



**BOWMANS**

THE VALUE OF KNOWING



**GUIDE -  
ENVIRONMENTAL  
LAW IN SOUTH AFRICA**





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## Introduction

This is the first edition of our *Guide to Environmental Law in South Africa*. It is intended to provide a selective overview of certain aspects of environmental law in South Africa and to answer some of the most frequently asked questions regarding environmental law in a transactional context.

We will, in future, expand this guide to also cover environmental regulatory considerations in Kenya, Tanzania and Uganda, along with other African jurisdictions.

*The contents of this guide are for reference only and should not be considered a substitute for detailed legal advice. It is correct as of December 2019. If you require further information or specific advice, please contact one of the key contacts listed at the end of this publication.*







## Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With nine offices in seven African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market and an understanding of their businesses. Our aim is to assist them to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

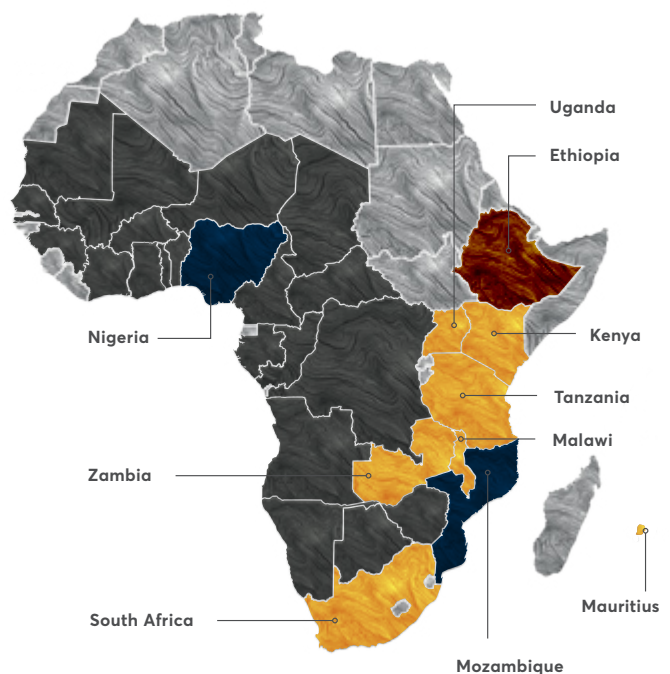
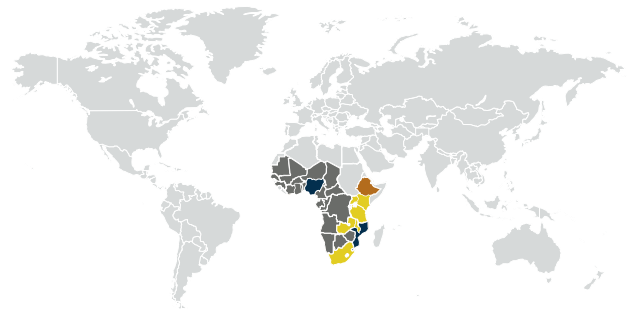
Our expertise is frequently recognised by independent research organisations. We received awards in three out of four categories at the *Dealmakers* East Africa Awards for 2019: top legal adviser in the M&A Category for both deal flow and deal value, and advised on the Deal of the Year. In the *Dealmakers* South Africa Awards for 2019, we were placed third for deal value in the M&A Category and advised on both the Deal of the Year and the BEE Deal of the Year.

# Our Footprint in Africa

We provide integrated legal services throughout Africa from nine offices (Cape Town, Dar es Salaam, Durban, Johannesburg, Kampala, Lilongwe, Lusaka, Moka and Nairobi) in seven countries (Kenya, Malawi, Mauritius, South Africa, Tanzania, Uganda and Zambia).

We work closely with our alliance firm, Aman Assefa & Associates Law Office, in Ethiopia, and our best friends in Nigeria and Mozambique (Udo Udoma & Belo-Osagie and Taciana Peão Lopes & Advogados Associados, respectively). We also have strong relationships with other leading law firms across the rest of Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. This association gives us access to the best firms in each jurisdiction represented.



-  Bowmans offices
-  Alliance firms
-  Best friends
-  Significant transaction or advisory experience



# Our Environmental Practice

Doing business in Africa, as in most international jurisdictions, requires specialised counsel to effectively manage corporate environmental risks and decision-making.

We are one of Africa's leading environmental law firms, offering real depth and a broad range of expertise in environmental law.

Our service covers legal risk mitigation and management, permitting, projects and developments, appeals against administrative decisions and judicial reviews, criminal and administrative disputes, litigation, impacts and compliance, due-diligence investigations and compliance auditing.

Our specialist environmental lawyers are equipped with a practical understanding of both the law and its application by the regulators and are able to handle environmental matters in all the jurisdictions in which we are located.

