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The Application of International Law in Terms of *Earthlife Africa Johannesburg and Another v Minister of Energy and Others 65662/16 (2017)* Case

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***Abstract*—**This study involves a legal analysis of the case *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others.* The case considered the impact of the Thabametsi Power Project if it operated to the expected year 2060 on the global climate and ever-changing climate, in South Africa. This judgment highlights the significance, place and principles of climate change and where climate change impacts the South African environmental law which has its founding principles in the Constitution of the Republic of South Africa, 1996. This paper seeks to examine the advances for climate change regulation and application in terms of international law, in South Africa, through a qualitative study involving comparative national and international case law. A literature review study was conducted to compare and contrast the various aspects of law in order to support the argument undertaken. The paper presents a detailed discussion of the current legislation and the position as it currently stands with reference to international law and interpretation. The relevant protections as outlined in the National Environmental Management Act will be discussed. It then proceeds to outline the potential liability of the Minister in the interpretation and application of international law.

***Keywords*—**Climate change, environment, environmental review, international law, principles.

I. Introduction

THE Constitution of the Republic of South Africa, 1996 (hence the Constitution) is regarded as an international law-friendly constitution, since it provides that in Chapter 2 of the Constitution one must consider international law [7]. The South African courts must interpret any legislation and acknowledge any reasonable interpretation of that legislation that will be consistent with international law, rather than an alternative interpretation that will be inconsistent with international law [7]. When interpreting these provisions, it will be evident that the courts must interpret and identify international law. The first part of this study will provide the significance, place and principles of international law in terms of the application in South African courts. The discussion will then be followed by the introduction of the *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (hereafter the Thabametsi-case) and a conclusion.

The United Nations Framework Convention on Climate Change (UNFCCC) is the international agreement for addressing climate change. This convention was adopted at the Rio Summit in 1992 and have the objective for countries to work together to limit global rising temperatures and climate change. The Paris Agreement is an issue that relates to the UNFCCC and is the new climate change agreement. According to the agreement, it has a protectory that limits global warming well below 2 ˚C [3]. South Africa ratified the Paris Agreement in 2016 and is committed to decline its greenhouse gas emission trajectory range, which is arguably ranged between 398 and 614 Mt Co^2-eq by 2025 and 2030 [4]. The aim of the Paris Agreement is to strengthen the global response of climate change by keeping the global temperature rise below 2˚ above pre-industrial levels and promote efforts to limit the increase in temperature increase further to 1.5˚C. The Paris Agreement further aims to increase the ability of different countries to adapt to the impact climate change have [13]. It requires the parties to the Paris Agreement to put forward their efforts through the National Determined Contributions (NDCs) to strengthen the fight against climate change. This also means that parties to the Agreement must report on a regular basis their emissions and the efforts to mitigate these emissions [13]. The key aspects of the Agreement include:

- The long-term temperature goal as set out in Article 2. This stipulates that globally, the temperature increase must be limited under 2 ˚C in pursuing the effort to limit the increase to 1.5 ˚C.
- Global peaking and climate neutrality as set out in Article 4. In order to meet the temperature goals, the parties to the Agreement aim to reach global peaking of greenhouse gas emissions as soon as reasonably practical, and also acknowledge the fact that it will take longer for developing countries, such as South Africa to accomplish a balance between the anthropogenic emissions by different sources and removal by sinks of greenhouse gas emission in the second half of the century.
- Mitigation as in Article 4 that establishes commitments that are binding on the parties to prepare, communicate and to maintain it in the NDC's.
- Sinks and reservoirs in Article 5 encourage parties to conserve and enhance sinks and reservoirs of greenhouse gas emissions which also include forests.
- Voluntary cooperation as in Article 6 stipulates that the parties agree to the Agreement on a voluntary basis which will allow for higher ambition in reaching the objectives as set out. The Agreement establishes a mechanism for internationally transferable mitigation strategies of

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greenhouse gas emissions which will also promote sustainable development [13].

NDC's are the heart of the Paris Agreement and is a 'tool' in achieving the objectives as set out by the Paris Agreement. NDC's suppose that there will be a global stock take every five years to assess the progress towards achieving the objectives as set out by the Paris Agreement [13]. South Africa submitted its Intended National Determined Contribution (INDC) on adaptation, mitigations as well as the finance and investments requirement. South Africa further stipulated that it is committed to address climate change based on science and equity. South Africa is vulnerable to the impacts of climate change, especially in terms of water and food security, and the impact on health, human settlement, infrastructure and ecosystems. South Africa is therefore firmly committed to working with other parties to ensure that the temperature is kept below the 2 ˚C, due to the fact that a global average temperature increase of 2 ˚C means that South Africa could experience a rise of up to 4 ˚C by the end of the century [14].

