

FLOOD AND DROUGHT LITIGATION

Lessons from Kenya and South Africa



Acknowledgements

This report, *Flood and Drought Litigation: Lessons from Kenya and South Africa*, serves as a strategic intervention into the crisis of climate change. By analysing the application of legal rules to flood and drought events, both as standalone disasters and as manifestations of human-induced climate change, the report provides an essential roadmap for utilising litigation to redress climate injustice.

The report was commissioned by Natural Justice and the Environmental Lawyers Collective for Africa.

Authors: Melanie Jean Murcott, Executive Director, Socio-Ecological Justice Lab NPC; Maricelle Botes, Researcher, Socio-Ecological Justice Lab NPC

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Cover photo: Flooding in the Gamtoos valley in the Eastern Cape in 2026, which has cost the South African government and local farmers an estimated R1.4 billion in losses. Photo by Fanjan Combrink.

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Executive Summary

This report studies “flood and drought litigation” with reference to how legal rules and principles are applied in response to flood and drought events, both independently of and factoring in climate change. It does so, given the increase in flood and drought events due to climate change, and on the basis that litigation can be a valuable tool in response to the ensuing climate injustice and human rights violations.

The report tabulates many legal instruments that could support litigants seeking to address flood and drought risks and harms under international, African regional, and domestic Kenyan and South African law. It notes that most of these instruments are not, in general, being effectively or meaningfully invoked by litigants in cases concerning flood and drought risks and harms.

Additionally, the report shows that a vast body of relevant cases have been decided in Kenya and South Africa’s courts, grounded in (i) the law of tort/delict to seek compensation (damages cases); or (ii) administrative and constitutional law to promote assessment of climate change impacts and public participation in environmental impact assessment (EIA) processes; mitigate flood and drought risks; address housing and displacement concerns; claim disaster relief; ensure municipal service delivery; and ensure compliance with water laws (human rights cases).

The cases grounded in administrative and constitutional law are viewed broadly as human rights cases because they are generally explicitly aimed at the protection, promotion and fulfilment of human rights entrenched in the constitutional texts of Kenya and South Africa, respectively. Having mapped the existing body of laws, policies, and cases, this report offers guidance to lawyers seeking to strengthen climate justice in Africa with reference to trends, barriers and opportunities emerging from our study.

A key trend in damages cases is that efforts to claim compensation under the law of tort/delict in Kenya and South Africa, respectively, have thus far been largely unsuccessful due to the difficulty in proving causation and foreseeability, suggesting the need to develop the law and embrace novel approaches.

The report identifies the potential to rely on attribution science, drawing from foreign case law, to strengthen future damages cases. The report further highlights potential lessons from decisions of international and regional fora. Several trends emerged from the human rights cases.

First, EIA cases have generally been successful in both Kenya and South Africa. These cases establish that EIAs must incorporate climate change impact assessments and that they must facilitate meaningful participation of those affected by development, including in relation to climate risks and harms such as flooding and droughts.

Second, flood and drought risk mitigation cases demonstrate that corporations in South Africa seeking to resist drought mitigation measures have generally been unsuccessful, while communities in Kenya have successfully used litigation to resist developments that could exacerbate the impacts of drought.

Third, in displacement cases in South Africa, human rights have been successfully relied upon where the government has failed to take “reasonable measures” to provide adequate emergency shelter to affected people.

Fourth, in disaster relief cases in South Africa, the government has been ordered to make decisions about applications for disaster relief in circumstances where it has been dilatory.

Fifth, a body of municipal service delivery cases in South Africa show that the government may not unreasonably terminate municipal services and may be held accountable for failures to maintain stormwater drains and provide other services when those failures threaten or violate human rights. However, where measures taken by the government are deemed reasonable, courts have generally refused to require that additional measures be taken. In the Kenyan context, the report identifies procedural barriers in human rights cases, such as the “presumption of regularity” and the requirement that litigants must raise “a substantial question of law”.

The report highlights that litigants could strengthen future human rights cases through enhanced reliance on foreign and international law cases, including the International Court of Justice (ICJ) Advisory Opinion on states obligations in respect of climate change (2025), as well as case law emerging from the African Court on Human and People’s Rights. Additionally, the report highlights that litigants could place greater reliance on the vast body of relevant international, regional and domestic legal instruments of relevance to the impacts and risks of floods and droughts in the African context.

I Introduction

Climate change is accelerating, with grave consequences for Africa and her people.¹ The World Meteorological Organization (WMO) reports that in 2024, the global annual mean near-surface temperature was 1.55°C above the 1850–1900 pre-industrial average; the highest on record across all six datasets they relied upon (WMO 2025: 1). The average temperature across Africa in 2024 was approximately 0.86°C above the 1991–2020 baseline, making it the warmest or second warmest year on record for the continent (WMO 2025). Comprehensive and authoritative climate science² confirms that these changes to the Earth's surface temperature are human-induced and are driving significant human suffering.

Africa is home to roughly 17% of the world's population (roughly 1.3 billion people) who are reportedly among the most vulnerable to climate change, including due to extreme weather events such as flooding and drought, causing disasters (IPCC 2022: 1294; WMO 2023). According to the WMO (2023):

More than 110 million people on the continent were directly affected by weather, climate, and water-related hazards in 2022, causing more than US\$8.5 billion in economic damages. There were a reported 5 000 fatalities, of which 48% were associated with drought, and 43% were associated with flooding, according to the Emergency Event Database. But the true toll is likely to be much higher because of under-reporting.

Kasimbazi (2024) further confirms that Africa's major disasters are climate-related:

Ninety per cent of major disasters in Africa have been climate-related. Drought and floods together account for 80% of loss of life and 70% of economic losses linked to natural hazards.

In Southern Africa, the last El Niño-driven drought reduced aggregate cereal yields by 16% below the five-year average, with Zambia and Zimbabwe recording declines of 43% and 50%, respectively (WMO 2024). Pre-existing high vulnerability, including persistent high food prices, livestock and crop pests, and ongoing recovery from prior floods and a cholera outbreak, compounded the drought's impacts (Kimutai et al. 2024). In Sudan, cereal production was forecast to decline by 35% in 2024, with 21.1 million people at crisis-level food insecurity (WMO e2024).

¹ References to climate change should be construed as changes to the climate “attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods of time” in line with the definition in the United Nations Framework Convention on Climate Change (1992) (UNFCCC).

² See the International Court of Justice *Advisory Opinion on Obligations of States in respect of Climate Change* (23 July 2025), paras 284 and 74.

Overall, floods and droughts have driven the displacement of millions of people; severe economic loss; water, food, and energy insecurity; and destruction and damage of property, livelihoods, and crucial service delivery infrastructure, leading to a general erosion of human dignity among people in Africa (UN 2025). In essence, the frequency and magnitude of flood and drought events have increased due to climate change, resulting in increased exposure, vulnerability and harm, necessitating legal responses responsive to the ensuing climate injustice.

This report proceeds from the point of departure that litigation can be a valuable tool in response to climate injustice. We refer to climate injustice as the disproportionate exposure of vulnerable people and ecosystems to climate risks and harms such as flooding and drought, despite being least responsible for them, while those most responsible, corporations and governments primarily in the Global North, remain least exposed. We recognise that this distributive injustice is inextricably connected to the root causes of climate change, including systems of oppression and marginalisation such as patriarchy, colonization, and racial capitalism (Murcott, Tigre, and Ann Samuel: 5–7). We further recognise that experiences of climate injustice are shaped by multiple intersecting axes of oppression and marginalisation, including gender, race, class, religion, age, and more (ibid).

Against this background, this report contributes to a growing body of knowledge on climate change law and governance and disaster risk management, specifically focusing on how the global phenomenon of climate change litigation can be leveraged, strengthened, and refined to address climate change-induced flood and drought risks and harms. Disaster risk management is understood as “the application of disaster risk reduction policies and strategies to prevent new disaster risk, reduce existing disaster risk and manage residual risk, contributing to the strengthening of resilience against, and reduction of, disaster losses” (Kreibich et al. 2022). This report draws on scholarly literature concerning climate change and disaster risk management, as well as laws, policies, and judicial decisions of Kenya and South Africa, locating them within the context of broader international and African regional regulatory frameworks, which we have also analysed.

Next, this Introduction (Part I) explains how we utilise the term “flood and drought litigation”. Then, we briefly comment on the complexity of this area of law before setting out the questions that this report seeks to unpack and the human rights approach that we adopt throughout. Part II details our Methodology, while Part III maps relevant laws and policies emerging from international, regional, and domestic (Kenyan and South African) spheres. Part IV analyses case law that broadly falls within our conceptualisation of flood and drought litigation or offers

useful lessons. Finally, Part V summarizes trends, barriers, and opportunities emerging from the legal instruments mapped out and the cases analysed.

A. Conceptualising Flood and Drought Litigation

Litigation is increasingly being utilised as a mechanism, often as part of broader legal mobilisation efforts, to hold state and non-state actors accountable for the causes and impacts of climate change (Murcott, Tigre, and Ann Samuel 2025). Much of this litigation has been described as “climate litigation”, referring to “cases where climate change law, policy, or science is a material issue” and that meets two criteria, namely the nature of proceedings and relevance of the subject matter.³ In terms of the former criterion, a case must qualify as a formal legal proceeding (either judicial or quasi-judicial), while the latter requires material relevance and climate change as the substantive issue of law or fact. The Sabin Center for Climate Change Law’s litigation database considers scope,⁴ exclusions,⁵ categorisation,⁶ sources,⁷ and limitations,⁸ and compiles judicial and certain quasi-judicial cases globally where climate change law, policy, or science is materially at issue. However, this definition does not necessarily encompass the types of cases that people on the African continent might wish to litigate in response to climate risks and harms arising from climate change-induced floods and droughts. We use the term “climate risks” to connote “the potential for adverse consequences” for human or ecological systems arising from “dynamic interaction between climate-related hazards with the exposure and vulnerability of the affected human or ecological system to the hazards” (IPCC 2020: 4–5). The term “harm” relates to loss and damage or other adverse consequences (whether for people, infrastructure, ecosystems, etc.) arising from climate risks.

Critiquing the scope of the Sabin Center’s approach to conceptualising climate litigation, Field (2024) argues that climate litigation should be identified more broadly, not only with reference to the visibility of climate change *per se* in court cases. Rather, cases should be identified in a manner that facilitates study and advocating for “transformation of the power relations,

³ Columbia Climate School and Sabin Center for Climate Change Law (n.d.) (hereafter Columbia (n.d.)).

⁴ Columbia (n.d.). The database’s scope includes to map “judicial cases, selected administrative and investigatory proceedings, investor-state disputes, and certain proceedings before UN and regional bodies”.

⁵ Columbia (n.d.). In relation to exclusions, the database excludes cases that “only mention climate change in passing, or that affect climate outcomes without raising climate arguments directly”.

⁶ Columbia (n.d.). With reference to categorisation, cases are “tagged by case category, principal laws invoked, jurisdiction, geography, and filing year. Some cases are also tagged by status”.

⁷ Columbia (n.d.). The sources assessed include: “Court documents, media, academic literature, legal databases, and partnerships with global research networks”.

⁸ Columbia (n.d.). The database does not claim to be “exhaustive”. For instance, “some cases may be missing due to language barriers, document availability, or limited reporting”.

institutions and processes most critical in responding to the urgent and severe risks and vulnerabilities” of climate change. Thus, Field (2024: 25) promotes a “risk-thematic approach” to the identification of climate litigation that puts climate risks at the centre of case identification, “taking into account the spatial and even temporal specificity impacts”. This approach takes account of climate change-related risks and harms experienced in Africa, reported on by the International Panel on Climate Change (IPCC).

As set out below (Part II Methodology), we view flood and drought litigation as legal disputes falling within the Sabin Center’s definition of climate litigation to the extent that they develop legal rules and principles that could be responsive to flood and drought risks and harms. In addition, adopting a risk-thematic approach, we view drought and flood litigation as addressing flooding and drought events broadly, regardless of whether litigants and/or courts do not directly link these events to climate change. The value of this broad approach to flood and drought litigation is that it enables an exploration of how legal rules and principles have evolved in response to flood and drought events independently of factoring in climate change, as well as the potential of legal rules and principles to evolve amidst the climate crisis.

B. Legal Challenges in Flood and Drought Litigation

Flood and drought litigation raises unique legal challenges. In flood-related cases, harm may arise due to a combination of climate risks, polluting industries, and negligent urban planning or inadequate drainage systems, for instance. Yet, legal standards (such as causation) were not necessarily developed with this kind of complexity in mind and may not be well-suited to holding government and corporations accountable for harms. Further, flood and drought litigation could implicate a range of intertwined laws governing human rights, disaster risk management, the environment, particularly water and land, and transboundary harms, from international to the sub-national regulatory regimes. Yet, knowledge of these laws and the interactions among them remains limited.

Given that Africa is particularly vulnerable to climate risks and harms arising from droughts and flooding, this report proceeds from the premise that there is scope for African lawyers in different jurisdictions to learn more about the role of litigation in advancing climate change and/or flood and drought risk and harm mitigation and adaptation, including how litigation can evolve, drawing on a range of possible legal tools. This report seeks to offer lawyers, activists, and others concerned with climate justice, an understanding of the relevant legal frameworks to empower them to assess whether and, if so, emerging litigation approaches that seek to advance accountability for droughts and flooding could be successfully implemented in their jurisdictions.

C. Key Questions

This report sets out to answer the following questions:

- First, what African regional and international legal instruments could potentially advance litigation in response to climate change and flood and/or drought risk management?
- Second, what is the body of domestic law and policy available to advance litigation in response to climate change and flood and/or drought risk management in Kenya and South Africa?
- Third, have cases been decided of relevance to flood and drought risks and/or harms in Kenya and South Africa, and what trends can be distilled from such cases, including in relation to the causes of action relied upon, the outcomes of the cases, and the reasoning of the courts?
- Fourth, what potential barriers and opportunities emerge from the cases for those seeking to advance climate justice in Africa and how could flood and drought risk litigation be strengthened by embracing the opportunities, overcoming the barriers, and drawing on the body of available legal instruments?
- Fifth, what insights can be gleaned from the International Court of Justice [Advisory Opinion](#) on states obligations in respect of climate change (2025), relevant African regional case law, and selected examples of foreign litigation?

Kenya and South Africa were selected as sites of study for several reasons. Firstly, they have both been vibrant sites of climate justice-oriented litigation that seeks to hold State and non-State actors accountable for climate risks and harms (Bouwer and Field 2021; Murcott and Vinti 2024; Omuko-Jung 2021). Put differently, both countries have an active base of civil society actors concerned with climate injustice and sufficiently independent judiciaries willing to adjudicate climate change issues. Secondly, a range of laws and policies responsive to climate risks and harms have been developed in Kenya and South Africa, traversed in this report (Part III Mapping). Thirdly, both countries are vulnerable to flooding and droughts, have already experienced floods and droughts worsened by climate change, and these events are predicted to become more extreme as the climate crisis deepens.⁹ These events are already violating human rights in Kenya and South Africa, necessitating measures to advance

⁹ See e.g. Okoko (2022); Lam et al. (2022); Orimoloye et al. (2022); Department of Cooperative Governance, Republic of South Africa (2023).

accountability. Fourthly, both countries have enabling constitutional regimes that entrench justiciable human rights and allow for reliance on international and regional laws, provided they are not inconsistent with human rights. Finally, both countries have signed on to key international and regional laws intended to be responsible for drought and flood risks and harms, exacerbated by the climate crisis.

D. Human Rights Approach

Overall, this report adopts a human rights approach, given that the impacts of climate change, particularly flooding and drought, have serious human rights implications, particularly for people in Africa. For instance, food and water insecurity and diseases driven by flooding and drought, adversely impact the rights to life, dignity, health, and environment, including by driving malnutrition and death. Children's rights are especially implicated, as malnutrition, which is worsened by extreme heat that disrupts food security and weakens immune systems, already affects almost a million children under five in South Sudan alone (IPCC 2022).

Our approach is supported by the International Court of Justice *Advisory Opinion on Obligations of States in respect of Climate Change* (23 July 2025), which highlights that “the full enjoyment of human rights cannot be ensured without the protection of the climate system and other parts of the environment” (para 403).

As such, in answering the questions above, we consider whether and to what extent courts, laws, and policies are engaging with and responding to the human rights implications of floods and drought arising from climate change. To the extent that the responses of courts, laws, and policies fail to adequately address these human rights implications, this report makes proposals to strengthen future litigation.

In offering solutions, this report should not be viewed as adopting the view that litigation is a panacea. It is merely a mechanism (with many limitations) that can be instrumentalised to protect human rights and address accountability failures.

II Methodology

To answer the questions raised above, we identified the existing body of decided cases, laws, and policies in Kenya and South Africa concerning climate change and the management of flood and drought risks and harms. We further identified relevant international and African regional laws. We considered scholarly literature to deepen our analysis.

Given that a wide range of cases have dealt with drought and flood risks in Kenya and South Africa, we identified relevant case law, first, through a broad online search using databases, namely: Southern African Freedom of Legal Information Institute (SAFLII),¹⁰ Kenya Law,¹¹ and AfricanLII,¹² and the Sabin Centre for Climate Change Law's climate litigation database.¹³ We used several iterations of search phrases, namely: "drought", "drought risk", "floods", "flooding", "loss and damage", "flood damage", "climate change", "water scarcity", "flood risk", and "disaster management". We identified thirty-nine potentially relevant decided cases emerging from Kenya's courts and seventy potentially relevant decided cases emerging from South Africa's courts.

We refined our searches by reviewing the cases and assigning them a value based on their relevance to the central project theme, assigning them either "i" for important, "b" for background information, "s" for scanning, and "n/a" for not applicable. Cases were deemed n/a if, despite mentioning flooding, drought, climate change, water scarcity, or disaster, they did not engage with laws or facts in any way that was meaningful to this report. For instance, some of these cases turned exclusively on procedural issues about jurisdiction. Cases were scanned or viewed as background if they touched peripherally on questions addressed in this report, without dealing with them in any detail. We have primarily drawn lessons from fourteen Kenyan and forty-nine South African cases identified as important ("i"), in the sense that they are relevant to the question of how the global phenomenon of climate change litigation could be leveraged, strengthened, and refined to address flood and drought risks and harms more effectively in the courts.

Given the breadth of laws and policies identified, in Part III (Mapping) we tabulated the laws and policies relevant in the global and African regional contexts, focusing on treaties, soft law, protocols, and guidelines, as developed by the African Union (AU), Southern African Development Community (SADC), and the East African Community (EAC), as well as at the

¹⁰ See <https://www.saflii.org/>.

¹¹ See <http://www.kenyalaw.org/>.

¹² See <https://africanlii.org/>.

¹³ See <https://www.climatecasechart.com/>.

international law level. We did the same for the law and policy frameworks of Kenya and South Africa, respectively. We assessed the applicability of the different instruments to flood and drought risks and harms based on their type, purpose, and relevance as determined by the content of the instrument. We also distilled keywords based on the relevance and purpose of the instruments. Keywords are used as a way for us to highlight certain trends and identify similarities or similar topics in the international, African regional, and domestic law and policy frameworks we explored. Keywords are, in some instances, words that are used in the same way in the different instruments, as well as words identified by us to act as “umbrella terms” or synonyms for words or phrases that we encountered repeatedly throughout our research and literature review. For example, we used “environmental protection” as the keyword encompassing, amongst others, “ecosystem” or “environmental protection”, and “conservation”.



III Mapping Relevant International, Regional, and Domestic Laws and Policies

One way to leverage, strengthen and refine climate litigation to address flood and drought risks and harms more effectively in the courts is to ensure that relevant legal instruments are mapped out so that they can be relied upon. This Part III (Mapping) therefore sets out to map relevant international, regional, and domestic legal instruments of relevance to climate change and drought and flood risks and harms. We begin by mapping international laws, then move to African regional laws, and then turn to domestic laws and policies in Kenya and South Africa, respectively.

A. International Laws

Globally, States have developed several instruments that are directly or indirectly responsive to flood and drought risks and harms, including by addressing the causes and impacts of climate change. These must be read with reference to the ICJ Advisory Opinion (2025), which confirmed, among other things:

- The customary obligation to prevent significant harm as applicable to the climate system, found that the due diligence standard that States must adopt in response, in order to be “stringent”, confirmed that climate obligations are *erga omnes*, and identified the legal consequences of breach, including full reparation (paras 138, 439–411; 449).
- The interdependence of environmental protection and the enjoyment of human rights (para 144).
- The Paris Agreement (2015) imposes legally binding obligations on States, including preparing, communicating, and maintaining nationally determined contributions, reducing emissions, and enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change (paras 245 and 306).

The most significant international treaties and soft law instruments are set out in Table A below.