We have a strong commercial-environmental understanding in a transactional context, including with respect to the intersection among sectors such as mining, energy and infrastructure developments, environmental issues and community interests, pollution and contaminated land liabilities, as well as appropriate mechanisms for the management and allocation of related risks in transactions, the authorisation requirements for developments and general environmental transactional risks and mitigation.

We frequently represent clients with respect to environmental authority enforcement actions, compliance notices, directives, appeals and reviews, as well as in criminal prosecutions on environmental matters.

*Chambers & Partners* has ranked our South African Environmental Practice in Band 1 for the past five years (2015 to 2019). We are regarded as an, 'Impressive environmental group with a prominent position in the market'. Clients are quoted in the 2018 edition of the publication as saying that we: '... have been excellent in all regards - strategy, guidance and legal action' and that we, 'give responsible and professional advice and, where appropriate, advise clients against unnecessary or imprudent litigation'.

We serve the top-end of the South African and broader African market, advising on government processes, commercial lending and mergers and acquisitions (including cross-jurisdictional work in transactional and other matters). Our clients include large listed corporations and the public sector.



## OVERVIEW OF SOUTH AFRICAN ENVIRONMENTAL LAW

### 1. What are the principal environmental laws in South Africa?

Environmental matters are highly regulated in South Africa, with the country having an environmental right enshrined in its Constitution, coupled with a range of environmental laws at a national, provincial and municipal (local government) level.

The Constitution of South Africa provides that the 'environment' generically is a functional area of concurrent national and provincial legislative competence, while some aspects of more specific environmental related considerations (such as air pollution, potable water supply systems, and domestic wastewater and sewage disposal systems) are within the executive and administrative authority of local government.

The National Environmental Management Act, 107 of 1998 (NEMA) is the principal environmental statute. Aligned with this are several so-called 'specific environmental management Acts' (SEMA), including the:

- National Water Act, 36 of 1998 (the National Water Act);
- National Environmental Management: Waste Act, 59 of 2008 (the Waste Act);
- National Environmental Management: Air Quality Act, 39 of 2004 (the Air Quality Act);
- National Environmental Management: Biodiversity Act, 10 of 2004 (the Biodiversity Act);
- National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (the Coastal Management Act); and
- National Environmental Management: Protected Areas Act, 57 of 2003 (the Protected Areas Act).

Various regulations, as well as norms and standards, have been published under NEMA and the SEMAs.

Other legislation also addresses environmental issues at a national and provincial level. This includes the:

- Mineral and Petroleum Resources Development Act, 28 of 2002 (the MPRDA) in the context of mineral prospecting and mining, and oil and gas exploration and production-related activities;
- Water Services Act, 108 of 1997;
- National Forests Act, 84 of 1998;
- National Heritage Resources Act, 25 of 1999 (the Heritage Resources Act); and
- Marine Living Resources Act, 18 of 1998 (the Marine Living Resources Act).

In addition to the Biodiversity Act and Protected Areas Act, nature conservation and biodiversity-related matters are regulated under provincial legislation that applies in South Africa's nine provinces.

### 2. What type of environmental consents, authorisations, approvals, licences or permits may be required for a new or existing development or operation?

NEMA and many of the SEMAs as well as other environmental statutes, require authorisations, licences or permits to be obtained before particular activities can commence or be undertaken.

Obtaining consents, or registration of activities or facilities, is also typically required for natural resource extraction or utilisation, such as in the mining and production context, for industrial operations, in the case of fishing and forestry, and for taking water from water resources, or impacting on water resources.

Consents may be required under legislation regulating the storage or use of certain types of hazardous substances, nuclear and radioactivity-related activities, biodiversity utilisation and impacts, conservation and activities in protected areas, and certain agricultural activities.



Activities that cause pollution or environmental degradation may require authorisation before the activity can commence.

Environmental laws that impose requirements for consents, such as authorisations, licences or permits, include:

