

The International Comparative Legal Guide to:

Environment Law 2007

A practical insight to cross-border Environment Law



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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in South Africa and which agencies/bodies administer and enforce environmental law?

The environmental right enshrined in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is the basis for environmental policy in South Africa and the relevant national and provincial legislation discussed below.

The Constitution provides that “the Environment” is a functional area of concurrent national and provincial legislative competence.

At a national level, the following departments are primarily involved in the administration and enforcement of environmental law:

- The Department of Environmental Affairs and Tourism;
- The Department of Minerals and Energy;
- The Department of Water Affairs and Forestry; and
- The National Department of Agriculture.

At a provincial level, the respective environmental directorates located in the 9 provincial governments are responsible for the administration and enforcement of environmental law in the relevant province.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The relevant authorities are becoming increasingly active in their enforcement of environmental laws.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Access to information held by the State is governed by the Constitution and the Promotion of Access to Information Act, 2000. Every person is entitled to have access to information held by the State if the disclosure of the record would reveal evidence of an imminent and serious public safety risk, or an environmental risk.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

A number of environmental statutes require the relevant person/s to obtain an authorisation, licence or permit before a particular activity can be carried out. A permit is usually required when carrying out natural resource extraction or utilisation. In addition, there is a statutory requirement that all water use be subject to a licence requirement under the National Water Act, 1998 (“NWA”). Permits are also required in terms of the legislation regulating hazardous substances, nuclear-related activities, biodiversity conservation, protected areas, fishing and the carrying out of certain agricultural activities. Activities causing pollution may also require a permit or licence.

The Environment Conservation Act, 1989 (“ECA”), for example, requires the permitting of waste disposal facilities. In general, environmental authorisations or permits are not transferable; however, this depends on the empowering legislation, and differs from statute to statute.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

South African environmental legislation generally contains provisions permitting the appeal of decisions pertaining to the granting of permits, licences and authorisations. However, should any legislation not contain such a provision, a person who feels aggrieved by a decision made by a competent authority is entitled in terms of the Promotion of Administrative Justice Act, 2000 (“PAJA”) to institute proceedings in a court or a tribunal for the judicial review of the decision. Furthermore, PAJA entitles a person who feels aggrieved by a decision made in terms of any appeal or review procedure or in terms of any legislation, to institute judicial review proceedings in a court of law.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Environmental assessment provisions are contained in the National Environmental Management Act, 1998 (“NEMA”) as well as in some sectoral legislation, such as the NWA, the Minerals and

Petroleum Resources Development Act, 2002 (“MPRDA”), the Development Facilitation Act, 1995, and the Marine Living Resource Act, 1998. The Environmental Impact Assessment (“EIA”) requirement under South African law is governed by the EIA Regulations that have recently been promulgated in terms of NEMA, repealing the old EIA Regulations that were contained under the ECA.

Both the NWA and the Biodiversity Act require that an assessment of sorts be carried out prior to undertaking certain activities in terms of those Acts.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

The criminal enforcement power is the most widely prescribed enforcement power for the implementation of environmental law in South Africa. The penalties prescribed usually involve a prison sentence for a specific period of time, a fine, or both such prison sentence and fine.

Many statutes empower officials to issue abatement notices and/or directives. Failure to comply with a directive usually constitutes an offence.

Civil liability may arise out of the violation of a permit, licence or authorisation if damages were caused as a result of such violation. Such circumstances will be governed by the law of delict or tort (that is, where the act of a person carried out in a wrongful and a culpable way causes harm to another).

Virtually all environmental legislation requiring permits, licences or authorisations to be issued contains provisions which provide for the withdrawal, suspension or cancellation of such permits, licences or authorisations.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

“Waste” is broadly defined in the ECA as including any undesirable or superfluous matter, material, by-product or residue of any process or activity that has been discarded, accumulated or that has been stored for the purposes of discarding, re-use or recycling. This definition goes on to specifically exclude six categories of materials, however, including radioactive substances, industrial effluent, sewage, building rubble, mining waste, and ash from electricity generation.

There is no statutory distinction between hazardous waste and non-hazardous waste in South Africa and as such no additional duties or controls pertain specifically to either category.

However, the Department of Water Affairs and Forestry’s “Minimum Requirements for the Disposal of Waste by Landfill” distinguishes between these two categories. Whilst the Minimum Requirements themselves do not have the force of law, they are often incorporated into waste disposal site permits, and the additional duties and controls in respect of hazardous waste are enforced in this manner.

In addition, the Hazardous Substances Act, 1973 classifies hazardous substances into four categories, each with their own requirements with regard to disposal; and the Regulations for Hazardous Chemical Substances, published under the Occupational Health and Safety Act, 1993, provide for particular requirements pertaining to packaging, transportation and disposal of hazardous waste.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The ECA provides that no person may establish, provide or operate any disposal site without a permit issued by the Minister of Water Affairs and Forestry. The operation of a waste disposal site is in addition an activity listed under the ECA which requires an authorisation to be issued by the competent authority (the provincial environmental directorate). In terms of the ECA, a person may only discard or dispose of waste at a disposal site for which a permit has been issued under the terms of the ECA.