Table A: International law framework potentially responsive to flood and drought risks and harms		
Climate and environmental laws		
Treaties		
Name	Purpose and relevance	Keywords
United Nations Framework Convention on Climate Change, 1992 (UNFCCC)	To stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human interference with the climate system.	Climate change mitigation; climate change adaptation; disaster risk reduction
Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention)	To introduce measures to prevent, control, and reduce transboundary impacts on watercourses.	Water security; water management; adaptation; equitable and reasonable utilisation
United Nations Convention on Combating Desertification, 1994 (UNCCD)	To improve the effectiveness and coordination of international cooperation to combat desertification and mitigate drought, particularly in Africa, as an urgent concern of the international community.	Disaster risk reduction; drought mitigation measures
Paris Agreement, 2015	To strengthen the global response to climate change, including by holding the increase in global average temperature to 1.5 degrees Celsius above pre-industrial levels; protect human rights; strengthen resilience, and reduce vulnerability to climate change.	Climate action; disaster risk reduction
Soft laws		
Sendai Framework for Disaster Risk Reduction 2015-2030, 2015	To prevent new disaster risks and reduce existing disaster risk and harm.	Disaster risk reduction; early warning systems; resilience
International human rights laws		
Treaties		
International Covenant on Civil and Political Rights, 1966	To ensure that states maintain conditions where all citizens enjoy civil and political rights necessary for the enjoyment of inherent dignity.	Human rights; vulnerability

International Covenant on Economic, Social and Cultural Rights, 1966	To ensure that states progressively realise economic, cultural, and social rights as the foundation of human dignity, in turn eliminating fear and want, and to create an adequate standard of living.	Human rights; vulnerability
Convention on the Elimination of All Forms of Racial Discrimination, 1965	To eliminate racial discrimination in all its forms, and ensure equity before the law, respect for human rights and fundamental freedoms, regardless of race. Additionally, to condemn colonialism, segregation, and actions that incite racial discrimination.	Human rights; vulnerability
Convention on the Elimination of All Forms of Discrimination against Women, 1979	To eliminate all forms of discrimination against women, devoting major attention to the reproductive rights of women and discrimination arising from procreation. Especially impoverished women who have limited access to opportunities.	Human rights; gender; vulnerability
Convention on the Rights of the Child, 1989	To ensure that children are afforded legal protection on the basis that the best interests of the child are a primary consideration.	Human rights; children's rights; vulnerability
Convention on the Rights of Persons with Disabilities, 2008	To enable persons with disabilities to fully enjoy all rights and fundamental freedoms equally, which includes the recognition of dignity, autonomy, diversity, and eliminating discrimination by removing societal and environmental barriers, and emphasising the need for accessibility, gender sensitivity, and care for other vulnerable groups, with an emphasis on mainstreaming disability issues and sustainable development.	Human rights; disabilities; vulnerability
Soft laws		
Universal Declaration of Human Rights, 1948 (Non-binding international declaration)	To introduce universal human rights standards that promote equality and dignity while condemning suffering and cruelty.	Human rights; vulnerability
Guiding Principles on Internal Displacement, 1998	To address the specific needs of internally displaced persons by identifying rights and guarantees relevant to their protection, including preventing discrimination, requiring the provision of humanitarian assistance; requiring the prevention and avoidance of conditions that lead to displacement, prohibiting arbitrary displacement, and protecting the human rights of displaced persons.	Human rights; disaster risk reduction; vulnerability

Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters, 2006	To provide people on the frontlines of disaster response guidance to ensure the protection of the rights of people left homeless by natural disasters.	Human rights; disaster risk management; disaster preparedness; vulnerability
Drought Risk and Resilience Assessment Methodology (International best practice)	To offer a structured methodology for evaluating drought risk and enhancing resilience to enable a transition from reactive to proactive drought management.	Disaster risk reduction; disaster preparedness; vulnerability

Perhaps the most significant of the international laws in relation to disaster management is the Sendai Framework, as all 54 African States have committed to fulfilling its targets, which include:

- Substantially reducing global disaster mortality by 2030;
- Substantially reducing the number of people affected by disasters globally by 2030;
- Reducing direct disaster economic loss in relation to global gross domestic product by 2030;
- Substantially reducing disaster damage to critical infrastructure and disruption of basic services, including by developing their resilience by 2030;
- Substantially increase the number of countries with national and local disaster risk reduction strategies by 2020;
- Substantially enhancing international cooperation to developing countries through adequate and sustainable support to complement their national actions for implementation of the Framework by 2030;
- Substantially increasing the availability of and access to multi-hazard early warning systems and disaster risk information and assessment to people by 2030.

However, our case law analysis reveals that the Sendai Framework is not yet being effectively relied upon in cases in Kenya and South Africa.

B. African Regional Framework

Africa has adopted a range of measures at the regional and sub-regional levels, potentially responsive to drought and flood risks and harms. The most significant of these are set out in Table B. We have included relevant sub-regional laws, given that sub-regional organisations on the continent have worked to facilitate the implementation and coordination of disaster risk reduction within their sub-regions, particularly to pursue interstate initiatives. Given our focus on Kenya and South Africa, we have engaged with instruments developed by the East African Committee (of which Kenya is a part) and the Southern African Development Community (of which South Africa is a part).

Table B: African regional framework for climate change and disaster risk management		
Treaties		
Instrument	Purpose and relevance	Keywords
African Charter on Human and Peoples' Rights, 1981	Recognises the importance of integrating environmental concerns into development plans and strengthening environmental governance and institutions.	Human rights; environmental protection; sustainable use of natural resources
African Charter on the Rights and Welfare of the Child (ACRWC) - A 23, 1990	Holds that states shall take all appropriate measures to ensure that refugee children, as well as children who have been internally displaced, including by disasters, receive appropriate humanitarian assistance.	Children's rights; vulnerability
Constitutive Act of the African Union (AU), 2000	Seeks to achieve human security for the peoples of Africa and includes strengthening resilience to disasters. Also, to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law; promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; promote sustainable development at the economic, social, and cultural levels. Promote co-operation in all fields of human activity to raise the living standards of African peoples and work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.	Disaster risk reduction; human security; good governance; human rights; resilience; sustainable development

Agreement for the establishment of the African Risk Capacity (ARC) Agency, 2012	To improve capacities to better plan, prepare, and respond to extreme weather events and natural disasters, and to assist member states to reduce the risk of loss and damage caused by extreme weather events and natural disasters affecting Africa's populations by providing targeted responses to disasters in a more timely, cost-effective, objective, and transparent manner. Deals with funding mechanisms and other responses in the context of extreme weather events and natural disasters.	Funding for loss and damage, disaster relief funding, emergency preparedness
African Union Revised Convention on the Conservation of Nature and Natural Resources, 2013	To adopt the measures necessary to ensure conservation, utilisation, and development of soil, water, flora, and faunal resources in accordance with scientific principles and with due regard to the best interests of the people, with full consciousness that soil, water, flora, and faunal resources constitute a capital of vital importance to humankind; of the ever-growing importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view; of the dangers which threaten some of these irreplaceable assets; and accepting that the utilisation of the natural resources must aim at satisfying the needs of man according to the carrying capacity of the environment; and the desire to undertake individual and joint action for the conservation, utilisation, and development of these assets by establishing and maintaining their rational utilisation for the present and future welfare of humankind.	Environmental protection; water resource management; water security; sustainable use of natural resources
Soft laws		
Africa Regional Strategy for Disaster Risk Reduction (ARSDRR), 2004	The strategy aims to increase political commitment to disaster risk reduction, improve identification and assessment of disaster risks, enhance knowledge management for disaster risk reduction, increase public awareness, improve governance of institutions, and integrate disaster risk reduction into emergency response management.	Disaster risk reduction; disaster risk management; emergency preparedness; public awareness; good governance
Guidelines for Mainstreaming Disaster Risk Assessment in Development, 2004	The Guidelines provide: (i) key principles for mainstreaming Disaster Risk Reduction (DRR) into development themes and sectors, including poverty reduction, agriculture, environment management, water resource management, land use planning, infrastructure, development, gender issues, HIV/AIDS and other health issues and climate change adaptation; and (ii) key guiding principles and questions on	Mainstreaming disaster risk reduction, disaster preparedness, sustainable use of natural resources, and emergency preparedness

	governance and institutional aspects of DRR, including risk identification, knowledge management, risk management applications, and integrating DRR into development plans, themes and sectors, preparedness and emergency management.	
The Climate for Development in Africa (ClimDev-Africa) Programme, 2008	An initiative of the African Union Commission (AUC), the United Nations Economic Commission for Africa (UNECA), and the African Development Bank (AfDB). It is mandated at the highest level by African leaders (AU Summit of Heads of State and Government). The Programme was established to create a solid foundation for Africa's response to climate change. Beyond the AUC-UNECA-AfDB partnership, the Programme works closely with other African and non-African institutions and partners specialised in climate and development.	Climate action
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (The Kampala Convention), 2009	Provides that state parties are obligated to facilitate the coordination of international relief and allow rapid and unimpeded passage of humanitarian relief to internally displaced persons. Links disasters and human rights and encourages coordination for victims. Article 5(7) requires that African Union Member States must not arbitrarily displace people during projects conducted by private actors.	Human rights; sustainable development; participation; displacement; vulnerability
Humanitarian Policy Framework, 2015	In respect of preparedness and response, regional emergency response teams will be established and comprise personnel from established regional, sub-regional, and national mechanisms, which will be supported by a variety of tools and mechanisms (such as the Centre for Disease Control, Disaster Management Guidelines, African Disaster Managers' Platform, and Humanitarian Action and Natural Disaster Support). Additionally, the Assembly of the AU adopted a decision in 2016 to establish the African Humanitarian Agency (AFHA) to effectively respond to and coordinate humanitarian crises in Africa.	Emergency response; emergency preparedness; disaster risk management
AU's Agenda 2063: "The Africa We Want", 2015	The Agenda lists climate resilience and disaster preparedness as priority areas to achieve the aspiration of regional transformation and makes it clear that climate-resilient communities and economies are an integral component of the continental vision for an integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena. Aspires that: "Africa's unique natural endowments, its	climate risk management, climate-resilient development; emergency preparedness; sustainable development; integration; cooperative

	environment and ecosystems, including its wildlife and wild lands are healthy, valued, and protected, with climate resilient economies and communities." "Africa shall address the global challenge of climate change by prioritising adaptation in all our actions, drawing upon skills of diverse disciplines with adequate support (affordable technology development and transfer, capacity building, financial and technical resources) to ensure implementation of actions for the survival of the most vulnerable populations, including island states, and for sustainable development and shared prosperity." "Africa will participate in global efforts for climate change mitigation that support and broaden the policy space for sustainable development on the continent. Africa shall continue to speak with one voice and unity of purpose in advancing its position and interests on climate change. Africa shall have equitable and sustainable use and management of water resources for socio-economic development, regional cooperation, and the environment."	governance; climate justice; inclusive and equitable participation; climate action, sustainable use of natural resources
Programme of Action (PoA) for the Implementation of the Sendai Framework for Disaster Risk Reduction 2015-2030 in Africa, 2017	To contribute to building resilient African communities. In addition to the Sendai Framework's targets, it introduces five additional Africa-specific targets, which aim to improve the number of countries with disaster risk reduction integrated into their educational systems; integrate disaster risk reduction in regional and national sustainable development and climate change policy; domestic financing; the number of countries with periodically tested and risk-informed preparedness plans; and the number of regional networks for knowledge management.	Disaster risk reduction; regional cooperation; emergency preparedness; climate resilience
Tunis Declaration on Accelerating the Implementation of the Sendai Framework for Disaster Risk Reduction, 2018	To urge the African States and local authorities to include disaster risk reduction and resilience approaches into relevant national legal frameworks, not only in disaster management acts, but also in sectoral legislation and regulations; Stress the need for adequate annual national budgetary allocation to finance disaster risk reduction programmes to effectively implement the Africa Regional Strategy for Disaster Risk Reduction and the Sendai Framework; Encourage African States, Regional Economic Communities, and Local Authorities to develop and strengthen disaster loss accounting capacity and generate national multi-hazard risk profiles for risk-informed development planning and investment; Commit to promote and support the integration of	Disaster risk reduction; sustainable development; service delivery, climate action; sustainable use of natural resources; early warning systems; emergency preparedness

	climate change, disaster risk reduction and sustainable development strategies, policies, programmes, and plans of action at all levels to ensure disaster risk-informed, inclusive, resilient, and sustainable development in Africa; Encourage African States to strengthen their early warning systems, including multi-hazard and impact-based early warning, with priority on hydrological and meteorological systems and the delivery of services in an understandable manner to end-users for enhanced preparedness, response, recovery, and reconstruction, among others.	
Strategic Framework for Drought Risk Management and Enhancing Resilience in Africa, 2018	To develop and implement a strategy for a “Drought Resilient and Prepared Africa” (DRAPA), integrating national and regional institutes in Africa under African Union leadership in collaboration with the international community, including United Nations agencies. The outcome of the development and implementation of the strategic framework will be people-centred, including women and minorities, and sharpening the focus on drought issues to reduce drought impacts and enhance drought resilience across all segments of society. The development of a strategic framework for drought risk management and enhancing drought resilience is a step forward in achieving these goals. The DRAPA strategic framework and its implementation are expected to ensure a substantial reduction of drought impacts on human lives in Africa. It would also lead to a significant reduction in drought impacts on economic and environmental assets of communities and countries in Africa. In collaboration with international institutes and countries around the world, Africa can integrate drought risk management into sustainable development policies and planning. In addition, African countries need to focus on the development of national and regional institutions, cultivate efficient mechanisms for addressing drought, and build disaster resilience.	Human rights; food security; sustainable development; vulnerable groups; drought resilience; law and policy integration; drought risk mitigation
Pan-African Action Agenda on Ecosystem Restoration for Increased Resilience, 2018	This Pan-African Action Agenda on Ecosystem Restoration for Increased Resilience proposes policy measures, strategic actions, cooperation mechanisms, and on-the-ground actions to advance land and ecosystem restoration in Africa.	Environmental protection
Africa Blue Economy Strategy, 2019	Guides sustainable development and the utilisation of aquatic resources in Africa.	Sustainable development,

	To guide the development of an inclusive and sustainable blue economy that becomes a significant contributor to continental transformation and growth, through advancing knowledge on marine and aquatic biotechnology, environmental sustainability, the growth of an Africa-wide shipping industry, the development of sea, river and lake transport, the management of fishing activities on these aquatic spaces, and the exploitation and beneficiation of deep sea mineral and other resources. The Africa Blue Economy Strategy outlines the key drivers of change that are shaping Africa's Blue Economy development; strategic and technical challenges to blue economy development and identifies priority areas of intervention for sustainable blue economy development in Africa.	sustainable use of natural resources, environmental protection
AU Green Recovery Action Plan (2021-2027), 2021	The Green Recovery Action Plan will tackle the combined challenges of the COVID-19 recovery and climate change by focusing on critical areas of joint priority, including climate finance, renewable energy, resilient agriculture, resilient cities, land use, and biodiversity. Its objectives are: 1. To strengthen collaboration on a broad range of shared priorities in support of the African Union's objectives for the Continent's sustainable and green recovery from COVID-19; and, 2. To support the realisation of a shared vision for a prosperous, secure, inclusive, and innovative future for Africa.	Environmental protection, climate action
AU - Climate Change and Resilient Development Strategy and Action Plan (2022-2032), 2022	To provide a continental framework for collective action and enhanced cooperation in addressing climate change issues that improve livelihoods and well-being, promote adaptation capacity, and achieve low-emission, sustainable economic growth. Its objective is to build the resilience of African communities, ecosystems, and economies, and support regional adaptation.	Climate action; resilience; vulnerability
Integrated African Strategy on Meteorology (2021-2030), 2022	The overall purpose of the Strategy is to position weather, water, and climate services as an essential component in the national and regional development framework and for sustainable development in Africa, particularly in poverty reduction efforts, climate change adaptation, and disaster risk reduction. The objective of the Strategy is to enhance cooperation among African countries and to strengthen the capabilities of	Sustainable development, climate action, disaster risk reduction, regional cooperation, service delivery

	governments to provide weather, climate, and hydrological services. At the same time, the Strategy is a blueprint for linkages of African NMHS actions with the Africa Agenda 2063: “The Africa We Want”, the Paris Agreement, the Sendai Framework, and the United Nations SDGs. The Strategy further aims to serve as a framework for integrated and coordinated mechanisms that provide strategic direction to Members and other stakeholders in streamlining policies that address challenges and opportunities associated with the development of adequate weather, water, and climate services at national, regional, and continental levels.	
Africa Water Vision 2063 and Policy (AWVP63), 2025	Vision intended to move Africa from where it is today to where it needs to be to ensure that water available in the future is sustainable and adequate in quantity and quality to meet competing demands in the long term, including with the goal of “A water-secure and resilient Africa with safe sanitation for all.” AWVP63 provides a continental framework to achieve inclusive and climate-resilient water security, aligned with Agenda 2063 and the Sustainable Development Goals	Human rights; water security; sustainable development; climate resilience
Sub-regional laws and policies		
East African Community (EAC)		
EAC Climate Change Policy, 2011	Provides a foundational framework for addressing climate impacts through adaptation, mitigation, and research.	Climate action
EAC Development Strategy (2011–2015), 2011	Operationalises the EACCCP by specifying actions to enhance technical capacity, protect transboundary ecosystems, and improve water and sanitation services.	Environmental protection; water security; service delivery
EAC Climate Change Master Plan (2011-2031), 2011	Offers a long-term vision for climate resilience, emphasizing adaptation, technology transfer, and disaster risk reduction across key sectors	Climate action; Climate resilience, disaster risk reduction
EAC Climate Finance Access and Mobilisation Strategy (2022/23-2031/32), 2022	Aims to overcome financial barriers and increase access to climate funds, supporting the region’s Nationally Determined Contributions (NDCs).	Climate finance; NDC support
Intergovernmental	Providing a framework for coordinated action to address	Climate action; climate

Authority on Development (IGAD) Climate Adaptation Strategy (2023-2030), 2023	climate risks and enhance resilience across member states.	resilience
Southern African Development Community		
Declaration and Treaty of the Southern African Development Community, 1992	To promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation, with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa, and support the socially disadvantaged through regional integration; and achieve sustainable utilisation of natural resources and effective protection of the environment.	Sustainable use of natural resources; water security; environmental protection
SADC Protocol on Politics, Defence and Security Cooperation, 2001	To provide a coherent and comprehensive framework for the implementation of SADC's regional integration agenda for the next 10 years. It lays out, incrementally, concrete steps and milestones to be achieved in the journey towards Vision 2050. It envisages "a peaceful, inclusive, competitive, middle- to high-income industrialized region, where all citizens enjoy sustainable economic well-being, justice, and freedom".	International disaster assistance; disaster risk management; coordination
SADC Climate Change Strategy and Action Plan, 2015	To provide a broad outline for harmonized and coordinated Regional and National actions to address and respond to the impacts of climate change. Intended to build resilience and climate-proof all SADC protocols, policies, and strategies, in particular, the Protocol on Environmental Management for Sustainable Development, the Revised RISDP, the Industrialisation Strategy and Roadmap, the Regional Infrastructure Development Master Plan, and the Regional Agriculture Policy. It complements the Regional Green Economy Strategy. It prioritizes Strategic Interventions and Actions for Adaptation, given the associated vulnerability of the region to climate change. Strategic Interventions and actions for Mitigation are mainly aimed at triggering nationally and regionally appropriate actions within the context of common but differentiated responsibilities across the Regions Member States, whilst prioritising those with adaptation benefits. It also aims to enhance the regional capacity in disaster risk reduction and management in the water sector and	Climate action; common but differentiated responsibilities; disaster risk reduction

	strengthen capacity in disaster risk reduction, as well as promote climate-proofing and strategic public infrastructure for social and economic development in the human settlements and infrastructure sector, amongst others.	
SADC Regional Indicative Strategic Development Plan (RISDP) 2020-2030, 2020	RISDP 2020–2030 is a coherent and comprehensive framework for the implementation of SADC’s regional integration agenda for the next 10 years. It lays out, incrementally, concrete steps and milestones to be achieved in the journey towards Vision 2050. It also includes a commitment to upholding the core principles of the community, namely, the sovereign equality of all Member States; solidarity, peace, and security; human rights, democracy, and the rule of law; equity, balance, and mutual benefit; and the peaceful settlement of disputes.	Environmental protection, climate action, Disaster Risk Management, mainstreaming, domestic law, and policy framework integration.
SADC - Vision 2050, 2021	It envisions a regional community that has a common future and that will ensure socio-economic well-being, improvement of standards of living and quality of life, freedom and social justice, and peace and security for the people of Southern Africa, as enshrined in the Treaty.	Sustainable use of natural resources; environmental protection; sustainable development; food security; climate action; disaster risk management
Southern African Development Community Disaster Risk Management Strategy and Action Plan (2022–2030), 2023	The SADC disaster management strategy and its other programmes have helped strengthen political commitment and institutional arrangements on disaster management and risk reduction. Regarding drought and flood, the SADC Water Sector Coordinating Unit has a strategic approach to the management of floods and droughts. The SADC Regional Early Warning Unit develops information on weather threats, drought conditions, and food security. The Disaster Risk Reduction Unit (SADC DRRU) is responsible for coordinating regional preparedness and response programmes for transboundary hazards and disasters.	Food security; climate action; environmental protection; water resource management; disaster risk reduction

Despite several laws that require African States to adopt proactive approaches to flooding and drought and protect human rights, Kasimbazi (2024: 332) claims:

Disaster risk management in Africa has been shown to have limited civil protection provisions that cover forecasting, early warning systems, emergency preparedness plans, collection and

storage of emergency items, safe evacuation, and mock drills. In addition, there are limited humanitarian action provisions that cover principles of humanity, impartiality, neutrality, and independence.