- **NEMA** – requires an environmental authorisation before many types of construction, development, expansion, decommissioning and other so-called 'listed activities' can commence. These include activities associated with clearing of indigenous vegetation, transformation of land and with respect to the exploration for, extraction, production and mining of, mineral and petroleum resources, as well as the associated closure or decommissioning of such activities.
- **National Water Act** – requires a licence or other form of entitlement, such as a general authorisation, for undertaking water uses, which include: abstractive water uses, various effluent discharge and waste-related activities that may impact on water resources, as well as activities entailing physical impacts on, or in proximity to, water resources.
- **Waste Act** – requires licensing of listed waste management activities or compliance with norms and standards for certain other listed activities; currently regulates residue deposits and residue stockpiles in the context of mining, production and related operations; and also imposes obligations relating to the reporting, handling and remediation of contaminated land. Contaminated sites may need to be reported to the environmental authorities and are potentially subject to remediation orders, being declared as remediation sites and recorded on the South African contaminated land register and with the Deeds Registry. The environmental authority may impose conditions that must be complied with in the transfer of ownership of remediation sites.
- **Coastal Management Act** – includes compliance obligations and restrictions with respect to activities within the coastal zone, or that may impact on the coastal zone (such as the use of coastal public property), as well as marine and coastal pollution control (such as the requirement to obtain a permit for dumping at sea).
- **Air Quality Act** – requires the licensing of listed activities that result in atmospheric emissions, with specific minimum emission standards being prescribed for such activities, as well as phased dates by when compliance with the prescribed emission standards must be achieved by existing or new operations. The Air Quality Act requires the reporting of emissions; includes mechanisms for air pollution control (such as by creating 'Priority Areas' around the country where air quality management plans are required to be in place); applies dust control regulations; and establishes categories of 'controlled emitters' which also have regulated emission standards that must be complied with. A recent focus has been on establishing mechanisms for registration; measuring and reporting regarding greenhouse gas emissions in light of a carbon tax regime that applies in South Africa in terms of the Carbon Tax Act, 15 of 2019; and other anticipated tighter climate change related regulatory controls, including through a pending Climate Change Act.
- **Heritage Resources Act, 25 of 1999** – creates various forms of heritage protection, including permitting requirements for impacts on heritage resources, and requires notification to and approval from the heritage authorities for certain types of specified development activities.
- **Provincial and local government legislation** – authorisations, licences or permits, or agreements with the municipality, are typically required for activities such as the storage of flammable substances or dangerous goods, the discharge of effluent into municipal sewers, municipal water supply, and undertaking listed scheduled trades. Permits are often required under

provincial legislation for activities that impact protected animal or plant species, while noise control and waste related legislation also applies in certain provinces, amongst other environmental laws.

An environmental impact assessment (EIA), or the less onerous Basic Assessment Report (BAR) process, or other forms of impact assessment, often have to be conducted prior to obtaining authorisation for undertaking regulated activities. NEMA and the Waste Act, among other legislation, require an environmental authorisation or waste management licence to be preceded by an impact assessment, either an EIA or BAR, depending on the nature of the intended activity.

**3. If a project or development does not require consents, authorisations, approvals, licences or permits in terms of the environmental laws, what general ‘duty of care’ or other similar compliance obligations are there in terms of the environmental laws?**

Under some of the SEMAs, there are specified activities that, while not triggering the need for licences, instead require compliance with published norms and standards, as well as possible registration of the activity.

An overarching statutory environmental ‘duty of care’ obligation is imposed in section 28 of NEMA and section 19 of the National Water Act, creating separate but similar general duties that have to be observed regarding the prevention and remediation of pollution or environmental degradation:

- **NEMA** – requires that any person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring or, in so far as it is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation. Persons upon whom these obligations are placed include owners of land or premises, persons in control of land or premises, or persons who have a right to use the land or premises.

- **National Water Act** – an owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

NEMA and the National Water Act allow for directives to be issued by the relevant authorities (such as when the statutory duty of care is not being adequately met) and for remediation or other costs, when incurred by the authorities, to be recovered from a wide category of persons. Aside from persons who are responsible for the pollution or degradation, as well as owners of the land and their successor-in-title, persons in control of, or who had the right to use the land at the relevant times, or who negligently failed to prevent the activity or the situation coming about, may potentially be liable for reasonable remediation costs.

Similar broadly stated general obligations are contained in certain of the SEMAs and apply with respect to the specific sectors regulated under the SEMAs, such as the duty to avoid causing adverse effects on the coastal environment contained in the Coastal Management Act. There is also a general duty in respect of waste management and specific duties of persons transporting waste contained in the Waste Act (including that any person who sells a product that may be used by the public and that is likely to result in the generation of hazardous waste must take reasonable steps to inform the public of the impact of that waste on health and the environment).

In respect of waste, NEMA contains cradle-to-grave principles, which are increasingly being given direct legal effect through the Waste Act, creating extended producer responsibility for certain products and materials. Requirements for compulsory industry waste management plans for a range of sectors, including the tyre industry, the paper and packaging industry, the electrical and electronic industry, and the lighting industry have also been published.

#### **4. Which authorities issue environmental consents, authorisations, approvals, licences or permits?**

Each statute prescribes the relevant competent authority. However, the key government departments and agencies that are involved in the administration and enforcement of environmental laws include:

- Department of Environment, Forestry and Fisheries (DEFF) and the relevant provincial Environment Departments;
- Department of Water and Sanitation (DWS);
- Department of Mineral Resources (DMR);
- Department of Energy (DoE);
- South African Heritage Resources Agency (SAHRA);
- Department of Agriculture; and
- Metropolitan, district and local municipalities.

At a provincial level, environmental directorates in the nine South African provincial governments are responsible for the administration and enforcement of aspects of environmental law in the provinces.

#### **5. What is the typical time period required to obtain environmental consents, authorisations, approvals, licences or permits? Is public participation required in the process?**

The time period for obtaining environmental consents will depend on the applicable legislation and the authorisation process that is prescribed under the legislation. This must take into account the nature and extent of technical investigations that may be needed, public participation requirements and the extent of opposition, and time periods for the authority to review and consider the application, among other considerations.