Under the terms of the Minimum Requirements documents, a person may only store waste for up to 90 days, before such storage site is deemed to be a disposal site for the purposes of the ECA. The Minimum Requirements prescribe various control and operational measures for the storage of various categories of waste.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

The “cradle to grave” principle (meaning that responsibility for the environmental and health consequences of a product, process or service starts with the extraction or processing of raw materials and extends through manufacturing and use to include ultimate disposal of products and waste) finds its expression in many of the policy documents guiding the development of waste management legislation, policy and decision-making in South Africa.

The “cradle to grave” principle has been incorporated into law, primarily through the principles of the NEMA. Whilst there are no specific obligations flowing from such incorporation, its application implies that a person retains responsibility for their waste, notwithstanding its transfer to a lawful recipient.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

There are no specific obligations requiring that waste producers take back or recover their waste; however, as discussed above at question 3.3, a person retains responsibility for their waste.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

In general, a breach of an environmental statute in South Africa, such as the NEMA or the NWA, invokes a criminal sanction.

Certain statutes impose strict liability, including the MPRDA and the National Nuclear Regulator Act, 1999.

The NEMA and the NWA also provide for the recovery of costs and damages for rehabilitation of the environment or for preventing damage to the environment.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

The NEMA provides that where environmental harm which is caused is authorised by law, such as in terms of a permit issued

under any environmental law, the relevant operator is obliged to minimise and rectify such harm. Where a person fails to take reasonable measures to minimise or rectify the effects of pollution or degradation of the environment, the relevant authority may itself take such measures, and recover the costs from the operator responsible for the harm. As such, an operator may in certain circumstances be liable for pollution remediation costs notwithstanding that the activity is authorised.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under the terms of the NEMA, an officer of a corporation may in certain circumstances themselves be criminally liable for the offence in question. The NEMA provides that damages may be awarded in such circumstances, and in addition, such person may be liable to pay the costs incurred in their prosecution.

A director of a corporation may also be liable to be criminally prosecuted and to pay what are, in effect, civil damages, if such director fails to take all reasonable steps as are necessary to prevent the committing of an offence.

Directors and officers of corporations cannot contract out of any statutory liability which they incur in respect of environmental wrongdoing, although there is nothing which provides that such persons cannot be indemnified by the corporations by which they are employed, for any damages or fines which are payable in respect of environmental damage; or that they cannot take out insurance against the payment of any such damages or fines.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

The legislative regime regulating environmental protection in South Africa imposes strict obligations on persons (including companies) who pollute the environment. These obligations are specifically aimed at owners of land or substances involved in a pollution-causing event. However, given that a fundamental principle of company law in South Africa is that of separate legal personality, such obligations do not extend to the shareholders of such owners.

As such, it would be preferable, generally speaking, from an environmental liability perspective, to purchase shares rather than assets.

However, direct delictual liability could be attributed to a shareholder in certain limited circumstances such as for operations, plans, policies, procedures or investments which it imposed, or for omissions which it caused a subsidiary to make, provided that all of the elements for delictual liability are present.

In addition, if a shareholder misused the corporate personality of a subsidiary for some advantage, and it resulted in environmental harm, a court may pierce the corporate veil and attribute liability to a shareholder as the directing mind or controller of the subsidiary, for environmental damage caused by the subsidiary.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

The two primary statutes regulating environmental pollution and degradation, that is NEMA and the NWA, extend the net of liability to include even those persons who 'indirectly contribute to' the pollution or degradation. Whilst the ambit of this terminology has

not been tested in a court of law, it is possible that in certain circumstances, liability may be extended to include a lender; but in the absence of some direct intervention, this is unlikely.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The fact that contamination of soil or groundwater occurred prior to a new owner of land taking ownership does not exempt the new owner from taking steps to remedy such environmental damage. Both the NEMA and the NWA provide that an owner of land may be liable for historic contamination which occurred prior to their taking ownership. The owner could attempt to recover a share of remediation costs from any prior polluter.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Both NEMA and the NWA provide for the apportionment of costs incurred by a government agency in remedying the effects of pollution to the environment. Liability is apportioned amongst the persons responsible for the pollution according to the degree to which each is responsible for the environmental harm in question.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Yes, this is possible, but there is no specific provision for this.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

It would be possible to institute a claim for damages against a predecessor-in-title; provided that it could be proved that the loss occasioned to the new owner was caused by the predecessor's failure to take measures to alleviate the environmental harm.

5.5 Does the government have authority to obtain monetary damages from a polluter for aesthetic harms to public assets, e.g., rivers?