Our review of the domestic legal frameworks of Kenya and South Africa reveals signs of hope, in that emerging policies seem to be responsive to this critique.

C. Domestic Legal Frameworks

Kenya

Kenya has published several laws and policies potentially responsive to drought and flood risks and harms. Some have already been invoked in litigation. The most significant of laws and policies are set out in Table C.

Table C: Kenyan laws and policies potentially responsive to flood and drought risks and harms		
Instrument	Purpose and relevance	Keywords
Constitution		
Constitution of the Republic of Kenya, 2010	Establishes a supreme law that protects the sovereignty of the Kenyan people and protects their human rights and fundamental freedoms, including rights to life, dignity, socio-economic entitlements, and a clean and healthy environment; and outlines the responsibilities of government in national disaster risk management at the national and county levels. Additionally, procedural rights to access to information and	Human rights; environmental protection; disaster management responsibility; good governance; accountability
Legislation (including draft legislation, i.e., bills and regulations)		
Environmental Management and Coordination Act, 1999	To give effect to the public's right to a clean and healthy environment, ensure sustainable development, put in place environmental protection mechanisms such as environmental impact assessment, and standards for water and air quality, while promoting public participation in environmental decision-making.	Environmental impact assessment; environmental principles; sustainable development
Climate Change Act, 2016	A consolidated legislative framework for addressing climate change, promoting climate resilience, and low-carbon development.	Climate action; climate resilience; low carbon development

National Drought Management Authority Act, 2016	Establishes a National Drought Management Authority responsible for overseeing Kenya's drought management policies and programmes, coordinating the government's drought response and climate change initiatives, promoting the integration of drought response into development programmes and projects, and developing a drought early warning system, promoting drought and climate resilience, conducting research on drought management and climate change, and publishing an annual report on climate change. Further, establishes a National Drought Emergency Fund to minimise the negative effects of drought and improve drought management.	Climate action; climate resilience; disaster risk preparedness; disaster risk reduction; early warning system; finance; stakeholder consultation
Physical and Land Use Planning Act, 2019	Provides for the planning, use, regulation, and development of land, including to combat climate change in land use development planning.	Sustainable development; climate action
Public Finance Management (National Drought Emergency Fund) Regulation, 2021	Establishes emergency funds for county governments under the Public Finance Management Act, 2012, to ensure that resources are available for disaster preparedness and response.	Disaster relief funding; disaster preparedness
National Disaster Risk Management Bill, 2023	To provide a legislative framework for disaster management and enhance effective disaster preparedness, management, mitigation, and recovery. Enhance the resilience to the impacts of disaster risks and climate change.	Disaster risk reduction; disaster preparedness; climate resilience; climate adaptation
Policies/other		
Vision 2033 Development Strategy for Northern Kenya and other Arid Lands, 2012	Accelerate development in previously marginalised arid lands, aiming to reduce poverty and inequality. Integrate regions into the national economy.	Drought management; climate change adaptation
National Disaster Risk Management Policy, 2017	Shifting from a reactive risk response to a proactive risk reduction. Forming an institutional framework by strengthening partnerships, institutions, and legal mechanisms for effective disaster management. Mainstreaming disaster risk reduction into national development planning. Enhancing capacity for early warning, mitigation, and preparedness.	Climate resilience; disaster risk reduction; flood risk management; vulnerability
National Climate Change Adaptation Plan 2023-2027, 2023	To implement climate adaptation and mitigation actions, including by improving the ability of people to cope with disasters and the delivery of disaster risk management,	Climate action; climate resilience; disaster risk reduction; disaster risk

	building resilience against extreme weather events such as droughts and floods, and guiding the nation towards a low-carbon, climate-resilient economy.	management
Disaster Risk Management Strategy 2025-2030, 2025	To reduce exposure and vulnerability of communities to disasters while enhancing their ability to withstand the effects thereof, including through a shift from short-term relief towards sustainable development and continued risk reduction of disasters aimed at minimising overall loss that results from disasters.	Disaster risk reduction; early warning systems; flood risk management
National Framework for Climate Services, 2025	A strategic initiative aimed at enhancing the delivery and use of climate information and services to support decision-making across various sectors, including by facilitating coordination with the Kenya Meteorological Department and other stakeholders to develop tailored climate services such as weather forecasts and early warning systems	Climate action; climate resilience; early warning systems

Kenya's laws and policies concerning disasters such as floods and droughts are implemented by a range of government actors at the national and county levels, most notably:

- The National Security Council, the highest authority within the disaster risk reduction framework, provides overall leadership, strategic direction, and policy oversight for disaster risk management activities;
- Various ad hoc committees of Cabinet;
- The National Disaster Management Unit, a specialised response service unit of the Kenya Police Service, tasked with providing emergency response services and managing disasters and disaster risks;
- The National Drought Management Authority;
- The Climate Change Secretariat under the Ministry of Environment, Climate Change, and Forestry;
- The Kenya Meteorological Department;
- County governments that are constitutionally mandated to manage disaster risks within their county;
- Disaster Management Committees at the county, sub-county, ward, and village level;
- The Minister of Environment, Climate Change, and Forestry, responsible for oversight of environmental and climate governance;
- The National Environmental Management Authority, the principal regulator of the Environmental Management and Coordination Act, 1999;

- The National Climate Change Council, chaired by the President of Kenya, is responsible for overall oversight, coordination, and policy guidance in implementing the Climate Change Act, 2016.

Kenya's law and policy response to drought and flood risks and harms must be read with reference to the country's supreme Constitution of Kenya, 2010, which provides that laws and conduct that are inconsistent with or contravene the Constitution are invalid (s 2(4)). In terms of section 3(1), every person has an obligation to respect, uphold, and defend the Constitution. The preambular text acknowledges respect for the environment, the heritage of the people of Kenya, and the peoples' determination to sustain the environment for the benefit of future generations. It also expresses a commitment to "nurturing and protecting the well-being of the individual, the family, communities, and the nation". The Constitution is further "given" to the people of Kenya and her future generations (preamble).

National values and principles of governance provided for in the Constitution are binding on courts when they interpret or apply any law or the Constitution (s 10). They include: the rule of law, democracy and participation, human dignity, equity, social justice, inclusiveness, equality, human rights, the protection of the marginalised, good governance, integrity, transparency, and accountability, as well as sustainable development (s 10).

The Bill of Rights is contained in Chapter 4 of the Constitution, and notes that the purpose of human rights "is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings" (s 19).

Relevant substantive rights that must be promoted, upheld and fulfilled in the context of preventing harms and risks arising from floods and droughts include the rights to life (s 26); equality (s 27); dignity (s 28); freedom and security of the person (s 29); privacy and freedom of expression (ss 31 and 33); protection of property (s 40); a clean and healthy environment (s 42); and culture (s 44). The Constitution further entrenches substantive economic and social rights, including rights to food, social security, water, education, and health care services (s 43); as well as rights of the child (s 53). These rights are complemented and reinforced by procedural rights to access to information (s 35) and fair administrative action (s 47).

Courts are enjoined to interpret the Bill of Rights in a manner that develops the law, to the extent that it does not give effect to a right or fundamental freedom, adopt interpretations that most favour the enforcement of rights and fundamental freedoms, promote the values that

underlie an open and democratic society based on human dignity, equality, equity and freedom, and the spirit, purport and objects of the Bill of Rights (s 20).

Generous standing to enforce human rights is advanced through a broad entitlement to access to justice (s 48), as well as peoples' right to institute proceedings to claim a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, whether acting in their own interest, on behalf of others or even in the public interest to enforce human rights (s 22). Additionally, section 70 of the Constitution states that "if a person alleges that a right to a clean and healthy environment has been, is being, or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter".

Kenya's Constitution incorporates international law into the law of Kenya (s 2(5)) and requires that the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms (s 21(4)).

The Environment and Land Court has jurisdiction over disputes related to Kenya's environmental right (s 3(3) of the Environmental Management and Coordination Act, 1999) and in exercising that jurisdiction, the Court must be guided by principles of sustainable development, including the principle of public participation, the cultural and social principles traditionally applied by communities in Kenya related to the management of the environment, the principles of inter- and intra-generational equity, the polluter pays principle, and the precautionary principle (s 3(5) of the Environmental Management and Coordination Act, 1999).

South Africa

South Africa has published several laws and policies potentially responsive to drought and flood risks and harms. As in Kenya, some have already been invoked in litigation. The most significant of laws and policies are set out in Table D.

Table D: South African laws and policies potentially responsive to flood and drought risks and harms		
Instrument	Purpose and relevance	Key Words
Constitution		
Constitution of the Republic of South Africa, 1996	Establishes a supreme law of South Africa that requires cooperative governance, including in relation to disasters, and entrenches human rights, including substantive rights to an environment not harmful to health and well-being; culture; access to food, water, housing, and social security; dignity; life; and equality; and rights of the child. Additionally, procedural rights to access to information and administrative justice are protected.	Environmental rights; human rights; service delivery; sustainable development; environmental protection; water security; sustainable use of natural resources; disaster relief funding; spheres of government; good governance; cooperative governance
Legislation and regulations		
Water Services Act, 1997	Formalizes the right of access to basic water supply and basic sanitation, including by establishing a non-negotiable minimum standard that must be maintained despite climatic shocks. Mandates comprehensive planning that indirectly addresses flood and drought risks to service provision.	Service delivery; human rights; climate adaptation
National Environmental Management, 1998 (NEMA)	NEMA mandates risk-reduction measures by enforcing sustainable development and preventing degradation, which directly mitigates flood and drought consequences.	Environmental protection; environmental impact assessment; climate change impact assessment
National Water Act, 1998	While the NWA does not explicitly use the term "climate change", its core principles establish the structural capacity to manage climate-related water risk, such as: 1) sustainable use (the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users, which is essential for climate resilience), 2) Catchment Management Agencies (CMAs) to delegate management functions to the regional or catchment level, allowing for decentralised and context-specific responses to localised climate impacts, 3) Water use licences, and 4) National monitoring systems and information systems to	Sustainable use of natural resources, water security, service delivery, water resource management, climate resilience, climate action, climate adaptation, monitoring, information management

	monitor the quantity and quality of water and atmospheric conditions that may influence water resources (s 137), providing the data foundation for climate adaptation.	
Compulsory National Standards and Measures to Conserve Water Regulations, 2001 (binding)	The regulations establish minimum compulsory standards for water supply and sanitation, which are necessary to protect public health from climate-related shocks (such as water scarcity or contamination from floods). They are primarily focused on drought risk mitigation through technical means, specifically water conservation and demand management (WC/DM). Flood measures are addressed indirectly through infrastructure protection.	Water resource management; service delivery; DRR; water security; drought risk mitigation
Disaster Management Act, 2002	Mandates a comprehensive approach to managing the risk of all disasters, which inherently includes floods and droughts. Explicitly focuses on the full disaster management cycle: from prevention and risk reduction to mitigation of the severity of disasters, to emergency preparedness and rapid and effective response to disasters, and post-disaster recovery. This framework requires the creation of Disaster Management Centres at National, Provincial, and Municipal levels, ensuring a multi-sphere response for localised events like droughts and floods, including by providing finance for loss and damage.	Disaster risk reduction; disaster risk management; cooperative governance, early warning systems; emergency preparedness; drought risk mitigation; flood risk mitigation; finance
National Environmental Management Biodiversity Act, 2004	NEMBA's measures are indirect but critical, focusing on protecting and managing the Ecological Infrastructure that provides natural defence against extreme hydrological events. The Act provides the legal basis for the National Biodiversity Framework (NBF), which prioritises conservation areas (like wetlands, rivers, and catchments) that naturally regulate water flow, filter water, and recharge groundwater, thereby mitigating drought and flood risks. Chapter 5 (ss 64–86) mandates the control and eradication of Invasive Alien Species (IAS). IAS consumes vast amounts of water, directly exacerbating drought conditions and threatening water security. Control programmes (Working for Water) are a primary tool for drought mitigation. The Minister may list threatened or protected ecosystems (s 52), which often include naturally flood-prone areas like coastal zones and wetlands. Protection ensures these areas can perform their natural flood attenuation and buffering	Environmental protection; drought risk mitigation; flood risk mitigation

	function.	
Climate Change Act, 2024 (partially in force in 2025)	Provides an overarching legal and institutional framework for addressing the impacts of climate change, including the planning required for flood and drought risks. Establishes a mandatory, multi-sphere planning framework for climate action, including measures that: address integrated disaster risk reduction; sectoral adaptation; include responses to localized vulnerability.	Climate action; disaster risk reduction; law and policy integration, cooperative governance, drought risk mitigation, flood risk mitigation
Policy, strategies, frameworks		
National Climate Change Response Policy White Paper, 2011	The White Paper is a foundational policy document from 2011. It provided the strategic direction for the more detailed National Climate Change Adaptation Strategy (NCCAS) of 2019 and ultimately the mandatory requirements in the Climate Change Act, 2024. The paper's core message is that adaptation is a national priority and should be mainstreamed across all government planning and operations. The NCCRP addresses flood and drought management through dedicated sectoral adaptation plans. It requires integration of climate change into the Disaster Management Act framework, specifically requiring enhanced early warning systems for extreme weather events, including floods and drought, and ensuring updated contingency planning.	Climate action; flood and drought management; sectoral adaptation planning; mainstreaming climate change
National Climate Change Response Monitoring and Evaluation System Framework, 2015	The M&E system tracks the socio-economic impacts of the climate change response, providing an opportunity to ensure that adaptation and mitigation efforts align with the principles of a just transition. The M&E Framework serves as the accountability mechanism for the country's climate response policies. It is a precursor and a foundational document for the Climate Change Act, 2024.	Climate action; climate resilience; emergency preparedness; early warning systems; drought risk mitigation; flood risk mitigation; information management system; data collection
National Climate Change Adaptation Strategy, 2019	The NCCAS outlines detailed actions to reduce vulnerability, which directly address flood and drought risk, including through integrated planning and green practices and infrastructure. It includes an action to adopt water-wise water management practices in urban areas, essential for drought resilience. It promotes increased environmental and ecological infrastructure resilience, recognising that healthy ecosystems (like wetlands and catchments) deliver services such as water	Climate action, climate adaptation, water resource management, environmental protection, climate mitigation, Early Warning Systems (EWS), climate resilience, drought risk

	and climate regulation and disaster risk reduction. It mandates the development/improvement of national early warning systems for key risks, including flooding and hydrological drought.	mitigation, flood risk mitigation
National Biodiversity Framework (NBF) 2019–2024, 2022	The NBF is an integrated planning tool and is designed to be a legally mandated instrument that compels co-operative governance and integrates biodiversity goals into other statutory plans, such as the IDPs of Municipalities. The NBF's core mandate, ecological infrastructure (EI) management, is a primary measure for mitigating flood and drought risks. The NBF promotes the use of healthy ecosystems (e.g., rivers, wetlands, catchments, and estuaries) as natural infrastructure to reduce socio-economic vulnerability.	Flood risk mitigation; drought risk mitigation; planning; vulnerability
National Water Resources Strategy in terms of the National Water Act, 1998 (NWRS-3), 2023	This is a high-level policy document that outlines the strategy for managing the resource (dams, rivers, bulk supply) in the context of South Africa's water scarcity and climate change. The NWRS-3 prioritises measures to ensure long-term water availability, directly mitigating drought risk, and includes planning for extreme events. Chapter 4 focuses on Reducing Water Demand (WC/DM), aiming to reduce non-revenue water (leaks and theft) and increase the efficiency of irrigation water use (Key drought-mitigation measures). Chapter 5 focuses on Increasing Water Supply through measures like groundwater development, water reuse, and desalination, which provide drought-proof water sources when surface water fails. The strategy mandates the review of dam safety and operating rules to balance water storage with flood attenuation (Chapter 9), ensuring infrastructure can cope with extreme rainfall events and assist in managing floods.	Flood risk mitigation; drought risk mitigation; planning; infrastructure; resilience
National Disaster Management Framework 2023 (Draft review Copy published June 2023, updating the 2005 version)	Details four key performance areas relating to disaster management, related to (1) establishing institutional capacity for implementing disaster risk management; (2) increasing disaster risk monitoring and assessment, including early warning systems; (3) introducing disaster risk reduction planning and implementation to inform developmentally-oriented approaches; and (4) requirements for preparedness, response, recovery, and rehabilitation. Acknowledges meteorological and hydrological hazards (such as drought, floods, heatwaves, and cyclones) as arising from the	Disaster risk reduction; disaster preparedness; climate resilience

	behaviour of the Earth's atmosphere, its interaction with land and oceans, the weather. and the climate it produces, and the resulting distribution of water.	
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South Africa's laws and policies concerning disasters such as floods and droughts are implemented by a range of government actors across the national, provincial, and municipal spheres of government, most notably:

- The Minister of Cooperative Governance and Traditional Affairs, designated by the President to administer the Disaster Management Act, 2002.
- The National Disaster Management Centre, responsible for promoting an integrated and coordinated system of disaster management focused on prevention, mitigation, and response; Provincial Disaster Management Centres, responsible for provincial disaster management; and Municipal Disaster Management Centres, responsible for municipal disaster management.
- The Minister of Forestry, Fisheries and Environment is primarily responsible for environmental and climate change governance, in conjunction with provincial and municipal officials, as well as the Minister of Mineral and Petroleum Resources and the Minister of Energy;
- The Presidential Climate Commission, empowered by the Climate Change Act, 2024, is a multi-stakeholder body responsible for advising the government on climate change responses and supporting a "just transition" to a low-carbon economy;
- The establishment of a Climate Change Response Fund was announced in 2024 to mobilise and direct finances towards climate resilience and financing gaps that hinder adaptation. The Presidential Climate Commission is currently sourcing funding for this Fund.

South Africa's law and policy response to drought and flood risks and harms must align with and protect, promote, and fulfil the human rights entrenched in the Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa, 1996, the country's supreme law (ss 1 and 2 of the Constitution, 1996). Relevant substantive rights include the right to an environment not harmful to health or well-being (s 24), the rights of the child (s 28), the rights to dignity, life

and security of the person (ss 10 and 11), the right to equality (s 9), the rights to access to housing (s 26), food, water and social security (s 27), the rights to privacy and freedom of expression (ss 14 and 16), and the right to culture (ss 30 and 31). The substantive rights are complemented and reinforced by procedural rights, particularly the right to administrative justice (s 33), the right to access to information (s 32), as well as broad standing and access to justice provisions that confer access to court to individuals and the public more generally, including to act in the public interest and the interests of the environment in litigation to enforce human rights (ss 34 and 38).

Importantly, the law and policy, as well as the common law, must be interpreted and applied by judges in flood and drought risk litigation in a manner that gives effect to the spirit, purport, and objects of the Bill of Rights (s 39(2)). The spirit, purport, and objects of the Bill of Rights are reflected in constitutional values contained in sections 1 and 2, such as constitutional supremacy, the rule of law, dignity, equality and freedom, as well as the preambular text, which contains an overarching social justice imperative and has been construed as advancing the African philosophy of *ubuntu* (*S v Makwanyane and Another*, 1995).

Environmental principles provided for in the National Environmental Management Act, 1998 (s 2), including the polluter pays principle, precautionary principle, and principles that require recognitional, procedural, and distributional environmental justice, must also inform all decision-making that has a significant impact on the environment.

Further judicial reasoning in flood and drought litigation must consider relevant international law and may consider relevant foreign law (s 39(1) of the Constitution).

A post-apartheid human rights-based approach to developing and interpreting law and policy with reference to environmental principles and international and foreign law represents a shift from the apartheid era treatment of law and policy in litigation that largely failed to ensure corporate or government accountability to adequately protect the rights of most people in South Africa or recognise that human flourishing and environmental flourishing are inextricably intertwined (i.e. there is no social justice without justice for the environment).

IV Case Law Analysis

This Part IV (Case law analysis) draws on insights from fourteen Kenyan cases and forty-nine South African cases that we identified as directly relevant to the question of how the global phenomenon of climate change litigation could be leveraged, strengthened, and refined to address flood and drought risks and harms in litigation. Most cases identified in both countries are grounded in administrative and/or constitutional law (generally in conjunction with human rights) rather than in the common law (fourteen of the cases reviewed in Kenya, and thirty-three of the forty-nine cases in South Africa). We begin in Section A (Damages cases) by engaging with the cases in which damages were sought for harms arising from flooding or drought, noting that litigants have met with limited success. We then turn in Section B (Human rights cases) to cases in which litigants relied on administrative or constitutional law (generally grounded in human rights).