NEMA, being the principal South African environmental statute, requires that an environmental authorisation must be issued before a listed activity may commence, with a diverse range over 120 listed activities currently applying under NEMA, continued in three separate Listing Notices published in 2014.

Depending on the category of listed activity for which an environmental authorisation is sought, which is determined by the Listing Notice in which the activity appears, applications entail either a BAR (a shorter procedure) or a scoping and EIA (a lengthier procedure).

Timeframes for the environmental authorisation application process are set out in the 2014 NEMA Environmental Impact Assessment Regulations:

- The shorter BAR process (including the period for public participation, consideration of the BAR by the environmental authority and the time periods expressly provided for within which a decision must be taken by the authority) may typically take around six months to complete.
- In general, the longer EIA process for the granting of an environmental authorisation (taking into consideration the time periods within which the scoping report must initially be submitted; the time periods within which the EIA must thereafter be submitted; the public participation process; and the periods provided for within which a decision must be taken by the authority) may typically take around 10-12 months, or possibly longer.

Applications for licences in terms of the Waste Act and the Air Quality Act are also subject to these processes in terms of NEMA.

An application for a water use licence under the National Water Act can often take lengthy time periods. In terms of the Water Use Licence Application and Appeal Regulations, the procedure (including any site inspection, if necessary; public participation periods; submission of technical reports; and consideration of and a decision on the full application and relevant reports by the DWS) may take over a year to complete.

**6. What is the security of tenure once issued with an environmental consent, authorisation, approval, licence or permit? Can such consents be withdrawn, suspended or cancelled and under what circumstances?**

A public participation process must usually be undertaken as part of the process of applying for an environmental consent. Interested or affected parties may make submissions to the relevant authority as to whether the permit, licence or authorisation should be granted or regarding the requirements that should be imposed as conditions so any adverse effects that would arise as a result of the issuing of the consent can be mitigated. This process also allows for an interested or affected party to object to the granting of a permit, licence or authorisation to approve the activity or development.

Once the permit, licence or authorisation has been issued or refused by the relevant authority in terms of NEMA or any other SEMA, appeals may be lodged against the decision of the authority. Pending the outcome of the appeal, the decision of the authority subject to the appeal under NEMA or a SEMA will usually be automatically suspended. By way of example, if a decision to grant an environmental authorisation under NEMA is taken on appeal, the environmental authorisation will effectively be suspended pending the outcome of the appeal, with consequent delays to commencement of the development or activity. The appeal procedures are usually determined in terms of regulations under NEMA, certain SEMAs or other environmental legislation.

Under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), a person may seek a High Court judicial review of the decision to grant or to refuse a permit, licence or authorisation. However, other than in exceptional circumstances, such a review may only be sought through the courts once all internal remedies provided for in the environmental legislation concerned have been exhausted, such as the internal appeal provisions. Once issued, many of the permits, licences and authorisations under NEMA and the

SEMAs (such as waste management licences in terms of the Waste Act, atmospheric emission licences in terms of the Air Quality Act and water use licences under the National Water Act) are subject to authority 'review' periods, at which time the conditions of the licence may be amended or otherwise varied.

Changes to conditions during the period of the permit, licence or authorisation could also be made by the relevant authority under other circumstances as stipulated in the applicable legislation, or otherwise as allowed in terms of the conditions of the permit, licence or authorisation.

The conditions contained in the permit, licence or authorisation must be adhered to, with a failure to comply not only being an offence, but also potentially resulting in the variation, withdrawal or suspension of the permit, licence or authorisation, either in terms of the conditions of the authorisation itself, or the applicable legislation.

**7. Are there any local ownership or empowerment requirements in relation to the issuing and maintaining of environmental consents, authorisations, approvals, licences or permits or are such consents issued with any local ownership or empowerment obligations as conditions thereto?**

The Marine Living Resources Act provides that only a defined 'South African person' may (unless otherwise determined by the relevant Minister in relation to holders of 'existing rights') acquire and hold rights as contemplated in Section 18, including commercial fishing rights.

Other than in certain state licensing, permitting and authorisation processes, there is no 'hard law' that any private entity in South Africa must meet specific broad-based black economic empowerment (B-BBEE) targets or must implement a B-BBEE policy. The Broad-Based Black Economic Empowerment Act, 53 of 2003 (BEE Act) does not provide for offences or penalties relating to B-BBEE performance but rather seeks, through the economic measures discussed below, to facilitate a uniform approach to B-BBEE in the South African economy.



In terms of the BEE Act, government bodies and state-owned enterprises (SOE) are required to take private sector parties' relative B-BBEE levels into account when (among other things) they issue any licence or other authorisation in respect of economic activity. As such, businesses that interact with government by, for example, operating in sectors that require licences to perform their particular activities, are incentivised to increase their levels of B-BBEE.

