’s total inventory of greenhouse gases. The vast majority of energy-sector emissions are generated by fuel combustion activities, although fugitive emissions from the fuels sector also have an impact. Fugitive emissions in the context of the oil and gas sector include emissions due to venting, flaring and all other sources associated with, *inter alia*, the exploration, production and transmission of oil and natural gas.

[11] Shell.co.za (10 May 2024) “Important Update for Our Loyal Customers!” (accessible at <https://www.shell.co.za/media/2024-media-releases/important-update-for-our-loyal-customers.html>), accessed on 20 November 2024.

[12] Section 27(1) of the Climate Change Act provides that the Minister must allocate a carbon budget to any person that conducts an activity listed in terms of section 26(2) and, *inter alia*, determine quantitative greenhouse gas emission thresholds to identify persons which are to be assigned a carbon budget and required to submit greenhouse gas mitigation plans.



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