A. Damages Cases

In order to successfully claim damages in tort/delict arising from drought or flood harms, it is necessary to satisfy all the elements of a tort/delict, namely conduct in the form of an act or omission; wrongfulness in the form of breach of a legal duty of care; fault in the form of negligence or intention; factual and legal causation; and damage or harm in the form of a quantifiable loss to a person or their patrimony. The elements of causation and negligence have been challenging to satisfy in the context of conduct (particularly omissions) related to flooding and drought.

Kenya

We identified two Kenyan cases where petitioners relied upon tort law to claim damages for flooding: *Guyo v Kenya Electricity Generating Company PLC (Kengen)* (2025) (“*Guyo*”), where the petitioner relied upon constitutional tort; and *Crystal Charlotte Beach Resort v The Registrar of Lands, Bondo and 5 Others* (2022) (“*Crystal Charlotte Beach Resort*”). In both instances, the petitioners were unsuccessful. A third case, *Lekulai & 90 Others v Attorney General & 3 Others* (2023) (“*Lekulai*”), was grounded in human rights, but the petitioners asked for exemplary damages in addition to various constitutional remedies arising from flooding and displacement. They, too, were unsuccessful.

A key lesson emerging from Kenya’s damages cases is that it has proven difficult for litigants to adduce evidence necessary to convince a court that the elements of a tort have been satisfied, particularly the elements of negligence and causation. For instance, the courts have found that flood damage has been described as “natural”, “unavoidable”, and “beyond human control”. In Part V (Trends, barriers and opportunities), we outline the possibility of relying on attribution science to hold both state and non-state actors accountable for damages arising from floods and droughts.

Guyo was decided in the Environment and Land Court, Malindi. The petitioner instituted a constitutional tort claim to enforce fundamental rights and freedoms in the public interest after the Tana River flooded. The petitioner relied on the right to a healthy environment, as well as rights to housing, water, health, and food. The flooding was caused by the release of excess water from a State-owned power company’s hydropower dams. In turn, the excess water was the result of “sudden and unpredictable weather events”. The case was dismissed on the basis that the State-owned power company had not negligently or maliciously caused harm and had given adequate notice to county officials. The Court took note of contributing factors, such as several water bodies cascading together and abnormal rainfall.

The petitioner was criticised for not distinguishing the effects of flooding from “unregulated rivers and streams vis-a-vis flooding that purportedly arose from the spillage of excess water from the respondent’s dams” (para 64). The Court acknowledged that the respondent had not adequately prepared for heavy rainfall, but that did not render it negligent. The Court ruled that the flooding, “while devastating,” was “natural” and “unavoidable”. *Guyo* suggests that it will be difficult to hold State-owned parties to account for flooding, relying on a constitutional tort if damage is caused by a “natural use of land”. According to the Global Strategic Litigation Council (n.d.), *Guyo* “highlights the complexity of attributing liability where natural disasters overlap with engineered water management systems”.

The Court made it clear that climate adaptation problems “unquestionably” fall within the jurisdiction of national or county governments to resolve (para 72). The Court also suggested that if the petitioner could show that the respondent had received climate action funding from the government to address this kind of problem, it could have had “wider latitude for investigation of [the petitioner’s] claim”. The Court implored the government to use climate finance and “wake up and take the necessary climate resilience action not just for the environment or the residents, but also for the added advantage of the great economic boon to be derived from agrarian and other developments unaffected by floods” (para 81).

In *Crystal Charlotte Beach Resort*, decided by the Environment and Land Court, Kisumu, the petitioner brought an action for damages of KShs 403,000,000 against several government respondents on the basis that part of the petitioner’s beach resort, located in the Lake Victoria region, was swept away by floods from Lake Victoria. The petitioner averred that the government had a statutory duty of care to the public in circumstances where the county government was aware of the expected rise in water levels in the region but failed to provide any relief or assistance. Further, the petitioner argued that the government should not have registered the properties knowing that it was riparian land susceptible to flooding. The government argued that the flood was an act of God as the circumstances were unforeseeable. The Court refused to hold the respondents liable on the basis that the petitioner built the structures, destroyed by the flood, contrary to the approved plans. The Court agreed with the government that the floods were unforeseeable and beyond human control. The claim was dismissed with costs. The Court did not engage with the duty of care raised by the petitioner and instead, focused on the issue of the petitioner building structures outside of the approved structural plans. Accordingly, the Court held that the government could not be held liable where rising water levels were unforeseeable.

Lekulai was brought to the High Court in Nairobi by the Masaai peoples displaced by flooding. The petitioners claimed that they were experiencing violations of fundamental rights and

freedoms and sought a declaration that their rights are violated, as well as an order directing the Ministry of Interior and Coordination of National Government to provide an elaborate plan to mitigate the disaster; compelling the government to institute affirmative action programmes to mitigate their suffering; directing the Minister of Education to provide a plan to protect learners at schools affected by the floods; an order that a commission of experts, including community representatives, assess and quantify the loss suffered, and socio-economic impacts arising from the acts and omissions of the government; assess and make recommendations on affirmative action measures to be taken, assess injury and commensurate award for harm suffered arising from constitutional rights violations (all to be done within six hundred days). The petitioners also asked for resettlement, compensation, and exemplary damages. The Court refused to grant relief in favour of the petitioners, finding that the government could not be blamed unless there was evidence that they were aware of the floods and took no action to avert the resultant effects. The petition was found not to include such evidence, and the petitioners were found not to have satisfied the necessary burden of proof.

According to the Global Strategic Litigation Council (n.d.):

This case underscores the importance of presenting robust evidence to prove that environmental events are part of a systemic pattern of government neglect rather than isolated incidents. Future litigation on climate-induced displacement should clearly differentiate between sporadic acts of nature and chronic failure in state response, while also highlighting the special vulnerabilities of indigenous and marginalized communities.

A further Kenyan case, *Nabori & 9 Others v The Honourable Attorney General and 3 Others* (2007) ("*Nabori*"), although not arising from flooding or drought damages, suggests a different approach is possible in cases concerning maladaptation (i.e., actions to adapt to climate change that result in unintentional, negative consequences, such as increasing vulnerability to climate change). In *Nabori*, the petitioners, communal landowners in a semi-arid area of Kenya, filed a suit in the High Court of Kenya in Nairobi against the government following the introduction of a noxious weed that had "run amok" and was interfering with their way of life. The weed was planted with the intention of reducing desertification and soil erosion, as well as providing wood and fuel. However, it had choked up indigenous plants and caused a loss of pastureland, loss of livestock, and blocked rivers, foot paths, and roads. The petitioners claimed the weed has thorns that are poisonous and harmful to humans, including causing allergies and lung problems such as asthma. They further stated that when livestock eat the plant, they lose their teeth and starve to death. The plants were introduced to reclaim quarry land that had been mined for cement.

It was argued that the government failed in its duties, including to prevent damage, monitor harms, and compensate affected parties for losses. The petitioners asked for declaratory relief, including that their human rights to property, life, and a clean and healthy environment had been breached, and that the introduction of the weed was a contravention of statutory and international principles, including the polluter pays principle, the precautionary principle, and sustainable development. The petitioners also asked for a declaration that certain government respondents be held directly liable for loss occasioned by the petitioners and other residents of the area, with such loss to be assessed and quantified, including resulting from the death of livestock, farmlands, playing fields, homes, and other social amenities, as well as loss arising from injury to persons. Further, the petitioners sought “an environmental restoration order” directing the government to restore the environment to the state in which it was prior to the introduction of the weed.

The Court upheld the polluter pays principle by holding the government accountable for introducing the weed. The court agreed that the weed had curtailed the petitioners’ right to develop and improve their lifestyle, such that the petitioners had been deprived of sustainable development. The court interpreted the right to life to include “the right to be free from any kind of detrimental harm to human health, wealth or socio-economic well-being”. The Court also found that the plant affected the petitioners’ right to access their properties. The Court ordered the government to pay damages caused by the weed to the region and ordered the Ministry of Environment to produce a policy working paper on the management and eradication of the plant, to be presented to Parliament within 60 days for debate and interpretation.

South Africa

We identified thirteen South African cases where litigants relied upon the law of delict in an endeavour to claim damages for flooding or drought events.

In nine of the thirteen cases, litigants sought to hold municipalities accountable for harm and damages arising from flooding: *City Council of Johannesburg v Television & Electrical Distributors (Pty) Ltd and Another* (1996) (“*Tedelex*”); *Mostert v Cape Town City Council* (2000) (“*Mostert*”); *City of Johannesburg v Debbie Investments CC* (2006); *Aboobacar and Another v Greater Johannesburg Metropolitan Council* (2003) (“*Aboobacar*”); *Lane and Others v Emfuleni Municipality* (2017) (“*Lane*”); *Savannah Foods v eThekweni Municipality & others* (2006) (“*Savannah Foods*”); *Abbott v Overstrand Municipality and Others* (2014) (“*Abbott*”); *Van Wyk v Umsombovu Municipality* (2011) (“*Van Wyk*”), and *Bergrivier Municipality v Van Ryn Beck* (2019) (“*Van Ryn Beck*”). Four of these cases were successful, while the remaining five were not, suggesting that municipalities can be held liable for flood damages in terms of

the law of delict in certain circumstances. A key factor is that expert evidence is required to prove the extent to which a municipality's negligence directly contributed to loss and damage.

The cases where municipalities have been successfully held liable for damages in delict (*Lane*; *Savannah Foods*; *Aboobacar*; and *Tedelex*) relate to poor municipal water management. In *Aboobacar*, a burst pipe caused flood damage to the plaintiffs' home. The flooding was caused when a T-pipe connected to a 60-year-old, 375mm municipal water main running along the street burst after municipal employees, attempting to increase water supply to a reservoir, opened a valve on one end of the main but failed to open a corresponding valve on the other end. This caused water pressure to build up in the sealed section of the old pipe (a "ballooning effect"), which eventually burst at its weakest point during early morning hours when water demand was lowest and pressure highest. The Court found that the municipality's employees had been negligent, applying a "reasonable expert" test, in that a reasonable municipal engineer would have foreseen the harm and conducted pressure and system tests, which were not done. *Aboobacar* demonstrates the value of expert testimony to explain complex engineering principles that enable courts to determine appropriate standards of care. The case establishes that municipal officials need to exercise due diligence when working with aged infrastructure in circumstances where flooding is foreseeable, noting that municipalities may be held to a "reasonable expert" standard.

In *Savannah Foods*, a municipality was held liable for damages arising from a failure to properly maintain stormwater infrastructure, with the Court confirming that municipalities cannot escape liability for flood-related harm by outsourcing their duties. Further, the case establishes that the government may be held accountable for failures in infrastructure management and climate adaptation. In *Lane*, the Court established that a municipality has a legal duty of care to ensure that its public works (in this case, the tarring of roads and construction of a stormwater drainage system) did not cause harm to adjacent private property. Where a municipality has failed in this duty and permitted the construction of an inadequate or inefficient drainage system, it may be liable in delict for flood damage that ensues. This principle is similarly illustrated by *Tedelex*, where flood loss and damage were directly attributed to the negligent design and construction of municipal infrastructure, in that case, a new bridge that obstructed the natural flow of a river, causing it to overflow its banks and flood a private property.

In the cases where municipalities escaped liability (*Abbott*; *Mostert*; *Debbie Investments*; *Van Wyk*; and *Van Ryn Beck*), the plaintiffs were unable to show that municipalities caused the flood loss and damage in question. These cases demonstrate the importance of expert evidence to prove the extent to which a municipality's negligence contributed to loss and

damage, setting a high evidentiary standard for flood and drought litigation arising from climate change. *Van Ryn Beck* also demonstrates that it can be challenging to establish that a municipality has a legal duty to design to a particular standard that prevents loss in cases of floods or droughts. It further illustrates that when assessing the reasonableness of a municipality's conduct, courts will consider a municipality's budget and competing priorities, such as the need to cater for informal settlements.

Two of the thirteen cases concerned commercial agriculture and involved crop failures due to drought: *Goliath and Another v Chicory SA (Pty) Ltd* (2022) ("*Goliath*"); and *Glencore Grain Africa (Pty) Ltd v Du Plessis NO and Others* (2007) ("*Glencore Grain*"). In both *Goliath* and *Glencore Grain*, drought was effectively relied upon as a defence to delictual damages claimed from farmers who were unable to produce crops due to, what the courts described as, unforeseen and unavoidable natural events.

The remaining two cases involved flooding arising from building defects where it was alleged that poor maintenance or repairs had caused damages in delict: *Rascal v Bouwer and Others* (2005) ("*Rascal*"); and *Tsogo Sun KZN (Pty) Ltd t/a SunCoast Casino & Entertainment v Specifire (Pty) Ltd* (2011) ("*Tsogo Sun*"). In both cases, the court refused to award damages in delict, since negligence had not been proven.

One additional delict case relates to financial harm arising from an alleged procurement process concerning water infrastructure: *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* (2023) ("*Esorfranki*"). *Esorfranki* concerned a claim for damages arising from an unlawful procurement process initiated by the Mopani District Municipality for the construction of a water pipeline and associated infrastructure that would draw water from the Flag Boshielo Dam. The successful bidder, G5 Consulting, was later found to have been non-compliant with the tender specifications, and it was alleged that the Municipality's officials acted with intentional misconduct in awarding the contract to G5 instead of Esorfranki, the compliant bidder. Esorfranki claimed pure economic loss (loss of profits) resulting from the Municipality's wrongful administrative decision and intentional breach of the constitutional and statutory procurement framework. The claim was based on the premise that the Municipality's breach of section 217(1) of the Constitution (fair, equitable, transparent, competitive, and cost-effective procurement) and the Prevention and Combating of Corrupt Activities Act, 2004, constituted an actionable wrong in delict.

The Constitutional Court dismissed the claim for delictual damages. The Court reasoned that holding the State liable in delict for pure economic loss resulting from an unlawful tender award would subvert the principle of subsidiarity. This principle holds that if a specific legal remedy

exists for a constitutional breach, that remedy must generally be used first. The Court found that the appropriate remedy for an aggrieved bidder lies in administrative law (judicial review of the decision) and statutory law (the Public Finance Management Act, 1999), not in a common law delictual claim for damages. Imposing delictual liability for this type of unlawful tender award was deemed inappropriate, especially where it involved intentional misconduct by State functionaries. *Esorfranki* highlights that the financial and economic integrity of critical water projects is directly linked to compliance with constitutional procurement principles. Although the delictual claim failed, the case confirms that intentional misconduct in the procurement of water infrastructure would amount to a constitutional and statutory breach, offering an opportunity to seek administrative law remedies to ensure that projects vital for drought mitigation and water security are awarded and executed transparently and competently. The ruling reinforces the constitutional duty of municipalities to manage public funds and projects, including water delivery infrastructure, with integrity.

Lessons from the damages cases

In both Kenya and South Africa, litigants have generally sought to recover damages from the government arising from flooding, as opposed to claiming damages from non-State actors such as corporations. A handful of South African cases involved unsuccessful challenges to recover damages from corporations in respect of flooding or droughts. In each of the cases involving corporations, delictual liability was avoided because negligence was not established. For instance, in the drought cases against private actors, litigants escaped delictual liability arising from crop failures because the losses were found to have been caused by unavoidable drought that was not foreseeable.

In South Africa, litigants may escape liability in damages cases where:

- Litigants were unable to establish that a municipality had a legal duty to design to a particular standard that prevents loss in cases of floods or droughts;
- A latent defect or complex systems failure can be established such that it is not possible to prove that a defendant was at fault;
- Flood or drought was not foreseeable, or the cause of loss cannot be attributed to a relevant actor who acted negligently or intentionally (e.g., where flood or drought is viewed as an “act of god”).

However, litigants in South Africa may be held liable for damages where:

- A litigant can show that municipal officials have a duty to exercise due diligence (for instance, when working with aged infrastructure in circumstances where flooding is foreseeable);

- Municipal officials are held to a “reasonable expert” standard, such that harm was foreseeable; and
- Flood loss and damage can be directly attributed to the negligent design and construction of municipal infrastructure.

In Kenya, courts appear to have been more deferential towards the government in assessing duties of care and standards of negligence than they might be in similar situations in South Africa, in that none of the flood or drought cases concerning omissions in circumstances where people have been displaced or suffered losses have been successful. The government has been excused from liability for the following reasons:

- The litigants failed to adduce evidence establishing that the government was aware of floods and took no action to avert the resultant effects;
- Flooding was not foreseeable;
- The litigants did not show that a State-owned company had received climate action funding from the government to address flood risk.

In both South Africa and Kenya, the law of delict/tort is capable of being developed, including how its elements of negligence, causation, and wrongfulness are interpreted and applied. One plausible basis to develop the law of delict/tort would be with reference to the need to give effect to the environmental rights entrenched in the constitutional texts of both South Africa and Kenya, including with reference to a growing body of foreign case law that is creatively using attribution science to construct causal chains, as discussed in Part V (Trends, opportunities and barriers) below. Additionally, the ICJ Advisory Opinion (2025), as discussed in Part V (Trends, opportunities and barriers) below, has made it clear that States have stringent due diligence obligations to take domestic mitigation and adaptation measures, and may be required to pay compensation to individuals where they fail to fulfil their human rights obligations. This could inform the development of the law of delict/tort.

A handful of pending damages cases are worth noting: *Kenya Human Rights Commission v Cabinet Secretary, Ministry of Interior and Coordination of National Government and Others* (instituted in 2024) in the High Court of Kenya at Nairobi (“KHRC”); and three cases against the eThekweni Municipality and other South African government bodies/officials in respect of the 2022 floods in Durban (the “Durban flood cases”). In *KHRC*, the Kenya Human Rights Commission is suing various government bodies/officials to seek compensation for victims of flooding after heavy rainfall in Kenya in March 2024 caused widespread displacement and loss of life. The Commission claims that the government failed to implement a timely national response plan, and its negligence persisted despite a warning from the Kenya Meteorological Department in July 2023. In the *Durban flood cases*, various corporations (including Caxton

Publishers, Toyota South Africa, and Coruseal Properties) are suing the government through their insurers for financial losses suffered because of the Durban floods. They argue that the government wrongfully and negligently failed to ensure that adequate and properly functioning flood mitigation measures were in place at the time of the floods, causing significant losses. *KHRC* and the *Durban flood cases* are likely to set important precedent in Kenya and South Africa, respectively, concerning the State's exposure to damages arising from flooding amidst the climate crisis.

B. Human Rights Cases

In both Kenya and South Africa, by virtue of constitutional supremacy under their post-colonial Constitutions and the overarching nature of human rights, as well as the obligation to interpret all law and conduct with reference to the Bill of Rights of each country, cases concerning the implementation and interpretation of environmental law and the right to administrative action that is lawful and fair fall under the broad banner of human rights cases. These cases concern challenges to environmental impact assessment processes (EIA cases), drought and flood mitigation issues, the fulfilment of the right to access to housing, particularly in emergency situations (drought and flood mitigation cases), disaster relief funding (disaster relief cases), cases concerning municipal service delivery (municipal service delivery cases) and water governance (including decisions relating to the use of water, including the banks of rivers, wetlands and estuaries and water pollution or non-compliance with water or related laws).

EIA cases

In litigation in both Kenya and South Africa challenging government decisions to authorise new developments or projects, it has been established that a failure to assess climate change impacts as part of an EIA process can render government decisions unlawful if climate change causes and impacts were relevant factors that were not adequately assessed as part of the EIA process. Additionally, EIA cases in both Kenya and South Africa underscore the importance of fair and inclusive EIA processes. They demonstrate that decisions to authorise new developments or projects can be set aside due to inadequate public participation. The body of cases confirming the importance of climate change impact assessment as a measure to ensure that human rights and climate change obligations under domestic and international law are fulfilled could be strengthened and refined to include the need to consider and prevent drought and flood risks and harms. For instance, courts could be asked to consider whether EIA adequately considers obligations under disaster risk management laws at the international, regional, and domestic levels. Thus far, very little judicial attention has been paid to these questions in EIA cases.



Kenya

At least three cases in Kenya have established that a climate change impact assessment should be conducted prior to the approval of projects that could be harmful to the climate system: *Amu Power Company Ltd v Save Lamu and Others* (2019) (“*Save Lamu*”); *The Greenbelt Movement & 4 Others v National Environmental Management Authority & Another; Kenya National Highways Authority (interested party)* (2023) (“*Greenbelt*”); and *Menengai West Stakeholders Forum & Solomon Manyarkir & Others v National Environmental Management Authority & Sosian Energy Ltd* (2025) (“*Menengai West*”).