The Minister of Trade and Industry has also published various sector-specific codes that detail the manner in which B-BBEE must be measured for businesses operating in particular sectors. Where a sector-specific code has been issued, businesses in that sector are required to apply the relevant sector code rather than the Codes of Good Practice (the Codes). The general Codes apply only where there is no sector-specific code although the general Codes and the sector-specific codes should generally apply the same broad principles. Sector codes were published for, among others, the forestry, construction, transport, and agriculture sectors.

Statutes that specifically provide for the consideration of empowerment goals include the:

- MPRDA in respect of mining, prospecting, exploration and production activities which require the holders of such rights to meet stipulated empowerment percentages; and
- Marine Living Resources Act, and the General Policy on the Allocation and Management of Fishing Rights, 2013, published thereunder, among other policies, which provide that, in respect of commercial fishing licence allocations and grants, empowerment and transformation goals be considered (however, no benchmarks in this regard have been published).

Even in terms of NEMA as it is currently drafted, as well as the SEMAs, an environmental or other authorisation may be issued subject to conditions imposed by the relevant

authority. Therefore, in principle, if the authority reasonably deems empowerment or local ownership requirements necessary to be incorporated into an environmental authorisation it is possible that empowerment or local ownership requirements could be imposed, but this must always be done lawfully. For example, water use licences issued in terms of the National Water Act are occasionally made subject to conditions relating to obtaining or maintaining specific B-BBEE levels.

#### **8. What regulatory rehabilitation/ remediation provisions are there in relation to a new and existing development or operation and do these rehabilitation/ remediation obligations survive in the event of a sale of business?**

Aside from the provisions specifically relating to prospecting, mining, exploration, production and related activities, which will be addressed in depth in a separate Bowmans guide, NEMA and the National Water Act both impose a 'duty of care' regarding the prevention and remediation of pollution and environmental degradation. The persons upon whom an obligation is placed are stated in NEMA to include an owner of land or premises, a person in control of land or premises, or a person who has a right to use the land or premises.

A South African Supreme Court of Appeal judgment dealing with directives issued in terms of the National Water Act held that directives issued against an owner of land and business can persist even after the land and business are sold and that prior owner has lost its connection with the land. This makes inclusion of appropriate contractual mechanisms in a sale of business agreement a key issue in the handling of responsibilities in terms of any directives and in addressing and allocating the potential long-term environmental liabilities of the parties.

In addition, NEMA requires that an applicant for an environmental authorisation (in particular relating to prospecting, exploration, mining or production) must comply with the prescribed Financial Provisioning Regulations for environmental rehabilitation in respect of

closure and ongoing post-decommissioning management of negative environmental impacts. It is also increasingly common for environmental authorisations issued under NEMA and waste management licences issued under the Waste Act to contain conditions which impose decommissioning, rehabilitation or ongoing liability obligations on the holder of the authorisation with regard to the authorised development and related activities, both during the construction period and at the end of life of the relevant infrastructure or facility.

There are also provisions in environmental laws, such as NEMA and the National Water Act, that allow for security to be required by the applicant relating to environmental damage caused by the authorised activity.

The National Water Act, and Water Use Licence Application and Appeal Regulations published thereunder, provide mechanisms enabling the relevant authority to, if necessary, require security to be put in place prior to the issuing of a licence. Similarly, NEMA makes provision for the relevant authority to publish regulations requiring the payment or provision of security in relation to environmental authorisations. Financial Provisioning Regulations have been published thus far in respect of mining, prospecting, exploration and production activities.

**9. What are the types of enforcement measures exercised by the environmental authorities in South Africa; for example, directives, suspension orders or compliance notices, administrative penalties, criminal prosecution or recovery of remediation or cleanup costs?**

Most environmental statutes contain criminal sanctions for non-compliance and penalties are typically potentially significant, usually including the possibility of imprisonment for a maximum specific period, imposition of a fine, or both such prison sentence and fine. Penalties under NEMA and the SEMAs are usually in the range of a maximum of ZAR 5 million up to a maximum of ZAR 10 million and/ or imprisonment for up to five or 10 years, depending on the offence. There is also the potential for personal criminal

liability for directors, employees and agents in the case of so-called NEMA Schedule 3 offences.

NEMA provides for the appointment of environmental management inspectors, with national and provincial enforcement directorates in various government departments.

NEMA, along with many other statutes, empowers officials to issue compliance notices and directives requiring the holder of any authorisation to comply with the conditions thereof, or with applicable legislation, or to ensure that pollution or environmental degradation is addressed. Any failure to comply with directives or compliance notices usually constitutes an offence in terms of legislation and may be followed by criminal prosecution and, after administrative process has been followed, the suspension or withdrawal of the relevant authorisation. If a directive which has been issued under NEMA or the National Water Act relating to pollution or environmental degradation is not complied with, the environmental authority may take the required remedial steps itself and seek to recover the costs thereof from the responsible person, as well as a wide range of other persons.