The UNFCCC signatories realised in the mid 1990's that stronger provisions needed to be implemented in order to reduce greenhouse gas emissions. The Kyoto Protocol was agreed to in 1997, where developed countries were legally bound by emissions reduction targets. The second commitment to the Kyoto Protocol was initiated in 2013 and will end in 2020. This Protocol binds 38 developed countries, which include the European Commission, and 28-member states that are participating [3]. The Doha amendment to the Kyoto Protocol is the second period from 2013 to 2020, in which participating countries are committed to reduce emissions by at least 18% below the 1990 levels. The problem that exists with the Kyoto Protocol is that it requires only developed countries to take action [3]. South Africa has therefore no binding targets to reduce emissions in terms of the Kyoto Protocol.

South Africa has been in the news for the Al Bashir saga after the country failed to arrest the Sudanese president when he attended an African Union Summit in June 2015 [15]. This paper will not focus on the question of Al Bashir, but rather the methodological application of international law in South African courts. The issue is a rather complex one that must be understood by South African courts for the interpretation and identification of the rule of international law, inconsistent treaties, customary law and other obligations that the country faces. The problem escalates since South Africa has complex domestic laws that stipulate how the country should effect to internal laws and regulations. This paper will focus on the assessment of recognised methods and doctrines for the interpretation of international law by the High Court, and the practice that is applied by the court in considering internal materials before it.

An analysis will be drawn in terms of how the courts interpreted and applied international law in the Thabametsi-case, where after a conclusion will be drawn. This paper consists of a literature review of relevant textbooks, articles, case law and legislation. Both primary and secondary source material will be subjected to an analysis, which will ultimately give rise to the conclusion.

II. The Identification and Interpretation of International Law

The conceptual issues are addressed, and the focus will be on the sources of international law. International law is implemented on a decentralised basis by the actions of different states which ultimately makes up the international community [5]. The *Statue of the International Court of Justice* in Article 38 have identified five sources of international law, namely: treaties between States; customary international law that are derived from the practice of States; general principles of the law that are recognised by civilised nations and as subsidiary means for the determination of the rules of international law; judicial decisions; and lastly, the writings of highly qualified publicists. For the purpose of this study and the interpretation of the court in the Thabametsi-case, the focus will be restricted to customary international law and treaties.

Customary international law is the oldest source and is binding on all States. Customary law is not a written source, and it depends of consistent practice and *opinio juris* (a belief in a legal obligation) that there is a belief that a State has a legal duty [5]. This was confirmed with the International Court of Justice (ICJ) in the *North Sea Continental Shelf* case:

> 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation' [11].

When interpreting the customary international law, it is also stipulated that it is not only the practice of the governments of States, but also of the courts and parliament of the State. For a new custom to emerge there must be enough practice and *opinio juris* [5].

The International Law Commission (ILC) adopted a draft conclusion during its session in 2016 which provides for the normative description of the procedural rules on how to identify customary international law [6]. The ILC's Draft conclusion determines roles for decisions of domestic courts. It can first be noted that judgements from national courts are a form of practice. Therefore, if a court decision is inconsistent with a customary international law, it will still practice and may therefore contribute to the formation of a new international customary law [12].

In terms of treaties, it is seen as an agreement between States or even between States and international organisations. Greenwood believes a treaty is not a source of law, but rather a source of obligation under law [5]. A treaty is binding on all States who are signatories to them. Becoming a party member to a treaty is entirely dependent on the State. *Pacta sunt servanda* takes effect and requires that parties to the treaty honour it. Different States agree to honour a treaty provision, and this supposes that it is State practice. If that State and a State that is not a member to the treaty apply a provision of a

treaty it can be seen a part of customary international law [5]. In terms of the Vienna rule of interpretation in article 31(1) and 32 of the *Vienna Convention on the Law of Treaties*, 1969. Article 31(1) states that:

> 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' [16].

Article 31(1) states that in ordinary meaning, the context and purpose of the treaty be interpreted in good faith. This means that all three elements must be interpreted in a text in order to fully understand the meaning. In terms of article 32, it supposes that where a treaty is unreasonable the Vienna Convention will allow for recourse for a supplementary means of interpretation.

It is because of the adoption of numerous treaties in different areas of international law that, this area of the law has undergone some important changes [5].

The question however remains, of whether South African courts are obliged to follow it in applying the rules as laid down by international law? It is important to note that, one should distinguish between the interpretation of international law rules and in the case where domestic legislation interprets the implementation of an international law. When domestic legislation implements an international rule, the legislation remains domestic in nature and the rules that are applicable to their interpretation are domestic rules of interpretation [12]. The *National Environmental Management Act* 107 of 1998 (hence NEMA) and *National Environmental Management: Air Quality Act* 39 of 2004 (NEM:AQA) are both legislation that incorporate different treaty regimes, and should be interpreted in terms of the international law that governs the interpretation [9], [10]. If there are any inconsistencies between the implementation of international law, it will be avoided in terms of section 233 of the Constitution. Section 233 of the Constitution stipulates that the reasonable interpretations that are consistent with international law should be followed rather than other interpretations [7].

Section 232 of the Constitution stipulates that customary international law is law that must be applied in South Africa. Therefore, South African courts are obliged to interpret international law.