Save Lamu concerned a successful challenge to the approval of a new coal-fired power development in an ecologically sensitive area. It was argued, among other things, that the project would significantly increase Kenya’s carbon footprint in breach of its international climate change obligations and various national obligations, including in terms of the Constitution. The Environment and Land Court (in an appeal decision) confirmed that the project’s Environmental & Social Impact Assessment (ESIA) did not adequately address the climate-change implications of the proposed coal plant, recognising that Kenya’s commitment to a “low-carbon climate resilient pathway” under both domestic law and policy (the Climate Change Act, 2016; Kenya’s Nationally Determined Contribution; and Kenya’s National Climate Change Action Plan) and its international obligations under the Paris Agreement, 2015 and UNFCCC, ought to inform the approval of such large-scale fossil-fuel projects, particularly in light of the greenhouse gas (GHG) emissions from coal combustion. It was also found that there was no proper public participation before the project was approved. The Court upheld an order that a fresh EIA must be undertaken and that proper public participation must be ensured.



The National Environmental Tribunal in *Greenbelt Movement* was concerned with whether the granting of a licence authorising the construction of a new expressway was lawful, including with reference to whether climate change had been adequately considered in the EIA process. The Tribunal found that a climate change analysis was necessary prior to the issuance of an EIA licence and should have occurred. However, the Tribunal declined to cancel the licence and instead ordered compliance with such a process within eighteen months from the date of the judgment. The government was ordered to ensure compliance with the Climate Change Act, 2016.

In *Menengai West*, petitioners challenged a decision to award a Geothermal Resource Licence to a company to explore for geothermal resources (heat reservoirs stored in the Earth's surface), including by undertaking geothermal drilling. The Environment and Land Court,

Nakuru, upheld their challenge, particularly because public participation was insufficient and a climate change impact assessment had not been conducted. In reaching its conclusion, the Court relied upon the Rio Principles and South African case law, including the *Earthlife Africa* decision discussed below. The Court remarked that “climate impact assessment is a tool used to guide policy development and decision-making, ensuring actions align with climate change duties, by identifying potential impacts and risks associated with climate change and proposed projects or policies” (para 70). The Court found that these assessments are “crucial for understanding the potential consequences of climate change and for developing effective adaptation and mitigation strategies” (para 71). The Court set aside the licence decision and ordered that a comprehensive Environmental and Social Impact Assessment Study in compliance with all relevant laws and regulations be undertaken, considering the views of all affected persons within the project area.

In addition to challenging EIA processes for failure to conduct climate change impact assessment, several cases concerning environmental decision-making have raised inadequate public participation. These include: *Abdalla Rhova Hiribae and 3 Others v The Hon Attorney General and 6 Others* (2010) (“*Hiribae*”); *Friends of Lake Turkana Trust v The Hon Attorney General and Others* (2012) (“*Lake Turkana*”); *Luo Council of Elders and 8 Others v County Government of Bomet and 24 Others* (2018) (“*Luo Council*”); and *Ndambiri and Another v Nairobi Metropolitan Services and 19 Others* (2024) (“*Ndambiri*”).

In *Hiribae* and *Ndambiri*, the petitioners sought to stop development projects from proceeding, and failed to do so, since they could not establish rights violations. It also appeared that they had been afforded at least some opportunities to participate in the decision-making processes at issue. In *Ndambiri*, the petitioners could not overcome a “presumption of regularity” in relation to the decisions taken. However, in *Hiribae*, the petitioners were able to convince the Court that the projects in question, which would occur in the Tana Delta Wetlands, an ecologically sensitive area, required ongoing monitoring to ensure that communities’ rights were not violated. In *Hiribae*, the Court thus ordered disclosure and a re-evaluation of the plans to develop the Tana Delta Wetlands with the participation of the petitioners and other affected communities.

Lake Turkana further highlights the importance of transparency in environmental decision-making. The governments of Kenya and Ethiopia had concluded an agreement to establish a grid connection between the countries and expand power supply. Various dams would have to be built as a result (for hydroelectric power) along the Omo River. The petitioner asked the court to compel the disclosure of the agreements and arrangements concluded relating to the project. The court was also asked to prohibit agreements from being concluded relating to the

power supply until a full, independent EIA had been undertaken. It was argued that the power project would deprive communities of their livelihoods, lifestyle, cultural heritage, and attachment to Lake Turkana, and that the government had failed in its role as public trustee by failing to conduct a comprehensive EIA. Concerns were also raised about a lack of transparency concerning the project.

The Court found that the project threatened the rights of communities, but no violations had occurred yet. The Court, therefore, refused to find that human rights (to dignity, life, livelihood, cultural and environmental heritage) had been infringed, as there was no concrete evidence of such violations. The Court found that the government and other parties sued, as trustees of the environment and natural resources, owe a duty and obligation to the petitioner to ensure that the resources of Lake Turkana are sustainably managed, utilised, and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Government of Ethiopia. The Kenyan government's duty not to cause harm was emphasised. The Court also highlighted the significance of the precautionary principle, "an approach to the protection of the environment that is based on taking precautions even if there is no clear evidence of harm or risk of harm from an activity or substance". Additionally, the court emphasised that: "access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment". Ultimately, the Court ordered that the relevant agreements must be disclosed and that measures be put in place to sustainably manage Lake Turkana.

Two cases reveal that procedural barriers can stand in the way of challenging the outcome of EIA processes. In *Luo Council*, the petitioners were advised that they ought to have challenged the veracity of an EIA report in the National Environmental Tribunal before approaching a court. In *Legai & 2 others v Six Zero Six Investments Limited & 7 others* (2023), the petitioners complained that a lease and tourism project had been permitted on land on which the II Ngwesi Community depended for their survival. The Community alleged that it experiences the effects of severe drought and climate change and has had to shift from reliance on pastoralism to agriculture to reduce the drought impact and unpredictable rain patterns. They argued that the development would violate their human rights, including their environmental rights. The Court ruled that the petitioners had to show that they had raised a "substantial question of law worthy of reference to the Chief Justice" but had failed to meet that standard. Accordingly, their claim was dismissed.

South Africa

A growing number of cases in South Africa establish the need to conduct a climate change impact assessment before an environmental authorisation can lawfully be granted in favour of new projects, particularly when the government authorises fossil fuel developments. In these cases, the courts have taken their role as guardians of the Bill of Rights seriously and relied upon the environmental right and right to just administrative action, sometimes in conjunction with other rights, such as the rights to food and culture, when interpreting environmental and planning legislation. These cases have demanded meaningful participation in EIA, as well as consideration of climate change causes and impacts, where they are relevant. The first case to do so was *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (2017) ("*Earthlife Africa*"), in which the Minister of Environmental Affairs' decision to grant an authorisation to Thabametsi Power Company (Pty) Ltd ("Thabametsi") to construct a new coal-fired power plant in South Africa's Limpopo Province was reviewed and set aside. Thabametsi's environmental authorisation was successfully challenged relying on a combination of human rights (including the right to just administrative action given effect by the Promotion of Administrative Justice Act, 2000) and environmental laws. Among other things, Earthlife Africa successfully argued that the granting of the authorisation was unlawful as a matter of administrative justice because climate change impacts had not been assessed. The High Court interpreted the relevant provisions of the National Environmental Management Act, 1998, to give effect to the spirit, purport, and objects of the Bill of Rights, particularly the environmental right, as well as South Africa's commitments under international climate law.

Building on *Earthlife Africa*, in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* (2022) ("*Sustaining the Wild Coast II*"), the High Court set aside a decision of the Minister of Mineral Resources and Energy. The Minister granted Shell and its local partners the right to explore for oil and gas in the seabed of South Africa's Eastern Cape coastline. The exploration right would involve Shell conducting seismic surveys in search of oil and gas reserves. The High Court recognised potentially interrelated impacts of seismic surveys and the granting of the exploration right more generally on the climate system, livelihoods, community wellbeing, cultural practices, and spiritual beliefs. It further acknowledged that the proposed seismic surveys and subsequent fossil fuel extraction would disrupt the marine ecosystem in the area, contribute to climate change, infringe upon local communities' right to access food, impinge subsistence fishing, which constitutes a vital part of their livelihoods (para 116). In reviewing the decision on the ground of a failure to consider relevant factors, the High Court stated (para 125):

Had the decision-maker had the benefit of considering a comprehensive assessment of the need and desirability of exploring for new oil and gas reserves for climate change and the right to food perspective, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable.

Among other things, the High Court emphasised that the affected communities have spiritual and cultural ties to the sea, and proposed oil and gas exploration would infringe their cultural rights entrenched in sections 30 and 31 of the Constitution (para 114).

Sustaining The Wild Coast II illustrates that a broad range of factors may be considered relevant in authorising new fossil fuel developments, and a failure on the part of the government to consider these factors can result in environmental authorisations being declared unlawful and set aside.



Another case concerning an EIA process is *Green Connection NPC and Another v Minister of Forestry, Fisheries and the Environment and Others* (2025) (“*Green Connection*”), a challenge to the granting of an environmental authorisation permitting exploration for oil along South Africa’s West Coast. The Minister of Mineral Resources and Energy had granted an environmental authorisation in favour of Total Energies EP South Africa Block 564 (Pty) Ltd. The authorisation permitted Total Energies to conduct, among other things, exploration drilling to determine whether geological structures in the seabed contain fossil fuels in extractable amounts. The applicants, Green Connection NPC and Natural Justice, argued that the Minister’s decision to authorise exploration drilling fell to be reviewed and set aside as unlawful administrative action, including because of a failure to consider relevant factors, including climate change impacts, transboundary harms, and socio-economic impacts. The High Court drew on the precautionary principle as expressed in the National Environmental Management Act, 1998, in reasoning that Total Energies “was compelled to adopt a cautious approach and take protective and preventive measures” before harm (in this instance arising from a blowout and oil spill) materialises (para 105). The decision to grant an environmental authorisation was reviewed and set aside.

Additionally, *South Durban Community Environmental Alliance and Another v Minister of Forestry, Fisheries and the Environment and Others* (2025) (“*SDCEA*”) concerned a challenge of a government decision to grant an environmental authorisation permitting Eskom to build a gas-to-power power plant in Richards Bay. The Supreme Court of Appeal affirmed the High Court’s finding in *Earthlife Africa* that “the climate change impacts of a listed activity must be considered when assessing applications for environmental authorisations” (para 48), including with reference to South Africa’s commitments under the UNFCCC and Paris Agreement (para 46). The Supreme Court of Appeal further highlighted that alternatives to the gas-to-power power plant (including renewable energy); cumulative impacts, including greenhouse gas emissions associated with the extraction and transportation of the gas from source to Richards Bay; and strategic concerns such as climate change and food security, needed to be assessed (paras 43–66). Because these and other factors had not been considered, the Supreme Court of Appeal set aside the decision to grant an environmental authorisation and ordered that a new application for an environmental authorisation be done by Eskom, particularly because the public participation process in the first EIA was inadequate.

Whilst *Earthlife Africa*, *Sustaining The Wild Coast II*, *Green Connection*, and *SDCEA* concern challenges to EIA processes related to fossil fuel projects, climate change has also been found to be a relevant consideration in the context of urban land use planning in the City of Cape Town. In *Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local*

Government, Environmental Affairs and Development Planning: Western Cape and Others (2020) (“*PHA*”), the High Court reviewed and set aside a land use planning decision and environmental authorisation approving an urban development that could adversely impact an aquifer on which farming in the area depends. The High Court set aside the decisions and referred them to the City of Cape Town for reconsideration. The Court reasoned that the decisions were unlawful because they were made without adequate and up-to-date geohydrological studies that considered water scarcity in a time of climate change. *PHA* sets an important precedent in relation to cases concerning the intersection of urban development, agriculture, and water and food security. It establishes the need for comprehensive and up-to-date scientific information relating to flood and drought risks and harms when authorising development.



Lessons from the EIA cases

Overall, the EIA cases in Kenya and South Africa establish that a climate change impact assessment should be conducted prior to the approval of projects that could be harmful to the climate system. They further show that a range of factors could be relevant in approving developments that align with human rights.

In our view, the phenomenon of climate litigation could be refined to place more emphasis on the need for flood and drought risk and harm assessments as part of EIA. This view is supported by the emphasis in the ICJ Advisory Opinion (2025) on the need for stringent due diligence to ensure compliance with States' adaptation and mitigation obligations, as well as the disaster risk management laws and policies outlined in Part III (Mapping). The methodology for assessment could be drawn from existing best practices, such as the World Bank Group's Drought Risk and Resilience Assessment Methodology, 2024.

The cases also underscore the importance of public participation, including with reference to transparency obligations. In Kenya, the *Hiribae* and *Lake Turkana* cases confirm that Courts can be approached to ensure transparency and ongoing monitoring of projects to protect human rights, which could be a valuable avenue for relief in cases concerning flood and drought risks and harms. Put differently, a lack of transparency could be the subject of litigation in response to flood or drought risk or harms.

In South Africa, *Sustaining The Wild Coast II* (confirmed on appeal in *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* (2024)), *Green Connection* and *SDCEA* highlight that public participation must occur in languages that people understand, must not be top-down, and must ensure meaningful participation of affected communities. In each of these cases, because of failures of meaningful public participation, the outcome of EIA processes was found to be unfair and, therefore, unconstitutional. The courts also connected the failure to ensure meaningful participation with a failure to consider relevant factors in decision-making. For instance, in *Sustaining The Wild Coast II*, Shell's failure to engage with communities meant that their concerns about their cultural practices protected by the rights to culture entrenched in the Constitution were left unheard.

The ICJ Advisory Opinion (2025), discussed further in Part V (Trends, barriers and opportunities), strengthens the argument for climate change impact assessments and addressing climate change as a human rights issue. This is because the ICJ found (para 403) that:

“In order to guarantee the effective enjoyment of human rights, States must take measures to protect the climate system and other parts of the environment. These measures may include, *inter alia*, taking mitigation and adaptation measures, with due account given to the protection of human rights, the adoption of standards and legislation, and the regulation of the activities of private actors. Under international human rights law, States are required to take necessary measures.”

Further, the ICJ reasoned that the customary duty to prevent significant harm to the environment entails an obligation to act with due diligence, which requires, among other things, undertaking risk assessments (paras 135–138). Additionally, to fulfil their climate change mitigation and adaptation obligations by acting with due diligence, the ICJ confirmed that States could be required to undertake assessments of climate change impacts and vulnerability (paras 251–259).

Drought and flood mitigation cases

Kenya

We did not identify decided cases challenging failures to implement relevant flood and drought risk or disaster management laws or policies in Kenya. This is unsurprising given that most of Kenya’s disaster risk reduction or management laws and policies are relatively new (see Table C in Part II (Mapping) above). However, in *Tsavo Heritage Foundation and 7 Others v Country Government of Taita Taveta and 2 Others* (2022) (“*Tsavo Heritage Foundation*”) the petitioners sought to declare, amongst other things, that certain land parcels located in the Taita Taveta region be protected as ranches, including for migration corridors, grazing land and waterholes for wild animals, and that the government be interdicted from taking ownership or possession of such land for alternative land uses. Essentially, the litigants sought to protect the land as a drought mitigation measure. The petitioners’ attempt to secure their land tenure was unsuccessful, but the Court did protect the use of their land as ranches and, in doing so, recognised that the protection of wildlife and their habitats was particularly important as the country faces prolonged droughts as a result of climate change (para 29). The Court acknowledged further that “prolonged drought results in depletion of food and water, which in turn leads to humans and wildlife competing for scarce natural resources” (ibid). These factors informed the Court’s order protecting the ongoing ranching. Further, *Haji and 6 Others v Cabinet Secretary, Minister of Tourism and Wildlife and 8 Others* (2025) (“*Haji*”) concerned a challenge to the establishment of wildlife conservancies as a drought mitigation measure. Affected communities argued that in establishing conservancies, there was inadequate public participation and that their human rights to life, which includes a right to live with dignity, and

the right to livelihood and earn a living, were threatened. They also claimed that they would suffer arbitrary deprivations of their property. The Court found that their claim was premature, since the conservancies in question had not yet been registered, public participation was ongoing, and no rights violations had occurred yet. As such, their claim was dismissed.

South Africa

Two cases in South Africa can be viewed as drought risk mitigation cases: *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* (2021) (“*Sembcorp*”) and *Astral Operations Limited v Ekurhuleni Metropolitan Municipality and Another* (2016) (“*Astral*”). *Sembcorp* demonstrates that increased water charges may be viewed as rational where they are intended to mitigate disasters such as drought and flood. *Astral* suggests that interdict proceedings to challenge water restrictions should be coupled with a review to challenge the lawfulness, fairness, and/or reasonableness of the underlying decision-making.

Sembcorp concerned the imposition of a tariff on the provision of water services to a private user, Sembcorp Siza Water (Pty) Ltd, to mitigate the effect of drought in South Africa’s KwaZulu-Natal Province. Sembcorp argued that the decision to impose the tariff was irrational and unfairly discriminatory and sought to review and set aside the decision in terms of administrative law. However, the Constitutional Court upheld the decision to impose the tariff, finding that it was rational, including because it was intended to cover operational and maintenance costs to mitigate drought.

Astral involved an unsuccessful challenge to a municipal decision to introduce a “watershedding programme” that would introduce water use restrictions during a drought. Astral Operations Limited, a distributor and supplier of breeding chickens, was unhappy about the restrictions as its abattoir and processing facility use high volumes of water, including for “evisceration”, which involves the systematic removal of internal organs from slaughtered birds. The company complained that it had not been consulted prior to the municipal decision; however, it did not seek to challenge the decision in terms of administrative or constitutional law, nor did it establish a clear right to an uninterrupted supply of water. Accordingly, the company’s interdict was unsuccessful. *Astral* demonstrates the importance of relying on administrative and constitutional law when seeking to challenge water restrictions that may be procedurally or substantively unjust. The case also demonstrates that it will be difficult to successfully pursue commercial-based challenges to the imposition of water restrictions in times of drought, given that there is no right to an uninterrupted water supply. In *Astral*, the Court noted that granting the company such a right would prejudice other users. Cases grounded in human rights and livelihoods are more likely to be taken seriously than cases grounded in commercial interests.

City of Cape Town v Really Useful Investments 219 (Pty) Ltd (2018) (“*Really Useful Investments*”), *Ehlers and others v Rand Water Board* (2006) (“*Ehlers*”), and *Glaffer Investments (Pty) Ltd and Others v The Minister of Water Affairs and Forestry of the Republic of South Africa and Another* (2000) (“*Glaffer*”) can be construed as flood risk mitigation cases. They set a strong precedent for using municipal by-laws and/or national environmental legislation and/or property law to address development activities that potentially or actually interfere with watercourses in a manner that could potentially increase flood risk and/or undermine flood risk mitigation.

In *Really Useful Investments*, the respondent, Really Useful Investments 219 (Pty) Ltd, owned a property in Hout Bay, Cape Town, adjacent to the Disa River, an area prone to flooding. It had been developing the property into a secure residential estate and began dumping fill material near the Disa River to create new platforms for building additional dwelling units. The City of Cape Town, as the local authority, was alerted to this activity and determined that the dumping was unlawful as it encroached on the Disa River’s floodplain. The City’s case was that the respondent’s activity contravened the City’s Stormwater Management By-Law of 2005 and environmental legislation. The City issued a compliance notice and directive, requiring the company to remove the fill material. The respondent resisted compliance, and the City initiated legal proceedings to compel the respondent to comply. The High Court declared the respondent’s conduct unlawful and found that the Disa River and its floodplain constituted a stormwater system, and the dumping of fill material within the 1:100-year floodplain was a *prima facie* violation of the By-Law. The Court accepted expert opinion that the dumping displaced water, which increased flood levels and the risk to other properties. The Court also found that the respondent had failed to obtain the necessary consent from the City for the activity. The City was authorised to remove the soil, rubble, and fill, and the respondent was ordered to comply with the compliance notice and directive issued by the City.

In *Ehlers*, two owners of units in a sectional title scheme had built structures below a flood control line near a watercourse controlled by a municipal body, the Rand Water Board. They had done so without obtaining the necessary approvals in terms of applicable water laws and had not complied with disaster risk procedures. The Water Board sought an interdict compelling the removal of the structures. The interdict was granted, and the High Court’s decision was taken on appeal. In the Supreme Court of Appeal, the appeal was dismissed, affirming the priority of public safety and statutory compliance over private property rights when it comes to flood risk management.

Glaffer concerned a servitude granted in favour of the government under an “old-order” water law, the Irrigation and Conservation of Water Act, 1912, which limited how private landowners

could use their land near Hartebeespoort Dam. The government argued that the servitude was important to prevent harm to the Dam infrastructure, including to prevent damage from foreseeable flooding. The landowners argued for a narrow interpretation of the servitude that would allow greater use of their land. The High Court supported a broader interpretation of the servitude aligned with the government's approach. In doing so, the court adopted a purposive interpretation of the law linked to the public necessity of dam safety and flood control. A similar line of reasoning was adopted in *Benoni Town Council v Meyer and Others* (1961) to interdict a person from filling a natural vlei (i.e. a marsh or wetland).