Virtually all environmental legislation which requires permits, licences or authorisations is subject to provisions providing for their withdrawal, suspension or cancellation for a failure to comply with the conditions imposed, or with the applicable legislation.

NEMA provides for the recovery of losses or damages caused by an environmental crime from the convicted person, including a director convicted under NEMA. In particular, an organ of state or private party that has incurred costs to rehabilitate the environment can claim such costs, losses or damages in the criminal trial without having to lodge a separate civil claim against the convicted person. The court may also assess the financial advantage that the offender gained as a result of the environmental crime and order the convicted person to pay back the fruits of the crime as damages, or compensation, or a fine. Furthermore, the convicted person may be required to pay the costs of the prosecution of the crime.



## 10. Which of the enforcement measures do the authorities generally take?

The South African National Environmental Compliance and Enforcement Reports (NECER Reports), which are prepared on an annual basis by DEFF, reflect enforcement and compliance statistics across all provinces and various sectors. The NECER Reports indicate compliance monitoring inspections and administrative steps, such as the issuing of pre-compliance and compliance notices, as well as directives, are generally the most common initial enforcement measure (aside from minor admission of guilt fines for more trivial offences).

There has been a general trend of increases in the number of compliance-monitoring inspections of facilities, issuing of pre-compliance notices, as well as compliance notices.

The number of matters which proceed to criminal prosecution and trial is substantially lower, with the environmental authorities and the National Prosecuting Authority being more selective as to which non-compliance matters proceed to prosecution. However, there have been successful prosecutions on environmental matters in recent years.

## 11. Are there any evident enforcement trends arising from court decisions in South Africa?

On the NECER Reports and the limited available court decisions, statistically there does not yet appear to be a consistent or uniform trend to enforcement over the years (those judgments that are available are often a result of plea agreements).

However, the general approach by authorities can be ascertained from the NECER Reports, which provides feedback on the types of enforcement steps taken and prosecutions that have proceeded. The NECER Reports suggest enforcement efforts, generally, are trending upwards (albeit with some year on year fluctuations):

- the number of criminal dockets registered has generally tended to increase in recent years;
- there has been an upward trend in the number of admission of guilt fines issued

(admission of guilt fines are fines paid for less serious environmental offences in terms of the Criminal Procedure Act, 51 of 1977);

- there has been a significant increase in the number of compliance-monitoring events in which facilities were inspected to ascertain compliance with relevant legislation and authorisations;
- the number of pre-directives issued has increased (pre-directives are issued to a person such as where there is confirmation an activity is causing pollution or degradation of the environment);
- the number of final compliance notices issued has generally increased in recent years; and
- the total amount of administrative fines paid for rectification of activities undertaken without the necessary authorisation in terms of NEMA amounted to ZAR 10 million in 2017/ 2018 (as opposed to the previous year's ZAR 9.7 million). In terms of section 24G of NEMA, when a listed activity is undertaken without prior authorisation, a rectification application must be made to the authorities. Part of this process includes an administrative fine being imposed on the applicant, which may be up to ZAR 5 million.

The increase in compliance-monitoring inspections indicates pre-compliance notices, as well as ultimately compliance notices, should be regarded as the more typical mechanism of administrative enforcement that would be encountered, along with pollution-related directives where appropriate, with prosecutions being less common. There is also increasingly active involvement of non-governmental organisations, environmental associations and interest groups, which not only monitor and report on the environmental performance of companies operating in South Africa, but which are willing to litigate on environmental issues. This includes a recent successful private criminal prosecution in accordance with the provisions of NEMA.



## **12. What remedies does an applicant for a consent, authorisation, approval, licence or permits have if the consent is delayed or refused, if it is issued with unfavourable terms or conditions, or if it is revoked?**

Specific timing stipulations are put in place in NEMA and the 2014 EIA Regulations in terms of which an environmental authorisation application process must proceed, and within which periods a decision must be taken on whether or not to grant an application. For example, it is required that the authority must grant or refuse the application within 107 days after the receipt by the authority of an applicant's BAR or scoping report and EIA.

NEMA contains provisions that, in the context of mining-related applications, allow for a delay in the decision to be escalated. In extreme circumstances of unreasonable delay, the applicant may consider taking action by way of application to the High Court in terms of the PAJA to compel the authority to make a decision.

South African environmental legislation generally contains provisions allowing for appeals, including by the applicant as well as interested and affected parties, against many decisions (such as relating to granting permits, licences and authorisations) and specific appeal regulations have been promulgated under NEMA (which also apply with respect to appeals in terms of certain of the SEMAs, including the Waste Act, Air Quality Act, Coastal Act and the Biodiversity Act). In terms of NEMA, any person may appeal a decision of the authority. During the course of this appeal process, the decision which is the subject of the appeal generally is suspended pending the appeal outcome.

