



## Commercial Law Team

Client Circular – May 2023

*Our Cox Yeats Commercial Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.*

### **Climate Change – The Opportunity for South Africa**

In a keynote address at Daily Maverick's First Earth Edition of The Gathering, held in Cape Town on 26 May 2023, former Eskom CEO, Andre de Ruyter, spoke about the opportunities to our economy in embracing climate change. He stated that "... *this is a huge opportunity, but it requires us to have a coherent policy environment, we need to have supportive industrial policies*". If we get this right, South Africa "*can lead the world and can ensure that we become and remain a competitive country, from an environmental perspective, from an export perspective, but also from an energy perspective.*"

De Ruyter is correct. Climate change offers an enormous opportunity to South Africa. Instead of treating the electricity crisis as a threat to our economy, we should be seeing this as an opportunity for economic growth. Like the United States, South Africa, historically, has been reliant on coal as a source of fuel to generate electricity. This reliance on coal has made South Africa the twelfth largest contributor of greenhouse gases in the world.

Instead of focussing on the loss of jobs that will follow, the closure of coal power plants, we should be focussing on the creation of a new economy and the building of new industries, on a massive scale. This will drive the transition to clean energy and address the climate crisis.

In the US, the Republican Party, led by Trump, raised the same concerns about transitioning from fossil fuels to renewable energy. The focus was on increasing the US production of oil, natural gas and coal.

In contrast, the EU has, for a long time, aspired to be a world leader – if not THE leader in fighting climate change. In July 2019, the European Parliament elected Ursula von der Leyen as President of the European Commission for the period until 2024. She has announced that she will focus on an ambitious climate agenda to make Europe the first climate neutral continent by 2050. In order to achieve this ambition, her agenda is to propose a European green deal that will include the first European climate law to enshrine the 2050 climate neutrality target into law.

Since Biden came to power in the US, he has introduced two pieces of legislation that will have a major impact on reducing US carbon emissions. This may well make the US the new world leader in taking concrete action on combatting climate change. The US focus is also on using climate change as a lever for economic growth particularly through the introduction of tax credits on a massive scale.

Like the EU and the US, can South Africa use climate change as an opportunity? Are the necessary policies going to be put in place to achieve this? By so doing, can South Africa lead the world economically and from an environmental perspective?

### **The Climate Change Bill**

The Climate Change Bill (the **Bill**) was introduced in Parliament in February 2022. It is the policy instrument to achieve climate change. The Bill is undergoing extensive public consultation with civil society. The Bill follows the EU approach in regulating climate change and setting targets to be achieved.

The object of the Bill is to provide for a co-ordinated and integrated response to climate change, to provide for the effective management of climate change impacts, make a fair contribution to the global effort to stabilise greenhouse gases and to ensure a just transition towards a low carbon economy and society. In addition, it aims to give effect to South Africa's international commitments and obligations in relation to climate change and to protect and preserve the planet for the benefit of present and future generations of humankind.

Every organ of State that exercises a power or performs a function affected by climate change is required to review, co-ordinate, amend and harmonise their policies, measures and programmes to ensure that the risks of climate change are taken into account. The Bill provides for provincial and municipal forums on climate change. The provincial forums on climate change are then required to provide a report to the President's Co-ordinating Council regarding the climate change responses, actions and considerations in the various provinces.

The Bill provides that the President establish a Presidential Climate Commission to advise government on its climate change responses and the mitigation of climate change impacts. Obligations are imposed on the Minister of Forestry, Fisheries and the Environment to determine national objectives, establish indicators for measuring progress and for setting a date by which the adaptation objectives should be incorporated into policies, planning instruments and programmes.

The Minister is obliged to develop a national adaptation strategy and plan. One of the most important aspects of the Bill is for the Minister to determine a National Greenhouse Gas (GHG) Emissions Trajectory which is a pathway that manages the reduction of greenhouse gasses emissions progressively over time. The National GHG Emissions Trajectory must specify a national GHG emissions reduction objective which is consistent with South Africa's international obligations.