Lessons from drought and flood mitigation cases

In Kenya, *Tsavo Heritage Foundation* suggests that litigants can potentially defend their land rights by demonstrating that existing land uses represent effective and necessary drought mitigation or adaptation measures. Further, *Haji* reveals that public participation is an important feature of any drought mitigation measure and that government officials must carefully consider the human rights implications of proposed drought mitigation measures. Among other factors, the Court suggested that grazing and water access needs of communities would be important considerations.

In South Africa, the case law suggests that the government has played a key role in ensuring that flood and drought risks are mitigated, including by imposing water restrictions or additional water charges on commercial users in the context of droughts and invoking environmental and property law to limit development in flood-prone areas. Government actors could bolster their flood and drought mitigation claims with reference to their climate change adaptation and mitigation obligations highlighted in the ICJ Advisory Opinion (2025), as discussed above in reference to the EIA cases. They could also rely on relevant international and regional obligations law. For instance, in *Tsavo Heritage Foundation* and *Haji* affected communities' claims could have been bolstered by reliance on Article 5(7) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), 2009, which requires that African Union Member States must not arbitrarily displace people during projects carried out by private actors. Moreover, the Sendai Framework for Disaster Risk Reduction 2015-2023, 2015 and Drought Risk and Resilience Assessment Methodology could be relied upon to motivate meaningful drought risk assessment. Lastly, the United Nations Convention to Combat Desertification, 1994, could be relied upon in flood and drought mitigation litigation as an interpretive framework to establish State obligations.

Housing and displacement cases

The right to access to adequate housing has been enforced in at least four South African cases concerning emergency situations, including cases where people were displaced due to flooding and required emergency shelter. We did not identify any equivalent cases in Kenya. None of the flooding events in the South African cases appear to have been explicitly linked to climate change. Moreover, climate and environmental laws did not inform the relief granted in favour of the vulnerable communities, representing a missed opportunity to recognise that a functioning and flourishing environment creates the conditions in which socio-economic rights can be fulfilled. Domestic disaster risk management law and policy played a material role in a 2026 case, suggesting that litigants are beginning to connect the human rights implications of flood and drought risks and harms to a failure to implement these laws.¹⁴

Government of the Republic of South Africa and Others v Grootboom and Others (2000) (“*Grootboom*”) is a well-known Constitutional Court decision in which a group of approximately five hundred and ten children and three hundred and ninety adults (the Grootboom Community) were living in intolerable conditions in an informal settlement. When they moved onto private land, they were forcibly evicted, and their shacks were demolished. They then sought shelter on a nearby sports field, living in desperate conditions, exposed to the elements during winter without basic sanitation or access to water. They successfully argued that the government was failing in its constitutional duty in terms of the right to access to adequate housing (s 26 of the Constitution) to achieve the progressive realisation of the right, especially for those in desperate need or a crisis. The Court reasoned that section 26(2) of the Constitution imposes a positive obligation on the government to devise and implement a comprehensive and coordinated housing programme that is reasonable, which requires that it be “balanced and flexible” and make “appropriate provision for crisis situations”. Existing housing programmes were found to be unreasonable because they did not provide relief for people in the position of the Grootboom Community. The Court issued a declaratory order (a declaration of rights) stating that the government's housing programme at the time was inconsistent with the Constitution for failing to make reasonable provision for people facing a housing emergency or crisis situation. The government was ordered to implement a programme that includes reasonable measures to provide relief for people in such situations.

In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* (2001) (“*Kyalami Ridge*”), the Constitutional Court faced an application challenging the government's decision to establish a temporary transit camp for

¹⁴ See *Saziwa and Others v Mhlontlo Local Municipality and Others* (2026) at paras 52, 54, and 63.

flood victims on state-owned land nearby. Wealthy residents belonging to the Kyalami Ridge Environmental Association alleged that the government's action was unlawful since it was not authorised by specific legislation and did not comply with environmental and planning laws. The Constitutional Court found that the government had acted lawfully, finding that the government owed the flood victims obligations in terms of the right to access to adequate housing, in the context of a disaster.

Kyalami Ridge demonstrates that the government may face resistance when it seeks to fulfil its human rights obligations in response to flooding and drought events. However, *Kyalami Ridge* is a valuable precedent demonstrating that human rights form a legitimate basis to pursue flood and drought risk and harm mitigation and adaptation measures. It further demonstrates that environmental laws ought not to be weaponized against vulnerable communities who suffer disproportionately from the impacts of disasters.

In *Mbatha and Others v City of Johannesburg Metropolitan Municipality and Others* (2014) ("*Mbatha*"), the applicants were residents of an informal settlement known as Freedom Charter Square. The settlement was situated on a flood line and was prone to frequent flooding due to rain. The applicants brought an urgent application for relief, specifically seeking an order to be relocated to temporary emergency accommodation. Their claim was based on the constitutional rights to housing, human dignity, and the rights of the child, arguing that the Municipality was failing its duty to take reasonable measures to provide temporary emergency accommodation under the National Housing Code. The High Court found in favour of the applicants. The court reasoned that the City of Johannesburg's offer to provide temporary emergency accommodation at a civic hall was inadequate, as it would infringe on the applicants' constitutional rights to human dignity, freedom, security, and privacy. It would also violate children's rights to basic nutrition, shelter, basic healthcare services, and social services. The court granted an order for urgent relief, directing the City of Johannesburg to provide suitable temporary emergency accommodation that did not violate the applicants' constitutional rights.

Mbatha provides an avenue for challenging substandard emergency shelter that violates the fundamental rights to dignity, privacy, and the rights of children. It also affirms the duty of municipalities to act urgently and proactively to move residents away from areas prone to foreseeable environmental disasters (such as an informal settlement on a flood line), linking climate vulnerability directly to constitutional socio-economic rights obligations.

The decision is a powerful application of the *Grootboom* principle (which requires the state to provide "reasonable legislative and other measures" for the progressive realisation of the right

to housing) in the context of an urgent crisis caused by environmental vulnerability. It suggests that “emergency accommodation” cannot simply be any shelter but must meet a minimum standard of constitutional decency. Interestingly, no mention is made of climate change in *Mbatha*, which could serve to link the applicants’ vulnerability to the climate crisis and trigger the governments’ obligations in terms of relevant climate and environmental laws in response to their plight. Instead, the judgment makes reference to “excessive rainfall”, without linking the cause of that rainfall to the climate crisis. This gap could be informed by an absence of expert evidence.

Finally, *Saziwa and Others v Mhlontlo Local Municipality and Others* (2026) (“*Saziwa*”) concerned extreme weather events that occurred in the rural district of Qumbu in the Eastern Cape, which affected the lives and properties of twenty-nine people (the applicants). The applicants contended that the extreme weather conditions rendered them with limited shelter and requested that the local municipality provide emergency shelter to all affected residents. The applicants relied on the Disaster Management Act, 2002, and sections 26 and 33 of the Constitution for relief. The government denied that an extreme weather event had occurred such that it was under an obligation to provide housing or shelter. They further denied that the extreme weather constituted a “disaster” for purposes of the Disaster Management Act, 2002, triggering an obligation to assist. Instead, the government contended that the application was a ploy on the part of the applicants to “jump the [social housing] queue”.

The Constitutional Court determined that the government officials had breached their constitutional and statutory obligations stemming from section 26 of the Constitution, the Disaster Management Act, 2002 and relevant housing laws. The Court held further that shifting blame from one government official to another, instead of assisting the applicants, was a failure of cooperative governance enshrined in the Constitution. The Court held that the matter must be remitted back to the High Court before another judge, to determine disputes of fact relating to the need for temporary emergency shelter for individual applicants. The government was, however, ordered to prepare a report, following the outcome by the High Court, and to deliver the report within two months, on affidavit, detailing how the needs of the applicants have been addressed. Usefully, the Court remarked that it is not necessary for a municipality to declare a disaster in terms of the Disaster Management Act, 2002, to trigger its obligations to deal with it.

Lessons from the displacement cases

The displacement cases demonstrate that floods and droughts are increasingly displacing vulnerable people, violating housing and other human rights. South African courts have shown a willingness to enforce housing rights. Representing a missed opportunity, none of the cases drew on the international or African regional climate change and disaster risk management laws and policies outlined in Tables A and B in Part III (Mapping) above, as discussed further in Part V (Trends, barriers and opportunities) below. Nor do the cases explicitly connect disaster management to climate change risks and harms. There is scope thus to develop this jurisprudence by relying on international and regional instruments concerning disaster risk management and climate action in future cases. Relevant obligations include those under the Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters, 2006, which provide people on the frontlines of disaster response with guidance to ensure the protection of the rights of people left homeless by natural disasters. Further, the displacement cases could leverage the phenomenon of climate litigation by making the link to climate change clearer in future litigation to bolster arguments that the government is required to fulfil not only housing rights and disaster management laws, but also climate change obligations, including in relation to climate resilience and adaptation.

Mbatha and *Saziwa* demonstrate that government officials do not appear to appreciate or understand their obligations to be responsive in disaster situations, suggesting that litigation could play a valuable role as an accountability-enhancing mechanism to prevent human rights violations and climate injustice. Additionally, it appears that education and capacity building on the content of government obligations under the disaster management laws are required. Educational and capacity-building endeavours are, in fact, required by relevant international and regional laws discussed Part III (Mapping) in Tables A and B, including the United Nations Convention on Combating Desertification, 1994, and the Sendai Framework for Disaster Risk Reduction 2015-2023, 2015.

Disaster relief cases

We identified three South African cases where authorities responsible for disaster management failed to provide disaster relief grants. We did not identify any equivalent Kenyan cases. However, *Lekulai* (discussed above in Section A. Damages cases) could have been framed as a disaster relief case, as opposed to a human rights and displacement case in which exemplary damages were sought.

The first of the South African cases was *Mweza v Member of the Executive Council Department of Social Services and Population Development (Northern Cape)*, *Barensse v*

Member of the Executive Council Department of Social Services and Population Development (Northern Cape) (2008) (“*Mweza*”), which concerned two consolidated applications involving failure by the government to provide disaster relief. The first matter related to drought relief. The applicant, Ms Mweza, lived in Hanover (Northern Cape), an area officially declared a disaster area due to drought. She depended on social grants and a small-scale subsistence farming activity (vegetables and maize). Drought had severely impacted her subsistence farming, undermining food security and livelihood. She applied for drought relief (R900) in May 2004. Despite a proper application, falling within the qualifying category, and the area being officially declared a disaster zone, she received no response or payment for an extended period (over a year).

The second matter related to storm disaster relief. The applicant had applied for emergency relief following storm damage. The government’s failure to provide disaster relief resulted in continued post-disaster vulnerability, prolonged economic and subsistence loss, deepened poverty, and hardship. This is a classic example of “secondary loss and damage”. The applicants relied upon their human right to administrative justice given effect by the Promotion of Administrative Justice Act, 2000, their entitlement to social assistance in terms of legislation, and their constitutional right to social security and dignity. The High Court found that the government’s failure to act was unlawful as a matter of administrative justice, and that the relevant officials had a duty to act timeously and reasonably in circumstances where applicants met the qualifying criteria for disaster relief. The Court considered the fact that the applicants were poor, vulnerable, and disaster-affected and depended on the relief for their survival. Further, the Court noted that the government could not escape accountability through bureaucratic failure. The Court ordered the government to make a decision on the applications and recognised the applicants’ entitlement to proper consideration and processing of their applications for disaster relief.

In the second case, *Winvoël and Others v MEC for Social Development, Northern Cape and Others* (2011) (“*Winvoël*”), in which 101 indigent people residing in the Colesberg District of South Africa’s Northern Cape Province sought to compel the government to determine whether they were entitled to a R900.00 once-off drought relief grant after their area was declared a disaster area in 2004 and 2005. The lead applicant, Ms Winvoël, was a functionally illiterate farm worker who lost her supplementary income from farming due to the drought. The applicants claimed they submitted application forms in May 2004, but their forms were overlooked or turned down without receiving any decision or reasons from the authorities. The applicants relied upon their right to just administrative action given effect by the Promotion of Administrative Justice Act, 2000. The High Court granted the relief sought, noting that the applicants’ version was more credible than the “contradictory and shameful” evidence of the

government officials. The Court issued a mandatory interdict compelling the relevant government officials to consider and decide the applications for disaster relief within sixty days, and if the applicants were unsuccessful, to provide written reasons within thirty days of the decision.

The third case, *National Minister of Social Development and Another v Carolus and Others* (2009) ("*Carolus*"), arose from a flood in the Northern Cape Province that left many people homeless and in a state of distress. The government had established a Disaster Relief Fund to provide assistance to the flood victims. An earlier court order had directed the Minister of Social Development to take steps to ensure that the fund provided relief to the respondents. The Minister failed to comply with the order, and the respondents then brought an urgent application for an order compelling the Minister to comply within 90 days. The Minister's defence was that the fund was a juristic person and the Minister had no authority to compel the fund to act. The Minister further argued that the order was incapable of being complied with. The flood victims brought a constitutional application to enforce a previous court order against the Minister and compel compliance. The application was based on the principles of the rule of law and the constitutional obligation of the state to provide social assistance and disaster relief. The High Court granted the application, ordering the Minister to comply with the previous order within 90 days. The Court reasoned that the Minister, as a public official, had a constitutional duty to respect and obey court orders. The Court found that the Minister's recalcitrance was without merit and that the Minister did, in fact, have the authority to compel the fund to act. The Court emphasised that court orders must be complied with, as non-compliance undermines the rule of law and the administration of justice.

A fourth case, *Bushula v Ukhahlamba District Municipality* (2012) ("*Bushula*"), concerned a situation where reasonable disaster relief, in the form of water supply, was provided to a community, but the community nevertheless later sought to compel the government to restore their water supply. The Court found that the government was taking reasonable measures in terms of the human right to access to water and that the community had a water supply, such that it refused to grant the relief sought by the community.

Lessons from the disaster relief cases

South Africa's disaster relief cases suggest that the government has allocated funding to assist vulnerable people in disaster situations, but is not necessarily administering the funding effectively, necessitating applications to compel the government to provide relief. Litigants are thus resorting to courts to uphold the human right to social security, which is particularly important in a time of disaster. They demonstrate that in circumstances where government officials have a duty to act in disaster situations, challenging their failure to act can secure

meaningful remedies for those affected. At the same time, they reveal recalcitrance on the part of government officials to provide disaster relief to vulnerable people, which only serves to heighten their vulnerability amidst the climate crisis, deepening climate injustice.

As in South Africa, Kenyan legislation (e.g., Public Finance Management (National Drought Emergency Fund) Regulation, 2021 and National Drought Management Authority Act, 2016) provides for disaster relief funding, such that future litigation in Kenya could seek to compel the provision of funding to those impacted by droughts and flooding, including with reference to the disaster risk management policies outlined in Table C in Part III (Mapping).

What is interesting about *Mweza*, *Winvoël*, *Carolus*, and *Bushula* is that the relevant disaster was not linked to climate change in the jurisprudence, and the cases are not framed as climate litigation. However, the government's own reports suggest that the weather events and their adverse impacts on human rights are undoubtedly driven by climate change (see e.g. Namakwa District Municipality 2023). The phenomenon of climate litigation could be leveraged by making the link to climate change in future disaster relief cases clearer to bolster arguments that the government is required to fulfil not only disaster management laws and rights to social security, but also climate change obligations, including in relation to climate resilience and adaptation.

Municipal service delivery cases

South Africa

We identified eight South African cases (not already discussed in this report) that speak indirectly or directly to municipalities' powers and duties of relevance in the context of drought and flood risks and harms. We did not identify any equivalent Kenyan cases.

First, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) ("*Bon Vista*") establishes that in view of the right to access to water protected by section 27 of the Constitution, a municipality may not disconnect the water supply of residents due to the building owner's non-payment of arrears. Although not directly about flood or drought risks or harms, *Bon Vista* affirms that litigants can insist on municipal water supply by virtue of the constitutional right to access to water, which could be relied upon in future cases concerning the impacts on water supply of climate-induced drought or flooding.

Secondly, in the infamous case of *Mazibuko and Others v City of Johannesburg* (2010) ("*Mazibuko*"), the Constitutional Court found that the City of Johannesburg's water policies that introduced pre-paid water metres and a very limited free basic water allocation for

impoverished people were “reasonable measures” aimed at achieving the progressive realisation of the right to access to water. The Court did so, given the need to manage a scarce resource and the fact that the City had an obligation to act reasonably within its available resources. *Mazibuko* has been highly criticised for upholding policies that leave the most vulnerable with no access to water (e.g., Murcott 2015) but nevertheless remains an important precedent that could inform a minimalist approach to water policies amidst climate-induced drought and flooding events, even for those most vulnerable.

Thirdly, in *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (2010) (“*Nokotyana*”), the applicants, residents of an informal settlement, sought an order compelling the Ekurhuleni Metropolitan Municipality to provide them with basic services, including sanitation and lighting. The case was not directly about flood or drought risk or harm, but sets a precedent that could be useful in future cases. The applicants lived in unsanitary and dangerous conditions. The municipality’s response was that it had a plan to upgrade the settlement but was awaiting a decision from the Member of the Executive Council (MEC) for Housing. The residents were suffering while the government entities were engaged in bureaucratic delays. The applicants approached the court to enforce their constitutional rights to adequate housing (s 26), an environment not harmful to their health or well-being (s 24), and access to sufficient water (s 27), arguing that the municipality and the MEC had failed to take reasonable and progressive steps to realise these rights. The Constitutional Court dismissed the applicants’ appeal, finding that the municipality had taken reasonable steps by submitting an upgrading application to the MEC. However, the Court found the MEC’s delay in making a decision unreasonable, and reasoned that the constitutional rights to housing and a healthy environment place a positive duty on the state to act, and that this duty is not fulfilled by inaction. The Court further affirmed that the right to housing must be realised progressively. Although the Court did not grant the applicants’ request for an order compelling the municipality to provide services, it issued a supervisory order (a type of structural interdict), compelling the MEC to make a final decision on the municipality’s upgrading application within fourteen months.

In a fourth case, *Propshaft Master (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* (2017) (“*Propshaft*”), the applicants were a group of private companies that brought an urgent application against the Ekurhuleni Metropolitan Municipality after their properties were repeatedly flooded by a nearby river. The river, which formed part of the stormwater system, was not properly maintained. Flash floods in November 2016 caused significant damage to the riverbed and the bridge culverts, and the municipality failed to take reasonable steps to clean and rehabilitate the area. The applicants argued that the municipality’s inaction caused the ongoing flooding and harm to their properties. The

applicants sought an order compelling the municipality to comply with its constitutional and statutory obligations. Their claim was based on a violation of the constitutional right to an environment that is not harmful to health or well-being in section 24 of the Constitution. They also relied on the municipality's statutory duties to manage and maintain stormwater systems.

The Court granted the application, finding that the municipality had a clear constitutional and statutory duty to maintain the river and stormwater system, grounded in the environmental right. The Court reasoned that the municipality's failure to act was unreasonable and constituted a breach of its obligations. The Court remarked that the applicants had "correctly, submitted that a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fall within the scope of protection provided by section 24 of the Constitution" (para 8.4). The Court held that the applicants were entitled to a legal remedy to compel the municipality to take the necessary steps to prevent further harm. The Court ordered the municipality to take all reasonable steps to remediate the river, including cleaning and clearing culverts beneath a bridge and preventing future blockages. The Court further directed the municipality to report back to the applicants within seven days and then monthly thereafter.

Fifthly, in *Mshengu and others v Msunduzi Local Municipality and Others* (2019) ("*Mshengu*"), the applicants were members of a community residing on a farm who brought an application against the Msunduzi Local Municipality for failing to provide them with basic services, including access to sufficient water, sanitation, and refuse removal. The applicants lived in conditions described as "appalling", with no running water, and they were forced to use open-pit latrines. The first applicant, Mr Mshengu, who died during the proceedings at the age of one hundred and four, was found to have the right to dignity, which was being undermined by the lack of basic services. The lack of water and proper sanitation created an environment of unhygienic conditions, and the applicants argued that this constituted a breach of their constitutional rights to a healthy environment, sufficient water, and dignity. The applicants brought a constitutional application to enforce their rights under the Bill of Rights against the municipality. They sought a declaratory order that the Municipality's failure to provide services was a violation of their rights. They also sought a structural interdict compelling the Municipality to provide the services.

The Court granted the application, finding that the Municipality's failure to provide basic services was a breach of the applicants' constitutional rights. The Court reasoned that the Municipality had a positive duty to take reasonable measures to progressively realise the rights in the Constitution, particularly the rights to sufficient water and a healthy environment. The Court held that the Municipality's conduct was unreasonable and that it had failed in its duty

to ensure the provision of these services in a sustainable manner. The court also held that the application did not need to be certified as a class action because it was an application to enforce rights under the Bill of Rights against the State. In addition to granting declaratory relief, the Court granted a structural interdict, compelling the Municipality to fulfil its positive duties under the Constitution. The Municipality was ordered to file a report detailing how it would provide the applicants with access to basic services, including water, sanitation, and refuse removal. The court retained supervision over the matter to ensure the municipality complied with the order. The case could inform municipalities in the context of flooding or drought events.