Following the appeal proceedings in terms of NEMA, a person aggrieved by an environmental authority's decision may, where justified, seek a judicial review of the decision under PAJA in a court or tribunal. However, such a review may generally only be sought through the courts once the aggrieved person has exhausted all internal remedies provided for in the environmental legislation concerned. Furthermore, in terms of PAJA, a person who

has been aggrieved by an authority's decision has a right to be given reasons for the decision.

## **13. How long does it typically take for such remedies to be pursued to a conclusion?**

In terms of the appeal regulations under NEMA, an appellant must submit his or her appeal within specified time periods as set out in the appeal regulations. These regulations also contain specific time frames for responding statements to an appeal to be submitted and by when a decision on the appeal must be made. If expert advice is required by the appeal authority or if an independent appeal panel is appointed, the time for processing an appeal in terms of the NEMA appeal regulations, would be longer. Typically, appeal proceedings under NEMA should take about four months to complete, but this may be longer depending on the complexity.

A more complex mechanism for appeals applies under the National Water Act and, depending on the nature of the activity for which a water use licence application and/ or the administrative decision which is the subject of the appeal, an appeal may have to be made to the Minister of Water and Sanitation or otherwise to the Water Tribunal, the latter being a potentially lengthy and cumbersome process.

Following the appeal proceedings set out above, and (other than in exceptional circumstances) only once the internal process has been exhausted, if aggrieved by the decision of the appeal authority, a person may take the decision on judicial review.

The matter will then be considered by the court and it is not possible to say how long the judicial review process would take to finalise.

## **14. Are there any specific laws which govern climate change in South Africa?**

In line with its international commitments as a member of the United Nations Framework Convention on Climate Change, South Africa has recently implemented a carbon tax regime through the Carbon Tax Act 15 of 2019. The Carbon Tax Act provides for a carbon tax to be levied on the carbon dioxide equivalent of the sum of greenhouse gas emissions of a taxpayer.



The tax is administered as an environmental levy under the Customs and Excise Act 91 of 1964, which also requires emission generation facilities to be registered or licenced. The emission generating activities in respect of which the tax is levied aligns with the Greenhouse Reporting Regulations under the Air Quality Act, in terms of which emissions need to be reported in specific instances.

Further and more onerous regulatory controls are anticipated through the pending Climate Change Act, which amongst others, is anticipated to impose mandatory carbon budgets and compliance with greenhouse gas mitigation plans.

In addition, there has recently been a focus on the extent to which climate change impacts need to be considered in the environmental authorisation process under NEMA, as well as social pressure on the need for lenders to disclose the climate change impacts/ greenhouse gas emissions and climate change related financial risk of the projects in which they invest.

## TRANSACTIONAL CONSIDERATIONS

### 1. Are there any 'change of control' or transfer of ownership requirements with respect to consents, authorisations, approvals, licences or permits, such as where a sale of business or shares is anticipated?

In the event of a sale of business, the environmental consents held by the seller will typically have to be transferred, in order to be held in the name of the buyer. Certain environmental legislation stipulates a specific process to be followed to effect the transfer of the consent from one person to another (which may include a 'fit and proper person' qualification criterion such as under the Waste Act and Air Quality Act)

but in some instances, an entirely new consent application may be required by the buyer:

- **Waste Act** - in relation to a sale of business, the holder of the waste management licence, with the permission of the licensing authority, may transfer the licence to the new owner.
- **NEMA** - in terms of the 2014 EIA Regulations, it is possible to apply for the amendment of the environmental authorisation, including changing the name of the person who holds the authorisation in the event of a change of ownership or transfer of rights and obligations.
- **Air Quality Act** - if ownership of an activity for which an atmospheric emission licence has been issued is transferred, it is possible to transfer the licence to the new owner of the activity. In order to effect such transfer, it is necessary to apply to the licensing authority.
- **National Water Act** - the holder of an entitlement to use water from a water resource in respect of any land may surrender that entitlement, or part thereof, in lieu of a different licence application in respect of other land and on the condition the subsequent application is granted. The National Water Act also provides that licences may be amended to reflect successors-in-title as a new licensee for the remainder of the term of the licence.

In the case of a sale of shares, change of control provisions are sometimes included as conditions to consents; for example, waste management licences under the Waste Act frequently contain authority notification requirements in the case of a change of particulars of the ultimate holding company of the licence holder. Rights and permits under the Marine Living Resources Act often contain conditions regarding sale of shares and change of control, potentially requiring notification or approval in certain circumstances.

All consents relevant to the transaction would need to be individually scrutinised for any change in control implications.

## **2. Is it required in terms of environmental legislation for a seller to disclose environmental liabilities and/ or compliance issues to a prospective purchaser in the context of a transaction?**

The Waste Act prescribes that no person may transfer contaminated land without informing the person to whom the land is to be transferred that the land is contaminated. In addition, if the land has been declared a remediation site in terms of the Waste Act, the Minister must be notified of the transaction and any conditions imposed by the Minister must be complied with.

There are no other provisions in terms of environmental legislation that specifically require the disclosure of environmental liabilities or compliance issues to a prospective purchaser.