Yes, damages are limited to what is required to remediate the polluted land.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

The recent amendments to the NEMA create extremely broad powers of search and seizure which may be exercised by inspectors appointed under the terms of the statute. Under the terms of these provisions, inspectors are empowered to question persons with

regard to acts or omissions which may constitute environmental offences, to require the production of documents, to remove specimens, to take samples, and to perform any other duty which is consistent with NEMA. Each of these powers is required to be exercised in a procedurally fair manner.

The NWA provides that the Department of Water Affairs and Forestry may request that any data, information, documents, samples or materials that are reasonably required for either monitoring purposes or for the protection of water resources, be provided to it.

Various other environmental statutes also provide for wide powers of search and seizure for inspectors appointed under those Acts.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Persons are not obliged to report pollution to an environmental regulator, unless the pollution which has occurred may be described as an “emergency incident”.

Where such emergency incidents occur, the responsible persons are required to report the incident and all relevant information regarding the incident to the Director-General of the Department of Environmental Affairs and Tourism, the police, the head of the relevant provincial government department and all persons whose health may be affected by the incident.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

There are no statutory obligations for persons to investigate land for pollution or contamination, except where an emergency incident has occurred. Where such an incident does occur, the responsible persons are required to take certain steps, which include assessing the immediate and long-term effects of the incident, and investigating the extent and existence of contamination.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

There is no statutory obligation to make any such disclosures. Parties will usually perform due diligence investigations for the purpose of ascertaining any potential environmental liability which may be relevant in the context of the transaction.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier’s potential liability for that matter?

It is very common for commercial transactions in South Africa to incorporate environmental indemnities as a means of limiting

exposure for actual or potential environmentally-related liabilities.

The polluter will remain liable in statute for any contamination or pollution, but could then require any loss occasioned following a successful prosecution to be made good by the indemnifier.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

There is no specific legislation regulating the dissolution of a company with particular reference to environmental liabilities. However, the normal principles of company law apply and any outstanding creditors, including those with an environmental or delictual claim for harm caused by the company, could apply to court to prevent the dissolution.

Furthermore, as set out in the answer to question 8.3 below, parent companies of subsidiaries which have caused environmental damage can in certain circumstances be held liable where the subsidiary has been dissolved. Experience from other jurisdictions indicates that the courts are more likely to attribute such liability to a parent company in circumstances where the subsidiary no longer exists.

In the context of liability for environmental harm caused as a result of mining activities, the MPRDA imposes strict liability on directors of a company or members of a close corporation for environmental damage caused by the relevant entity which they represented, even if they no longer represent such entity for whatever reason, including that the entity no longer exists.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

In terms of the NWA and NEMA, any person “in control” of land may be liable for pollution arising from the land. There is no case law on whether this will extend to parent companies.

Delictual or tortious liability may also theoretically be attributed to a foreign parent company for damage caused to persons or property by operations, plans, policies, procedures or investments it proposed, or for omissions which it directly caused a South African subsidiary to make, provided that all of the elements for delictual liability are present. There is however no decided case law on this in South Africa.

8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

The Protected Disclosures Act, 2000 makes provision for procedures under the terms of which employees in both the public and private sectors may disclose information regarding unlawful or irregular conduct on the part of their employers. The disclosure of information regarding damage or likely damage to the environment is specifically protected, and persons making such disclosures are protected from being treated in a detrimental fashion in the workplace. Remedies are available to employees who do suffer a detriment as a result of having made a protected disclosure.

NEMA also makes a specific provision for the protection of employees who disclose information which they believe is evidence of an environmental risk.

8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

The Constitution provides for class action, as does NEMA; however there are no Rules of Court to assist with such action.

Penal or exemplary damages are not awarded to claimants in South Africa.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in South Africa and how is the emissions trading market developing there?

There are no such local schemes at present.

10 Asbestos

10.1 Is South Africa likely to follow the experience of the US in terms of asbestos litigation?

South Africa has seen growth in the number of asbestos-related claims in the past few years. However claims directly against employers are extinguished by occupational compensation legislation, and South Africa does not have a litigious culture on the scale of the United States.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The applicable regulations do not impose any specific requirements regarding the removal of asbestos from the workplace, but set out certain control measures which employers must take in respect of asbestos-containing materials, exposure to asbestos, spraying asbestos material, demolition work and disposal of asbestos.

The regulations require that an assessment be done of the potential exposure of employees to asbestos in the workplace.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in South Africa?

The different types of environmental insurance available are:

- environmental impairment liability policies; and
- directors’ and officers’ liability insurance.

Whilst many companies are beginning to realise that their environmental risks are poorly covered and are beginning to invest in various appropriate risk management measures, principally through the purchase of environmental insurance policies, this is still fairly limited in South Africa.

11.2 What is the environmental insurance claims experience in South Africa?

At this stage, the environmental insurance claims experience in South Africa is fairly limited.



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BG Bowman Gilfillan Attorneys

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