Sixthly, in *Unemployed Peoples Movement v Premier Province of the Eastern Cape and Others* (2020) (“UPM”), the Unemployed Peoples Movement sought relief against the Makana Municipality for persistent service delivery failures and maladministration stretching back to 2014. These failures had led to a crisis, impacting the constitutional rights of residents to a safe environment, water, and basic social security. The Municipality had even failed to comply with a mandatory financial recovery plan imposed on it in 2015. The Movement sought a declaration that the Municipality had breached its constitutional obligations and an order directing the Provincial Executive to intervene. The Court granted the relief sought and directed the Provincial Executive to dissolve the municipal council and appoint an administrator to approve a temporary budget and ensure functionality until a new council was elected. *UPM* suggests that in the event of extreme maladministration, including in response to flooding or drought, an appropriate remedy may be to dissolve a municipal council.

In a seventh case, *Oppenheimer Park Golf Club v Matjhabeng Local Municipality and Another* (2020) (“OPGC”), a golf club brought an urgent application against the Municipality for failing to maintain and repair the municipal stormwater drainage system. As a result of the Municipality’s failure, the golf course was repeatedly flooded with stormwater, sewage, and other pollutants, causing significant damage. The golf club argued that the Municipality had a constitutional duty to provide a safe and healthy environment, and that its failure to maintain the drainage system was a breach of this duty. The applicant sought a structural interdict to compel the Municipality to comply with its constitutional obligations and to take the necessary steps to repair and maintain the stormwater drainage system. The claim was based on the Municipality’s failure to uphold its constitutional duties under section 24 (the right to an environment that is not harmful to health or well-being) and section 152 (the objects of local government) of the Constitution.

The Court granted the structural interdict in favour of the golf club. The Court reasoned that the Municipality had a clear constitutional and statutory duty to manage and maintain the

stormwater drainage system. The Court found that the Municipality's failure to do so was a breach of its constitutional obligations and that the golf club was entitled to an order to compel compliance. The Court noted that a structural interdict was the most appropriate remedy because it would require the Municipality to take specific, positive steps to rectify the problem and would also allow for ongoing court supervision to ensure compliance.

Lastly, *South African Property Owners Association v City of Johannesburg* (2024) ("SAPOA") concerned a municipality's right to impose a once-off levy on new land developments to fund the capital cost of installing new or upgrading existing bulk external engineering services, including water, sanitation, electricity, roads, and stormwater. The South African Property Owners Association alleged that the imposition of the levy was unlawful as a matter of administrative justice, but the Court upheld the charge, permitting the municipality to impose it, including to support the City's overall infrastructure growth and ensure that the existing infrastructure drawn upon by the new development could be funded for future upgrades. SAPOA lays the foundation for municipal efforts to fund and maintain services and infrastructure that can prevent drought and flood risks and harms from materialising.

Lessons from the municipal service delivery cases

The South African cases establish that municipalities may not unreasonably terminate the provision of basic services in a manner that infringes human rights. Additionally, municipalities have positive duties to take reasonable measures to provide basic services. Where they unduly delay in the provision of those services, the courts may grant structural interdicts and exercise supervisory jurisdiction to ensure that measures are taken within a reasonable time. In extreme circumstances, a court may even dissolve a municipal council.

The case law also establishes that municipalities shoulder constitutional and statutory duties to prevent flooding by maintaining stormwater drainage. Where they fail to fulfil these duties, courts may require that municipalities take specific, positive steps to rectify ensuing problems and may exercise supervisory jurisdiction to ensure compliance. Thus far, the cases have not drawn on relevant regional and international law obligations arising from the instruments outlined in Tables A and B in Part III (Mapping), representing a missed opportunity. For instance, the Sendai Framework for Disaster Risk Reduction 2015-2030, 2015 requires that municipalities strengthen disaster risk governance and allocate specific budgets and integrate structural, economic, and environmental measures to mitigate risks.

Water governance cases

Kenya

Mureithi and 2 Others (Suing as administrators of the Estate of Ruth Muthoni Rudorot) v Nancy Rudorot (2022) (“*Mureithi*”) concerned the protection of a wetland in terms of the Environmental Management and Coordination Act, 1999. The case arose from a dispute about the subdivision of land and the proper determination of the boundaries of the land because the land in question had changed due to climate change drying up land that was once swampy, potentially making it more readily available for use. The Court remarked that the parties were obliged to conserve and protect the riverine wetlands because the law requires their sustainable utilisation in a manner compatible with the continued presence of wetlands and their hydrological, ecological, social, and economic functions and services. Given these obligations, in surveying the land for purposes of subdivision, the county surveyor was obliged to include the relevant environmental authorities.



South Africa

Several cases in South Africa concern water governance of potential relevance to flood and drought litigation in the future.

Two cases, *Umfolozi Sugar Planters Limited and Others v Isimangaliso Wetland Park Authority and Others* (2017) (“*Umfolozi*”) and *Abbott* (discussed in Section A. Damages cases) establish that private land owners are not owed a duty to artificially breach a river mouth or estuary to prevent harm caused by flooding to the property owners. Such flooding is viewed as a “natural consequence” of private land lying in the estuarine functional area. Judicial reviews challenging a refusal to breach a river were unsuccessful. In *Umfolozi*, the relevant government powers were interpreted with reference to the right to an environment not harmful to health or well-being. On the other hand, *Gerber and Another v Gerber and Others* (2009) (“*Gerber*”) illustrates that obstructing the flow of a river in a manner that disturbs peaceful and undisturbed possession of water flow can be prevented in litigation on the basis that such action infringes property rights and access to water. This is particularly so if the obstruction occurs without compliance with the National Water Act, 1998. The successful litigant relied upon the *mandament van spolie* and non-compliance with water law. A key lesson is that drought and flood risk and harm mitigation measures must be taken in compliance with the National Water Act, 1998.

Two cases relate to the transferability of water rights: *Ramah Farming v Great Fish River Water Users Association and Others* (2020) (“*Ramah Farming*”) and *Lötter NO and others v Minister of Water and Sanitation and others and related matters* (2022) (“*Lötter*”). Both *Ramah Farming* and *Lötter* confirm that water rights may be transferred, but that such transfer must comply with the National Water Act, 1998. This is important since water trade could be utilised to promote climate resilience amidst drought and flooding. At the same time, trade can facilitate unjust distribution of water.

Two cases demonstrate that the government is empowered to enforce a statutory duty of care imposed on polluters to take reasonable measures to prevent pollution to water in terms of the National Water Act, 1998: *Harmony Gold Mining Co Ltd v Regional Director: Free State, Dept of Water Affairs and Forestry and Another* (2006) (*Harmony I*) and *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others* (2013) (*Harmony II*). They both concerned a challenge by the mining company to the lawfulness of directives compelling it to take reasonable measures to prevent pollution, including pumping and water treatment. The directives were aimed at preventing acid mine drainage in the event of polluted mine water rising to the surface or leeching into underground water. Even though the mining company had ceased operations, the decision to issue a directive was upheld. In

both cases, the Supreme Court of Appeal found that the statutory duty of care to prevent pollution should be interpreted in a broad manner that gives effect to relevant environmental principles and the environmental right.

Mostert Snr and another v S (2010) relates to crimes for breaches of water law, including providing false water consumption readings, theft of water through an unregistered pump station, tampering with a water flow monitoring system measuring device, and illegally abstracting water in a manner that detrimentally affected a water resource. While the court reasoned that water in a river is not capable of being stolen, the Court held the accused liable for multiple statutory offences in terms of the National Water Act, 1998, and for fraud. The case sets precedent for holding those who fall foul of water laws accountable under criminal law.

Lessons from the water governance cases

We identified only one relevant Kenyan water governance case, which affirmed the need to protect and conserve wetlands in the context of climate change. Without reference to climate change, South Africa's water governance cases reveal that litigation seeking to compel the government to prevent flooding that is a "natural consequence" of private land lying in an estuarine functional area has proven unsuccessful thus far. Courts could take a different approach where vulnerable peoples' lives and rights to access to adequate housing are at stake as a consequence of such flooding. South Africa's water governance cases demonstrate further that the unlawful disruption of water flow can be prevented in interdict proceedings, while unlawfully abstracting water in breach of water law can lead to criminal sanctions. Interestingly, water trade has been endorsed by the South African courts, which could serve to heighten or alleviate unjust water distribution, depending on who is permitted to trade water and at what cost. Finally, South African courts have interpreted the government's power to compel polluters to take reasonable measures to prevent pollution to water in a broad manner, considering the environmental right and environmental principles, including the polluter pays principle.

V: Trends, Barriers, and Opportunities

In this Part V, we discuss, in Section A., **trends** distilled from relevant litigation in Kenya and South Africa, including in relation to the **causes of action** relied upon, the **outcomes** of the cases (remedies granted), and the **reasoning** of the court. Then, in Section B., we address **potential barriers** and **opportunities** for those seeking to advance climate justice in Africa. In doing so, we explore how climate-induced flood and drought risk litigation could be strengthened.

A. Trends

Litigants potentially or actually impacted by climate change, flooding or droughts in both Kenya and/or South Africa have primarily relied upon causes of action grounded in: (i) tort/delict to seek compensation in the form of damages for harm caused by flooding or drought (damages cases) or (ii) administrative and constitutional laws grounded in constitutionally entrenched human rights to promote the assessment of climate change impacts and public participation in EIA processes; mitigate flood and drought risks; address housing and displacement concerns; claim disaster relief; ensure municipal service delivery; and ensure compliance with water laws (human rights cases). We highlight key trends emerging from the damages and then turn to trends that can be gleaned from cases grounded in human rights.

Damages cases

Damages cases relating to flood and drought harm in South Africa and Kenya have been mostly unsuccessful. They have not generally leveraged the global phenomenon of climate litigation by linking harm to climate change and States' obligations in the face thereof. In South Africa, a handful of cases grounded in the law of delict against municipalities have been successful in circumstances where harm could be directly attributed to a municipality's negligence concerning infrastructure or construction, municipal officials were held to a "reasonable expert" standard, or a municipality owed due diligence obligations in circumstances where harm was foreseeable given aged infrastructure, for instance. In Kenya, tort cases pursued against the State or State-owned entities concerning harm due to flooding and droughts have been unsuccessful due to challenges in adducing evidence that the government was aware of risk and took no action to avert harm, flood impacts were not foreseeable, or an absence of climate finance to address risks.

Where the elements of a tort/delict can be established, damages could be awarded for the cost of fixing structural damage, the cost to repair damaged movable assets, medical

expenses, the costs of temporary accommodation, loss of earnings by individuals or loss of revenue of businesses, compensation for physical or emotional trauma and loss of enjoyment of life, particularly if injuries prevent people from carrying on their normal daily activities.

In Kenya, the *Nabori* case demonstrates that courts may be willing to grant “environmental restoration orders” in circumstances where an act of government has caused harm to the environment that results in injuries and loss of life and destruction of farmlands and social amenities. Courts may also order the payment of damages and produce policies to address harms.

Key barriers include the challenges of proving the elements of delict or tort, particularly causation and foreseeability, an aspect of fault. Opportunities include reliance on a growing body of attribution science and drawing on foreign case law that has invoked attribution science, as well as relying on the findings emerging from the ICJ Advisory Opinion (2025). We discuss these further in Section B. (Barriers and opportunities) below.

Human rights cases

EIA cases

Courts in both Kenya and South Africa have firmly established in a growing body of EIA cases that climate change impact assessment is required prior to the approval of developments that could harm the climate system. Additionally, the EIA cases demonstrate that public participation must be conducted meaningfully (including in relation to climate change impacts) to withstand judicial scrutiny. Litigants seeking to set aside approvals of developments where climate change impact assessment was not done properly or at all have generally been successful. Similarly, litigants who have challenged EIA processes where public participation consisted of a mere check-box exercise or was exclusionary have generally been successful. In these cases, the types of government decisions where a failure to assess climate change mitigation and/or adaptation concerns has been successfully raised thus far include approval of coal-fired power stations (*Earthlife Africa* and *Save Lamu*); approval of a new expressway (*Greenbelt Movement*); approval of a geothermal resource licence (*Menengai West*); approval of offshore exploration for oil and gas (*Sustaining the Wild Coast*; *Green Connection*); approval of urban development (*PHA*); and approval of a gas-to-power plant (*SDCEA*). The EIA cases have leveraged the global phenomenon of climate litigation to advance climate justice.

The EIA cases in Kenya have established that climate change impact assessments must be done with reference to rights in Kenya’s Constitution and obligations under the Climate Change Act, 2016, and the Paris Agreement, 2015. In South Africa, the courts have interpreted

various environmental legislation, particularly the National Environmental Management Act, 1998, with reference to a range of human rights, particularly the environmental right, and international law, particularly the UNFCCC and Paris Agreement. The EIA cases in both countries have also engaged with international human rights obligations and obligations under the African Charter, to some extent.

EIA cases have not generally engaged with the need to assess flood and/or drought risks and ensure that appropriate mitigation and adaptation measures are in place (though *PHA* in South Africa is a notable exception). The opportunity exists in future EIA cases to rely on international, regional and domestic laws and policies concerning disaster risk reduction and management (summarised in Tables A and B as well as C or D in Part III (Mapping) above), and to insist on disaster risk assessments as part of the South African or Kenyan governments' stringent due diligence obligations outlined in the ICJ Advisory Opinion (2025), discussed further in Section B. (Barriers and opportunities) below.

The remedies awarded in EIA cases have generally been to set aside the EIA or outcome thereof, and require that a new EIA process be followed, including by prescribing that particular issues should be assessed in a comprehensive and participatory manner. Additionally, courts have ordered that officials must comply with their obligations under relevant laws, such as Kenya's Climate Change Act, 2016, or produce relevant information to communities to ensure transparency and inclusivity in EIA processes.

Flood and drought risk mitigation cases

Litigants in Kenya relied on human rights to resist the authorisation of developments that could increase drought in *Tsavo Heritage Foundation*. The Court connected drought risk mitigation to climate change by acknowledging that "prolonged drought results in depletion of food and water, which in turn leads to humans and wildlife competing for scarce natural resources".

In South Africa, corporations have attempted to rely on constitutional and administrative laws, without success, to resist government action aimed at mitigating harm arising from droughts. Meanwhile, government officials have successfully relied on property law, environmental law, and water law to address development activities that potentially or actually interfere with watercourses in a manner that could potentially increase flood risk and/or undermine flood risk mitigation. The South African cases have not leveraged the global phenomenon of climate litigation in relation to the need for flood and drought risk mitigation measures that are responsive to climate injustice.

The remedies available in flood and drought mitigation cases include orders protecting land uses that prevent potential harm arising from droughts, and orders that require compliance with enforcement measures aimed at preventing flood risks and harms.

In future drought and flood risk mitigation cases, there is scope for litigants in Kenya and South Africa to rely on the international, regional and domestic legal instruments concerning climate change, human rights, and disaster risk reduction and management (summarized in Tables A and B as well as C or D in Part III (Mapping) above), and on the South African or Kenyan governments' stringent due diligence obligations outlined in the ICJ Advisory Opinion (2025), discussed further in Section B. (Barriers and opportunities) below.

Housing and displacement cases

Human rights, particularly the right to access to adequate housing, have been successfully relied upon in several South African cases concerning the need to provide for people in emergency or crisis situations, including people displaced by flooding. In these cases, the government has been held to the standard that it must take “reasonable measures”, which includes:

- A positive obligation to devise and implement a comprehensive and coordinated housing programme that is “balanced and flexible” and makes “appropriate provision for crisis situations” (*Grootboom*).
- Obligations towards flood victims, including to provide emergency shelter (*Kyalami Ridge* and *Saziwa*) of a standard consistent with dignity, freedom, security, and privacy, and to protect the rights of the child to basic nutrition, shelter, basic healthcare services and social services (*Mbatha*).

In *Saziwa* reliance was also placed on the Disaster Management Act, 2002, and the Court confirmed that the government officials owed obligations in terms of that Act to people displaced by extreme weather.

The remedies granted thus far in housing and displacement cases include declarations of rights violations; orders that appropriate measures must be put in place in response to emergency situations, including the provision of suitable temporary emergency accommodation; and an order that relevant government officials prepare and deliver to the court a report detailing how flood victims' needs will be addressed.

None of South Africa's housing and displacement cases thus far have explicitly connected flood events to the climate crisis and its justice implications, nor have they relied upon laws governing climate change. There has further been only limited reliance on environmental laws

and on disaster risk reduction and management laws and policies. Leveraging on the global phenomenon of climate litigation, future cases could draw on these laws as well as on the ICJ Advisory Opinion (2025), discussed further in Section B. (Barriers and opportunities) below, to be more explicitly responsive to climate and environmental injustices.

Disaster relief cases

South African courts have ordered that the government provide disaster relief grants to victims of droughts and floods in three cases. In these cases, litigants have successfully relied upon human rights and administrative laws as well as the Disaster Management Act, 2002. The courts have granted relief by ordering relevant government officials to take decisions about applications for disaster relief within a specified period. In *Carolus*, the court went so far as to order that the Minister of Social Development has the necessary authority to compel the Disaster Relief Fund to aid flood victims, after the Minister failed to comply with an order directing them to do so.

Unfortunately, none of the disaster relief cases connect the disasters in question to the climate crisis and its justice implications, such that they do not leverage the global phenomenon of climate litigation. By doing so, future cases in South Africa and Kenya could seek to compel the provision of disaster relief with reference to the international, regional and domestic laws and policies concerning climate change, human rights and disaster risk reduction and management (summarised in Tables A and B as well as C or D above in Part III (Mapping)), and the South African or Kenyan governments' stringent due diligence obligations outlined in the ICJ Advisory Opinion (2025), discussed further in Section B. (Barriers and opportunities) below.

Municipal service delivery cases

Several South African cases have interpreted the obligations of municipalities in relation to service delivery in a manner that could be relevant to future climate-induced drought and flood litigation. They have not leveraged the global phenomenon of climate litigation in doing so. Nevertheless, usefully, in *Propshaft* the Court confirmed that "a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fall within the scope of protection provided by section 24 of the Constitution". *Bona Vista* establishes that municipalities may not unreasonably terminate the provision of basic services in a manner that infringes human rights. However, most municipal service delivery cases speak to the positive duties owed by municipalities to take reasonable measures to provide basic services or put in place appropriate policies and programmes. Litigants have successfully relied on human rights law to challenge municipalities' failures to maintain

stormwater drainage (*Propshaft* and *OPGC*) and provide basic services in a manner that impacts on residents' rights to a safe environment, water, and social security (*Mshengu* and *UPM*). Where successful, remedies include supervisory orders and other structural interdicts aimed at ensuring the provision of municipal services to vulnerable people, including through ongoing judicial oversight. For instance, the courts have ordered that municipalities must take remedial steps to address flood damage. Where a municipality's service delivery failures are persistent, a court may also be willing to order that provincial authorities dissolve its municipal council, appoint an administrator, and ensure the functionality of the municipality until the election of a new municipal council.

Litigants have been unsuccessful in challenging alleged service delivery failures where municipalities have taken what the court deemed to be "reasonable measures" by putting in place policies or programmes (e.g., in *Mazibuko* and *Nokotyana*). At the same time, it has been established that municipalities are legally entitled to impose levies to fund the costs of infrastructure development, laying the foundation for municipal efforts to fund and maintain services and infrastructure to mitigate and adapt to drought and flood risks and harms.

Thus far, the municipal service delivery cases have not linked the need for service delivery to the climate crisis and its justice implications, nor have they drawn on relevant regional and international law obligations arising from the instruments outlined in Tables A and B in Part III (Mapping), representing a missed opportunity to leverage and refine the global phenomenon of climate litigation. For instance, litigants could rely on the Sendai Framework for Disaster Risk Reduction 2015-2023, 2015 since it requires that municipalities strengthen disaster risk governance and allocate specific budgets and integrate structural, economic, and environmental measures to mitigate risks.

Water governance cases

In Kenya, it has been established that in making decisions about the subdivision of land, the government has a duty to conserve and protect riverine wetlands and involve environmental authorities (*Mureithi*). The case demonstrates that environmental laws can shape land use decision-making that impacts on wetlands. In South Africa, several water governance cases have potential relevance to future climate-induced flood and drought litigation. It has been established that private landowners are not owed a duty to artificially breach a river mouth or estuary to prevent harm caused by flooding (*Umfolozi* and *Abbott*). Litigation relying on administrative and constitutional law to challenge the government's refusal to breach a river mouth or estuary has been unsuccessful. Meanwhile, landowners are not permitted to obstruct the flow of a watercourse in breach of water laws and in a manner that would disturb peaceful and undisturbed possession of water.