In addition, the Minister must, within one year of the Act coming into operation, publish a list of the GHG Emitting Sectors subject to sectoral emissions targets. These targets must be implemented by the Ministers responsible for the administration of the relevant sectors. The targets must set goals for the first five years, the subsequent five to ten years and for a ten to fifteen year period thereafter. In that way, the Bill seeks to facilitate a just transition towards a low emissions and climate resilient economy.

The Minister must publish a list of GHGs which cause, or are likely to cause or exacerbate, climate change and a list of activities which emit one or more of the listed gases. The GHG emission thresholds must be expressed in carbon dioxide equivalents in order for the Minister to identify entities to be assigned a carbon budget. The carbon budgets must be reviewed every five years.

If an entity has been allocated a carbon budget, it must prepare a GHG mitigation plan which outlines the mitigation measures that the entity proposes to implement in order to remain within its allocated carbon budget.

It is likely that the introduction of the Bill and the implementation of the Carbon Tax Act of 2019 will accelerate South Africa's move to a low carbon, climate resilient and ecologically sustainable economy and society. It will also aim to ensure that South Africa achieves its commitments under the Paris Agreement and the goals set during the United Nations Climate Change Conference of the Parties (COP26) in November 2021.

Will these measures provide the platform for a competitive and sustainable energy sector? Will the opportunities which De Ruyter speaks about be fulfilled?

### **The US Approach**

The US approach is to focus on the effect of policies.

The Trump America First Energy Policy sought to remove all bureaucratic and political barriers to energy development. All regulations were tested against whether these were "good for the American worker". Regulations implemented under the Obama Administration were rolled back

and the return of coal fired electric generation was favoured to the disfavour of renewable resources. In his 2015 book "*Great Again: How to Fix our Crippled America*", Trump wrote:

*"The whole push for renewable energy is being driven by the wrong motivation, the mistaken believe that global climate change is being caused by carbon emissions. If you don't buy that – and I don't – then what we have is really just an expensive way of making the tree huggers feel good about themselves".*

It was initially felt that President Biden had high aspirations but it was unlikely that much would be achieved by him on the renewable front.

As it turns out, the Biden Presidency has achieved passage of two highly significant pieces of legislation that will make a major impact on reducing US carbon emissions. They are:

1. The Bipartisan Infrastructure Investment and Jobs Act of 2021 (**IIJA**); and
2. The Inflation Reduction Act of 2022 (**IRA**)

The two laws represent an energy transmission and climate change package that will benefit from more than US\$2 trillion in spending. Once fully deployed, these investments are predicted to reduce US greenhouse gas emissions by nearly 1 150 million metric tons in 2030. These reductions are about equal to the annual combined emissions from every US home. It is estimated that the two pieces of legislation will reduce greenhouse gas emissions across the entire economy to 40% below 2005 levels. This, however, is still below the Biden announced target in 2021, to reduce emissions by 50% from 2005 levels, and by 2030.

The IIJA and IRA combined will probably bring US climate change related spending to be nearly equal to the European Union's climate related budget and may well place the US as the singular global leader in climate change (the European Union has had to take a step backwards following the Russian invasion of Ukraine and the subsequent need to burn more coal).

IIJA provides for:

- US\$65 billion for electricity transmission grid upgrades to expand the amount of renewable energy on the grid;
- US\$7.5 billion over 5 years to establish a national charging infrastructure for electric vehicles;
- US\$6 billion over 5 years for battery storage efforts;
- US\$3 billion for advance demonstration projects for nuclear energy;
- US\$2.5 billion for developing large scale carbon capture demonstration projects;
- US\$1 billion for electric school busses.

The IRA was signed into law on 16 August 2022 and is aimed at supercharging the clean energy industry. The law calls for the investment over a 10 year period of nearly US\$400 billion in tax credits aimed at steering consumers to electric vehicles and prodding electric utilities towards renewable energy sources like wind or solar. It contains numerous provisions designed to encourage automakers and battery makers to buy lithium, nickel and other key materials from suppliers in North America or from the United States trade allies.

