

The International Comparative Legal Guide to:

# Environment Law 2005

A practical insight to cross-border Environment Law



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# South Africa

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## Bowman Gilfillan

### 1 Enforcement agencies/bodies

#### 1.1 What agencies/bodies are involved in the enforcement and administration of environmental law?

The Constitution of the Republic of South Africa, 1996 (“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.

In addition, various environmental statutes establish bodies or authorities which administer certain provisions of the relevant statute, such as the Chief Air Pollution Control Officer designated in terms of the Atmospheric Pollution Prevention Act, 1965.

#### 1.2 What policies underlie the enforcement of environmental law by such agencies/bodies, and to what extent is environmental regulation impacted by other regulatory controls (such as price controls and/or energy regulation)?

The environmental right enshrined in the Constitution is the basis for their actions which are also guided by the relevant national and provincial legislation discussed below.

### 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 Atmospheric Pollution Prevention Act, 1965 (“APPA”) for example, lists 72 industrial activities as “scheduled processes”, which require a registration certificate before being allowed to proceed. In general, environmental authorisations or permits are not transferable, however this depends on the empowering legislation, and differs from statute to statute.

#### 2.2 Is there any right of appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of unduly onerous 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. Should, however, 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 in terms of any legislation, to institute judicial review proceedings in a court of law.

### 2.3 Are there any special permitting requirements (e.g. requirements to conduct environmental audits or environmental impact assessments) for particularly polluting industries or large-scale installations/projects?

Environmental assessment provisions are contained in both the Environment Conservation Act, 1989 (“the ECA”) and the National Environmental Management Act, 1998 (“NEMA”) as well as in some sectoral legislation, such as the National Water Act, 1998 (“NWA”), the Minerals and Petroleum Resources Development Act, 2002 (“MPRDA”), the Development Facilitation Act, 1995, and the Marine Living Resource Act, 1998. The EIA requirement under South African law is however currently in a state of flux, and new draft EIA Regulations have recently been promulgated in terms of NEMA, repealing the current EIA Regulations contained under the ECA. The changes are anticipated to commence in 2005.

Currently however, in terms of the ECA, no person may carry out an activity listed in terms of the ECA as an activity which may have a detrimental effect on the environment, without written authorisation. The EIA Regulations (promulgated under the ECA) provide that such written authorisation will only be granted after considering one or more of the following reports pertaining to the listed activity: a plan of study for scoping; a scoping report; a plan of study for an environmental impact assessment; and an environmental impact assessment report.

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 civil and/or criminal enforcement powers does the government 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 in a wrongful and a culpable way causes harm to another).

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

## 3 Waste

### 3.1 What is waste and are there special categories of waste that involve additional duties or controls?

Waste is broadly defined in the Environment Conservation

Act, 1989 (“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 Can I store and/or dispose of waste on my property?

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 in terms of the ECA.

In 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 If I transfer waste to a lawful recipient, do I retain any residual liability in respect of it (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 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 NEMA. Whilst there are no specific obligations flowing from such incorporation, its application implies that a person retains

responsibility for their waste, notwithstanding transfer to a lawful recipient.

## 4 Liabilities

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

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

Certain statutes impose strict liability including the Minerals and Petroleum Resources Development Act, 2002, and the National Nuclear Regulator Act, 1999.

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?

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 direct that person to take certain steps to do so, failing which 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?

In terms of NEMA, an officer of a corporation may in certain circumstances themselves be criminally liable for the offence in question. 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.

Directors of corporations, 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 may attract to them 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 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 it imposed, or for omissions which it caused a subsidiary to make, provided 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 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 National Environmental Management Act, 1998 ("NEMA"), and the National Water Act, 1998 ("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. The 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 it 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?

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 from a polluter monetary damages 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 National Environmental Management Act, 1998 ("NEMA"), which although enacted have not yet come into force, create extremely broad powers of search and seizure, which powers may be exercised by inspectors appointed in terms of the statute. In 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 National Water Act, 36 of 1998 ("NWA") provides that the Department of Water Affairs and Forestry may request that any data, information, documents, samples or materials be provided to it that are reasonably required for either monitoring purposes or for the protection of water resources.

Various other environmental statutes also provide for wide powers of search and seizure for inspectors appointed in terms of 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 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 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 Is it necessary for a seller to disclose environmental problems to a prospective purchaser in the context of a merger and takeover transactions?

There is no statutory obligation to make any such disclosures. Parties will usually perform due diligence investigations for the purposes 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 in respect of 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 environment-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 dissolving 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, in certain circumstances, can 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 Minerals and Petroleum Resources Development Act, 2002 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 parent company be held liable for pollution caused by an affiliate and/or sued in its national court for pollution caused by a foreign affiliate?

In terms of the National Water Act, 1998 and the National Environmental Management Act, 1990 (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 Is there any legislation to protect “whistle-blowers” in environmental matters?

The Protected Disclosures Act, 2000 makes provisions for procedures in 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 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 Does the law facilitate emissions trading and, if so, what emissions trading schemes are in operation?

There are no such local schemes at present.

### 9.2 What is the general policy with respect to climate change?

South Africa is a signatory to the Kyoto Protocol. As South Africa is classified as a developing country, it has no targets or timetables.

The South African Government is in the process of establishing the clearing house needed for South African companies to participate in clean development mechanism projects and carbon trading.

## 10 Asbestos

### 10.1 Is South Africa likely to follow the lead 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 to 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 How big a role does environmental risks insurance play in South Africa

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 types of environmental insurance are available in the market?

- Environmental impairment liability policies; and
- Directors' and officers' liability insurance.



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While overseas she worked for two years in London at Leigh Day and Co on plaintiff actions against multinational corporations causing damage to people and environments in developing countries, particularly on the Cape plc Asbestos case and the Thor Chemicals case.

### 11.3 What is the environmental insurance claims experience?

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



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## BG Bowman Gilfillan Attorneys

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