III. Identification and Interpretation of International Law in the Thabametsi-case

The Thabametsi-case is concerned with the granting of environmental authorisation to Thabametsi Power Company (Pty) Ltd to establish a 1200-megawatt coal-fired power station near Lephalale in Limpopo Province. However, Earthlife Africa appealed to the Minister of Environmental Affairs against the decision of the Chief Director of Integrated Environmental affairs to grant the environmental authorisation. Earthlife Africa based the appeal on the fact that the Chief Director failed to consider the State's international and national obligations to mitigate climate change and to promote action against climate change in South Africa. The Minister of Environmental Affairs dismissed the appeal of Earthlife Africa and made the environmental authorisation conditional to a climate change impact assessment that must be submitted to the Department of Environmental Affairs prior to the commencement of the Thabametsi Power Plant [4].

The application of Earthlife Africa was opposed by the Minister, Chief Director and Thabametsi Power Plant. This Minister, in the affidavit, provided insight into the Government's climate change management approach and argued that:

- Climate change impact assessments are not mandatory components of environmental impacts assessments and currently, South Africa does not have any greenhouse gases emission guidelines. The Minister further stipulated that climate change impacts have been conducted in air quality and water impact studies by Thabametsi during their environmental impact assessment.
- The Minister also stipulated that until the Paris Agreement's obligations are enacted into national law, they are not binding on a domestic level.
- Since South Africa is facing challenges in the energy sector, which is also acknowledged by the Nationally Determined Contributions (NDCs), the transition into a low carbon economy is rigid and slow.
- The Thabametsi Power Plant will establish a high efficiency power plant that will include modern abatement technology which will ultimately comply with the Government's obligation under the Paris Agreement [4].

The *National Environmental Management Act* 107 of 1998 gives the fundamental framework legislation in terms of which, section 24 of the Constitution should be interpreted. Therefore, NEMA should also be consistently interpreted with international law. Section 24(O)(1)(b) of NEMA states that if the Minister, Minister of Minerals and Energy or a MEC considers an application for environmental authorisation, they must take in account all relevant factors, the ability of an applicant to take and implement mitigating measures, using reasonable alternatives to the activity in order to minimise the harm to the environment. Section 24(O)(1)(b) must be read in conjunction with article 3(3) of UNFCCC that stipulates that States must take all precautionary measures to anticipate, prevent or minimise the effect of climate change. Article 4(1)(f) further stipulates that all States should take into account climate change considerations in the relevant environmental policies and action in order to minimise the effects of climate change on people and on the environment [9], [8].

The importance was stressed by Earthlife Africa that the Government remains constitutionally bound to apply national law in a manner that is consistent with international law obligations such as the Paris Agreement, and therefore Thabametsi should conduct a climate impact assessment prior to the approval of the environmental authorisations and alight the Thabametsi project with the NDCs [4]. The case refereed to the interpretation of legislation that it is bound by section 39(2) of the Constitution and that it should promote the purports, spirit and objects of the Constitution [2]. The specific right that is activated in terms of section 39(2) of the

Constitution refers to the ever-important rights as laid down by section 24, which reads:

'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' [7].

Constitutional interpretation as seen in section 24 above, means, that the context in which the constitutional provision is given will determine the interpretation [1]. Section 39(2) and section 24 of the Constitution should be read together with section 8 of the Constitution that stipulates that the Bill of Rights binds all legislatures, the executive, judiciary and all organs of State [7]. Therefore, when the court made a judgement in terms of the Thabametsi-case it had to consider the Bill of Rights which stipulates that international law must also be interpreted and applied.

In terms of the High Court's interpretation of the Paris Agreement, it was held that a climate change impact assessment is necessary and relevant to ensure that the Thabametsi Power Plant fits into South Africa's NDC trajectory and that it is committed to build a cleaner and more efficient power station [4].

IV. The Importance of International Law in the Interpretation of National Laws

The importance of international law in the interpretation of national law can be seen in section 233 of the Constitution where it provides that inter interpretation of legislation and the interpretation that is consistent with international law must be considered over any interpretation of any other law. As mentioned above, international treaties such as the UNFCCC must be identified and interpreted. This supposes that there is not a need for an interpretation that is consistent with a source of international law, but an interpretation that is consistent with international law [12]. Tladi believes that in order to interpret the significance of international for the purpose of section 233, it is of importance to note that domestic problems cannot be addressed without opting to international law questions [12].

V. Conclusion

South Africa emphasizes the fact that it constitutes an international law-friendly framework as discussed above. The Constitution also refers to provisions that address international law as well as the application of it. Therefore, in the case of Thabametsi, the court interpreted the procedural question of the identification and application of international law correctly, notwithstanding the incorrect interpretation by the Minister, Chief Director and Thabametsi Power Plant.

The High Court in Thabametsi held the issue of the interpretation of the UNFCCC and whether South Africa should strive to interpret the measures as seen in international law. The court adopted a rigorous approach and interpretation to the identification to the UNFCCC and stipulated that international law must be adopted in national law and that the State should consider the climate change impact assessment in authorisations. This will then adhere to the NDCs.

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