Gina McCarthy, Biden's national climate advisor, stated in the New York Times:

*"Over the past 20 months, as America's first ever National Climate Advisor, I have witnessed a paradigm shift: the private sector no longer sees climate action as a source of job losses but rather as an opportunity for job creation and economic revitalisation. It is a striking shift after 4 years of the Trump Administration, which threw science out of the window and backed out of the Paris Climate Agreement. In 2020, the future seemed grim. But today, States and companies are running towards a clean energy future".*

## **The EU Approach**

Following the crisis in the Ukraine, the EU announced in March 2022 its REP Power EU Plan. A key element of the REP EU Plan is the diversification of energy sources and accelerating the

green transition through a substantial investment in renewable energy. This includes increased production of bio-methane and hydrogen projects.

Before the crisis, Europe imported 83% of its natural gas requirements, of which 41% was of Russian origin. The plan addressed an immediate need, in the short term, to procure alternative supplies of gas, oil and coal and develop renewable hydrogen.

The EU approach is based on the Treaty on European Union (**TEU**), the Treaty on the Functioning of the European Union (**TFEU**) and the Charter of Fundamental Rights of the European Union. These primary laws and framework treaties set out the competencies and procedures for EU secondary law.

The objectives set out in the TEU and the TFEU are carried out in secondary law, which is drafted and adopted by the three main bodies of the EU's legal system:

- The European Parliament;
- The Council of the European Union; and
- The European Commission.

The EU's plan to address climate change is found in the 2020 Climate and Energy Package which aimed to reduce GHG emissions by 20%, obtaining 20% of EU energy from renewables and have a 20% improvement in energy efficiency by 2020. These objectives were re-inforced by the 2030 Climate Energy Framework which further set targets for 2030 to reduce GHG emissions by 40%, obtain 32% of EU energy from renewables and have a 32.5% improvement in energy efficiency.

To achieve these targets, the EU adopted a multipronged approach comprising of an Emissions Trading System, an effort sharing decision for non-ETS sectors, a renewable energy directive, a carbon capture and storage directive and an energy efficiency directive.

### **Climate Change related Judicial Decisions**

The courts are likely to play a far more active role in enforcing climate change.

Two landmark decisions are likely to fundamentally affect the legal landscape with respect to climate change litigation. In *Urgenda vs Kingdom of the Netherlands*, the Court of Appeal of the Hague in the Netherlands issued an order that the Dutch State be required to reduce its greenhouse gas emissions by 25% by 2020.

The judgement handed down in October 2018 involved a claim by a Dutch citizens environmental organisation whose aim was to stimulate and accelerate the transition process to a more sustainable society. The organisation claimed that the Dutch State had failed to commit to an emission reduction target so that the cumulative volume of Dutch greenhouse gas emissions would have reduced by at least 25% from the base of 1990, by the end of 2020. The Hague Court of Appeal upheld a ruling that the State was under a duty of care to limit the GHG emissions.

The second case was in Australia where the Land and Environment Court of New South Wales decided, in *Gloucester Resources Limited vs Minister for Planning*, that a coal mine development should be blocked in part because of its potential impact. The court held that an open cut coal mine was being proposed at the wrong time because the GHG emissions of the coal mine will increase global total concentrations of GHG at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions.

### **Conclusion**

Climate change provides an opportunity for addressing the South African electricity crisis. If South Africa creates the right environment, the State and the private sector can solve the electricity crisis and address the challenge of climate change.

The Bill is currently before Parliament. It is supposed to be the document which is to achieve these objectives. It sets targets which are aimed to address South Africa's excessive GHG emissions. The approach adopted is quite similar to the EU approach. It requires companies to comply with targets.

The US approach adopted by the Biden Administration seems to be more effective. In a very short period, it has reversed the conservative policies that were introduced by Trump.

If South Africa is to address its electricity crisis and create sustainable economic growth, it would do well to follow the approach adopted in the US and in that way, the optimism expressed by De Ruyter may well be achieved.

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