Water law has been interpreted to permit trade of water (*Ramah Farming* and *Lötter*), which could serve to heighten or alleviate unjust distribution of water amidst the climate crisis, depending on who trades with whom and at what price. It has been established that the government has wide powers to issue directives to polluters to take reasonable measures to prevent pollution of water (*Harmony I* and *Harmony II*). Finally, those who breach water laws may be held criminally liable, including in circumstances where water has been illegally extracted (*Mostert*). South Africa's water governance cases have not directly engaged with the climate crisis and its legal, policy, or justice implications, nor have they engaged with disaster risk reduction and management laws and policies (whether under international, regional, or domestic law). There is thus ample opportunity for water governance cases to connect the issues to leverage the global phenomenon of climate litigation in these cases.

B. Barriers and Opportunities to Strengthen Future Climate-induced Flood and Drought Litigation

In this Section B., we engage with barriers to climate justice in the courts and opportunities to strengthen future climate-induced flood and drought litigation.

Barriers

Damages cases

In the context of damages cases, a key barrier to climate justice in both Kenya and South Africa is establishing causation, including in relation to the foreseeability of harm in the context of omissions by the state. For instance, in *Lekulai*, Masaai peoples displaced by flooding were unable to hold the government accountable in circumstances where they had suffered extensive harm. The Court reasoned that the government could not be blamed unless there was evidence that officials were aware of the floods and took no action to avert the resultant effects. Below, we discuss how reliance on attribution science, as illustrated by foreign climate change litigation, could bolster future damages claims. However, we acknowledge that access to the necessary expertise to rely on attribution science remains a barrier to such reliance. We also discuss how the ICJ Advisory Opinion (2025) could establish duties of care in future damages cases.

South African litigants should keep in mind that when instituting damages claims against the State, it is necessary to give notice within 6 months in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002. A failure to do so would necessitate an application for condonation.

Civil litigation in which there are disputes of facts, necessitating a trial procedure, can be very time-consuming and costly, including due to extensive backlogs in the judicial system. In Kenya, it can take up to three years to secure a trial date, whereas in South Africa it can take five years or more. Human rights cases, which primarily proceed by way of an application procedure (through exchange of affidavits), and focus on questions of law rather than fact, are generally considerably faster processes, and may be preferable for litigants.

Human rights cases

In the context of human rights cases, litigants in Kenya have faced procedural barriers where they failed to approach the National Environmental Tribunal before approaching a court to challenge the outcome of an EIA process, suggesting that it is important to exhaust relevant avenues for relief and not to approach courts prematurely. Additionally, Kenyan litigants must establish, when they approach the court regarding a violation of the Bill of Rights or question of constitutional interpretation, that they are raising a substantial question of law worthy of reference to the Chief Justice. This is a high standard. The determination of what constitutes a “substantial question of law” is determined on a case-by-case basis and is informed by whether the issue raised is weighty and novel, purely a legal (rather than factual) question, is of general public importance, and concerns a genuine ambiguity in the law. The South African legal system does not impose a similar barrier on litigants who seek to address violations of the Bill of Rights or constitutional interpretation.

Kenyan litigants should also be aware that to challenge administrative decisions, they must overcome a “presumption of regularity”, an evidentiary principle that results in courts presuming that public officials have properly performed their duties and that their decisions are procedurally sound and valid, unless proven otherwise. The presumption does not override explicit constitutional or statutory mandates, such that it cannot be relied on when government bodies/officials act outside of their jurisdiction or in violation of constitutional rights. Further, the presumption cannot be relied upon to avoid transparency. No similar presumption exists under South African law, where litigants are merely required to prove, on a balance of probabilities, that an administrative act falls foul of one or more grounds of review.

In South Africa, where government officials are attempting to put in place a policy or programme to fulfil human rights and other constitutional obligations, even with limited or no success, it can be challenging to establish that the State is not taking “reasonable measures” required to fulfil various positive human rights obligations (such as municipal service delivery or access to water and sanitation). As we discuss below, the ICJ Advisory Opinion (2025) could be relied upon to shape what constitutes a reasonable measure in the context of the climate crisis. Additionally, reliance jurisprudence of the African Court could be useful in future

litigation, particularly once the African Court has issued its pending advisory opinion on the obligations of African States in response to the climate crisis.

The human rights cases concerning displacement and disaster relief in South Africa suggest that government officials would benefit from capacity-building and training on their responsibilities in disaster/emergency situations. Such capacity-building and training should address the full suite of obligations arising from relevant domestic laws and policies such as the Disaster Management Act, 2002, the Climate Change Act, 2024, the National Disaster Management Framework, 2023, and the National Climate Change Response Monitoring and Evaluation System Framework, 2015, and how they interact with regional and international law obligations. Similar capacity-building and training should be rolled out in Kenya. Additionally, efforts should be made to ensure that Kenya's National Disaster Risk Management Bill, 2023, is enacted as soon as possible, as required by Kenya's international and regional climate change and disaster risk management obligations (see further Tables A and B in Part III (Mapping) above).



Opportunities

In the face of barriers to climate justice, there are many opportunities to strengthen future climate-induced flood and drought litigation, as we discuss next.

Reliance on attribution science and foreign/international cases

Reliance on attribution science and foreign climate cases

As discussed in Section A. (Trends) above, satisfying the elements of tort/delict in Kenyan and South African damages cases has thus far proved challenging. An under-explored opportunity is the use of attribution science and the construction of causal chains, which we acknowledge requires considerable expertise and funding. A growing body of climate litigation elsewhere in the world, in which attribution science has been relied upon, could be leveraged by litigants in the African context.

Attribution science is a “branch of science which seeks to isolate the effect of human influence on the climate and related earth systems”.¹⁵ As the Centre for Environmental Rights (2024) points out, attribution science allows for precise determination of which extreme weather events are caused by climate change (extreme event attribution) and can link specific events to human activities or entities (source attribution). The science, in turn, enables the calculation of individual companies’ historical cumulative GHG contributions to global climate change, and precisely how much their emissions proportionally contributed to specific climate-induced extreme weather events. Importantly, climate attribution science has uncovered that just ninety fossil fuel and cement companies are responsible for 63% of GHG emissions from 1854 to 2010, and 100 companies are responsible for 70% of the total accumulative emissions in the past three decades (Griffin 2017).

According to Walker-Crawford et al. (2026) attribution science is useful in the context of litigation because it “has transformed our ability to connect greenhouse gas emissions to their consequences”. Walker-Crawford et al. (2026: 13–18) highlight that, by relying on the science, litigants are increasingly able to construct causal chains demonstrating, first, that certain harms are climate hazards and pose a credible risk to them; second, that a climate-related physical hazard or risk (such as sea level rise, melting glaciers, or extreme storms, heatwaves and droughts) is or will be caused or intensified by anthropogenic climate change; and thirdly, that GHG emissions of specific major emitters are proportionally responsible for the physical hazard or risk.

¹⁵ Burger M, J Wentz & R Horton “The law and science of climate change attribution” (2021) *Columbia Journal of Environmental Law* 45 57 at 63.

A body of climate litigation is emerging in which attribution science has been invoked, most notably the German case of *Lliuya v RWE* (2025) ("*Lliuya*") and the pending Swiss case of *Asmania v Holcim* ("*Asmania*"). These cases offer valuable insights into how a causal chain could be constructed in future tort/delict cases brought by victims of floods and droughts in Africa and could be leveraged accordingly.

The German case of *Lliuya* concerned a challenge by a Peruvian farmer against flood risks posed by melting glaciers which he claimed could cause a glacial lake to overflow. He argued that RWE, a German energy company and major emitter of GHG emissions driving climate change, was at least partially responsible for the risk. He relied on attribution science, which indicates that RWE is responsible for 0.38% of global GHG emissions. He sought compensation proportional to RWE's share of emissions. Unfortunately, the Court reasoned with reference to expert evidence the risk was not sufficiently likely to materialise and dismissed the case. However, the Court recognised that major emitters such as RWE could be liable for climate-related harms, in principle. The Court also affirmed that a 0.38% share of global emissions was sufficiently significant to give rise to a causal contribution to harm.

As in *Lliuya*, in *Asmania*, vulnerable people have relied on attribution science to hold a major emitter responsible for damage arising from climate-related physical hazards in proportion to the emitter's contribution to GHG emissions causing climate change (Walker-Crawford et al. 2026: 18). In *Asmania* a key issue is whether Swiss cement company, Holcim, can be held liable by four claimants of Pari Island in Indonesia for damage caused by sea level rise and other climate hazards proportional to Holcim's 0.42% contribution to GHG emissions, as determined by attribution science. Walker-Crawford et al. (2026: 18) point out that reliance on attribution science: "[i]n *Lliuya*, this meant seeking compensation proportional to RWE's 0.38% share [of GHG emissions] and in *Asmania*, proportional to Holcim's 0.42% share". In ruling that the claim is admissible, the Court acknowledged, among other things, that those seeking to hold Holcim accountable have already suffered identifiable damage from flooding. Aligned with the approach in *Lliuya*, the Court also found that Holcim's 0.42% contribution to global emissions was sufficiently material to have made a difference to climate change.

Both *Lliuya* and *Asmania* demonstrate that attribution science presents a valuable opportunity to litigants in Kenya and South Africa to strengthen arguments relative to causation and hold polluters liable for climate hazards and risks. To do so, litigants will need to integrate scientific, legal and other evidence to establish a causal chain, with scientists, lawyers and communities collaborating in a transdisciplinary manner (Walker-Crawford et al. 2026: 25). Notably, the costs of obtaining attribution science are likely to be extensive and not easily accessible or

within the means of the most vulnerable people. Philanthropists and governments will need to fund litigation to facilitate this kind of intervention.

Reliance on the ICJ Advisory Opinion (2025)

Future litigation concerned with flood and drought mitigation and harm should explicitly connect the need for flood and drought mitigation measures in the context of the climate crisis. The cases could then draw on key findings in the ICJ Advisory Opinion (2025). Relevant findings include:

- States have a customary international law duty, *erga omnes* (para 440), to prevent significant transboundary harm which includes a duty to prevent significant harm to the climate system, including where no harm has yet been caused, but the risk of future significant harm exists, or where some harm has already been caused and there exists a risk of further significant harm (paras 274–279). The duty is “stringent” and entails an obligation to act with due diligence, including by taking precautionary measures, undertaking risk assessments, and notifying and consulting with other States (paras 135–138). The ICJ considered it important that “all States provide for and conduct EIAs with respect to particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control, on the basis of the best available science” (para 298).
- States have a duty, *erga omnes* (para 440), to implement domestic mitigation measures, which entails a stringent standard of due diligence in taking measures to achieve the objectives set out in their nationally determined contributions in terms of the Paris Agreement (paras 251–254). The duty applies to the activities conducted by private actors. The ICJ further opined that States must use their “best efforts”, which could include “putting in place a national system, including legislation, administrative procedures and an enforcement mechanism, and exercising adequate vigilance to make the system function effectively”.
- States have a legally binding obligation, *erga omnes* (para 440), to undertake adaptation planning actions, including formulating and implementing national adaptation plans, assessment of climate change impacts and vulnerability, monitoring and evaluation, and building the resilience of socio-economic and ecological systems (paras 255–259). The fulfilment of the obligation is to be assessed with reference to a standard of due diligence through States’ best efforts in line with the best available science (which includes IPCC reports). The measures should enhance adaptive capacity, strengthen resilience and reduce vulnerability. Measures could include restoration of ecosystems, creation of early warning systems, resilience-enhancing

infrastructure, regenerative farming, crop diversification, weather-proofing buildings, and managing land to reduce wildfire risk.

- States must take international human rights law obligations into account when implementing their obligations under climate change treaties and other relevant environmental treaties and under customary international law, and must similarly take their obligations under climate change and other environmental treaties, as well as customary international law, into account when implementing human rights obligations (para 404). This is because “[t]he degradation of the climate system and of other parts of the environment impairs the enjoyment of a range of rights protected by human rights law” (para 375). Further, “the adverse effects of climate change...including, *inter alia*, the impact on the health and livelihoods of individuals through events such as...natural disasters...may impair the enjoyment of certain rights” (para 376). Relevant rights that are impaired include:

- The right to life recognised in Article 3 of the UN Declaration on Human Rights; Article 6 of ICCPR; and Article 6 of the Convention on the Rights of the Child;
- The right to health, recognised in Article 12 of ICESCR, Article 25 of the UN Declaration of Human Rights, and Article 34 of the Convention on the Rights of the Child.
- The right to an adequate standard of living (which encompasses access to food, water and housing) provided for in Article 11 of the ICESCR and Article 25 of the Universal Declaration of Human Rights, since climate change can interfere with individual’s effective enjoyment of these rights (para 380).
- The right to privacy, family and home, protected by Article 17 of ICCPR, since “a State’s failure to implement timely and adequate adaptation measures to address the adverse impacts of climate change may violate the right to privacy, family and home” (para 381).
- The rights of women, children and indigenous peoples (paras 382–384).
- The right to “a clean, healthy and sustainable environment”, which the ICJ found is a precondition for the enjoyment of many human rights, “such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment” (para 393).

To fulfil the standard of due diligence established by the ICJ as set out above, States could be expected to comply with, among others:

- The Guidelines for Mainstreaming Disaster Risk Assessment in Development, 2019; and
- The World Bank Group's Drought Risk and Resilience Assessment Methodology (2024).

Where States fail to do so, litigants could seek to hold them liable for human rights violations, given that the ICJ highlighted implications arising from a State's failure to comply with its international obligations:

- A duty of cessation arises, which requires that the State cease a particular act. This could include taking all means at the State's disposal to reduce their GHG emissions and any other action necessary to ensure compliance with their obligations (paras 447–448).
- A duty to make reparations, which could include:
 - Payment of compensation to individuals arising from the breach of human rights law, provided causation can be established between the wrongful act of the State and the damage suffered (para 449).
 - Restitution, by re-instating a situation that existed before the wrongful act was committed, which could include reconstructing damaged or destroyed infrastructure or restoring ecosystems and biodiversity (para 451).

Reliance on environmental cases decided by the African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights has not yet ruled on climate change. However, it is presently seized with a [petition for an advisory opinion](#) on African States' obligations amidst the climate crisis. The African Court's advisory opinion will no doubt offer crucial insights for future flood and drought litigation in Africa. Meanwhile, the African Court and the African Commission on Human and Peoples' Rights have made several useful findings in relation to the environmental right entrenched in the African Charter, which could usefully be relied upon by litigants.

In *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria* (2001) ("SERAC"), the Ogoni people of Nigeria argued that the Nigerian government had failed to protect them from environmental harm caused by the Nigerian National Petroleum Company Shell Consortium, including by facilitating harm through the use of the government's security forces. The Commission acknowledged that Nigeria has a right to produce oil, but found that the government must comply with its duties to ensure a satisfactory environment as required by Article 24 of the African Charter. The Commission found that

environmental rights in the Charter “requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources” while obligating “governments to desist from directly threatening the health and environment of their citizens” (para 52). The Commission’s reasoning and orders in *SERAC* could bolster arguments that government officials are obliged to take drought and flood mitigation and adaptation measures, including through appropriate risk assessments.

In *African Commission v Republic of Kenya* (2017) (“*Ogiek Merits*”), the Ogiek people, who live in the Mau Forest in Kenya, faced eviction by the government without their prior consultation or consideration of the importance of the forest for their survival. They argued that the Kenyan government was violating their right to development under Article 22 of the African Charter, and their right to freely dispose of their wealth and natural resources, and not to be deprived of that freedom under Article 21 of the African Charter. They claimed that their economic, social and cultural existence is fundamentally tied to the Mau Forest, such that exclusion from it and its destruction violated their rights. The African Court found that the Ogiek peoples’ rights under Articles 21 and 22 were violated, including because their livelihoods and survival depend on their unhindered access to the forest (paras 201 and 210). The African Court took note of the community’s strong attachment with nature. The African Court subsequently ordered that the Ogiek people be paid restitution, in addition to making orders concerning the protection of their ancestral land and its use and enjoyment by the Ogiek people. The right to development could be usefully relied upon in future cases concerning flood and drought risk and harm, drawing on the African Court’s findings in *Ogiek Merits*.

Finally, in *LIDHO and Others v Côte d’Ivoire* (2023) (“*LIDHO*”) the African Court was asked to determine whether a range of Charter rights, including the right to life and the right to a satisfactory environment, had been violated after commodities trading group, Trafigura, dumped toxic waste off the coast of Abidjan in circumstances where the government of Ivory Coast knew or should have known that the life and physical integrity of people of Abidjan could be threatened but failed to take measures to attenuate the risk. Moreover, it granted an authorisation permitting the dumping of waste. At least seventeen people died as a result, and more than a hundred thousand more were poisoned. The African Court found that the government had a duty to prevent and combat the import of toxic waste into its territory and that the impact on human life should have been known to it. Having failed to fulfil these obligations, the government was found to have violated the right to life under Article 4 of the African Charter (paras 124–144). Further, the government’s conduct was found to have violated the environmental right, including because the government did not ensure that the receipt of toxic waste occurred with the necessary caution from the standpoint of

environmental management or in a manner that would protect human health and the environment from the harm that could ensue if they did not (paras 175–176). The African Court ordered the payment of reparations, including to repair the damage caused to victims. *LIDHO* sets useful precedent on the content of due diligence obligations of States in circumstances where they authorise “development” that will inevitably lead to environmental harm and loss of life, and establishes that reparations could be payable in circumstances where the authorisation results in loss of life and severe health impacts.

Enhanced utilisation of international and regional laws

Only fifteen of the cases discussed in this report engaged with international law (inclusive of regional laws), and only eight of these did so relatively in-depth. Given that the constitutional texts of both Kenya and South Africa require courts to rely on international law, the opportunity exists to strengthen future climate-induced flood and drought litigation by relying on the obligations of States in terms of international and regional laws (see Tables A and B in Part III (Mapping) above). To do so, they need to connect drought or flood-related risks and/or harms to the climate crisis, to leverage and refine the global phenomenon of climate litigation.

Litigants could, in future cases concerning displacement arising from flood and drought, draw on:

- The Guiding Principles on Internal Displacement, 1998, which address obligations relating to humanitarian assistance and the prevention and avoidance of conditions that lead to displacement, prevention of arbitrary displacement and protection of human rights of displaced persons, for instance.
- The Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters, 2006, which provide guidance to ensure that the rights of people left homeless by natural disasters are protected.
- Article 5(7) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), 2009, which requires African Union Member States must not arbitrarily displace people during projects conducted by private actors.

Litigants could, in future cases concerning disaster relief, drought and flood mitigation, and municipal obligations, rely on:

- The United Nations Convention to Combat Desertification, 1994, an interpretive framework to establish State obligations in the context of climate-induced flood and drought litigation.

- The targets contained in the Sendai Framework for Disaster Risk Reduction 2015-2030, 2015, for instance, if municipalities have not developed or implemented disaster risk reduction strategies, including through budgeting, or ensured access to early warning systems and disaster risk information and assessment.
- The Africa Regional Strategy for Disaster Risk Reduction, 2004, given that it aims to increase the management of disaster risk reduction and improve governance in emergency response management.

Additionally, litigants should connect the relevant disaster laws to climate change obligations determined by the ICJ, discussed above.

Enhanced utilisation of relevant domestic laws and policies

Lastly, both Kenya and South Africa have developed several disaster management laws and policies that could be relied upon in future flood and drought litigation. South Africa's Disaster Management Act, 2002, has been relied upon, to some extent, in cases concerning disaster relief and failures to implement appropriate disaster responses. However, there remains greater scope to invoke South Africa's disaster management laws and policies in cases concerning municipal obligations and displacement. Additionally, future litigation could rely on relevant obligations in the Climate Change Act, 2024, particularly in flood and drought risk mitigation cases. Doing so could better leverage the global phenomenon of climate litigation in cases concerning disaster management.

In Kenya, there remains a need to enact the National Disaster Risk Management Bill, 2023, which would then be a useful legal tool in future litigation concerning flood and drought events. Meanwhile, there is scope for litigants to rely on the National Drought Management Authority Act, 2016 and Public Finance Management (National Drought Emergency Fund) Regulation, 2021, to access disaster relief in the context of the impacts of droughts. Additionally, relevant policies could be relied upon to demonstrate that the government has a duty of care in relation to flood and drought events, including the National Disaster Risk Management Policy, 2017, the National Climate Change Adaptation Plan 2023-2027, 2023, and the Disaster Risk Management Strategy 2025-2030, 2025. Each of these policies requires disaster risk reduction, including in relation to droughts and floods. Positively, Kenyan courts have already begun to enforce obligations emerging from the Climate Change Act, 2016, particularly in EIA cases. This Act could be invoked in future flood and drought risk mitigation cases, as well as cases concerning displacement.

To conclude, there are many avenues to leverage, strengthen and refine the global phenomenon of climate change litigation to address climate change-induced flood and drought risks and harms. While this report has focused on Kenya and South Africa, its lessons could be extrapolated to other African countries; an important endeavor given the prevailing impacts of the climate crisis on Africa and her people, as well as the need to enhance accountability among State and non-State actors across the continent.



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