However, it is required in terms of the 2014 EIA Regulations under NEMA (and is an increasingly common requirement in conditions of environmental authorisations and licences) that holders undertake independent compliance audits from time to time, and report the results of the audits, as well as reporting routine monitoring results and pollution incidents, to the environmental authorities. These audit and other reports provide a useful point of reference for a prospective purchaser.

Pending amendments proposed to NEMA will provide for the possibility for a successor-in-title or a person in control of land to undertake a rectification application process for a transgression relating to commencing of a listed activity under NEMA by a preceding/ other party. The implication of this proposed amendment is that the applicant who purchases the business and proceeds with rectification, may be liable for an administrative fine of up to ZAR 5 million (or more in terms of the pending NEMA amendments) by virtue of the ownership of the historically unlawful business and/ or control of the land associated with the transgression.

It is prudent for purchasers to undertake appropriate due-diligence investigations in circumstances where there could be environmental compliance or pollution/ contamination-related risks and liabilities associated with a business.

## **3. Can contractual environmental indemnities between the parties to the transaction be used effectively to limit exposure for environmental liabilities?**

To varying degrees and depending on the facts, contractual environmental indemnities and undertakings between the parties to the transaction can be used as an effective mechanism to limit, but not entirely remove, exposure to environmental liabilities and risks. Specialist legal advice is often required to ensure the potential risks and liabilities are identified and that commercially appropriate and practical terms are included in the transaction documents.

A company may also take out environmental impairment liability policies and/ or Directors and Officers Liability Insurance to protect its directors and officers against the payment of any damages or fines.

There are limitations as to how far this form of contractual and insurance protection can go. For example, a director who is appointed following the transaction could face personal criminal liability, including possible imprisonment, in the event that there is ongoing non-compliance associated with the business which cannot be immediately remedied post-transaction (such as where a licence to operate a key facility is outstanding, or where conditions of a licence, such as relating to emission limits, cannot be complied with without investing significant capital expenditure and long construction lead times).



#### **4. Can lenders, shareholders, directors, employees, agents or other persons be liable for environmental transgressions and/ or pollution and environmental degradation-related remediation costs?**

South African statutory provisions regarding possible extended liability for transgressions and pollution or environmental degradation have not yet been comprehensively tested in the courts, but a broad overview of some of the principal areas of potential lender, shareholder, director, employee and agent exposure to environmental liabilities is set out below. It would be advisable for specific legal advice to be sought in a transactional context where there are concerns of material environmental transgressions or pollution and environmental degradation-related liabilities, particularly in circumstances where enforcement action has already been threatened or commenced.

NEMA allows for personal criminal liability of directors, employees and agents in the case of so-called NEMA Schedule 3 offences, with the majority of the more significant environmental crimes that fall under a range of environmental legislation at a national and provincial level being included as Schedule 3 offences.

In the case of directors, NEMA provides that directors at the time of commission of the offence shall be guilty of the offence, where the offence resulted from the director's failure to take all reasonable steps necessary under the circumstances to prevent the commission of the offence. This is subject to a further proviso that proof of the offence by the company constitutes prima facie evidence the director is guilty, creating an evidentiary burden on the director. In order to escape liability, a director would have to show that he or she took all reasonable steps under the circumstances to prevent the commission of the offence.

NEMA also provides for the recovery of losses or damages caused by an environmental crime and other financial claims from the convicted person, including a director convicted under NEMA.

In the case of potential criminal liability of shareholders, there is no presumption or other statutory environmental liability directly associated with shareholding. All of the elements of a crime would have to be established for a successful prosecution and conviction of a shareholder for any of the relevant offences, such as stipulated in NEMA and the National Water Act.

Regarding pollution and environmental degradation liabilities, section 24N(8) of NEMA provides that, notwithstanding the South African Companies Act, 71 of 2008, the directors of a company "are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including damage, degradation or pollution". This provision (which was previously contained in the MPRDA) remains untested in the South African courts.

Section 28 of NEMA and Section 19 of the National Water Act both seek to make any person who can be said to have participated in or benefited from a polluting activity potentially liable for the pollution, including through cost-recovery mechanisms that apply if remediation costs are incurred by the authorities. Both statutes include provisions which make a person who is in control of land or premises potentially liable for pollution or environmental degradation, or for pollution of water resources. South African courts have not considered what the term in control means in this context of pollution or environmental degradation and whether this extends to parent companies. However, depending on the facts, a shareholder could potentially be considered to be in control of land or premises under certain circumstances.

Both NEMA and the National Water Act also extend cost-recovery liability to persons responsible for, or who directly or indirectly contributed to, the pollution or degradation and persons who negligently

failed to prevent the activity or process being performed or undertaken or the situation occurring. Additionally, a shareholder could possibly be liable under the cost-recovery provisions based on its shareholding because NEMA and the National Water Act provide that any person who benefited from remediation undertaken by the authorities may be liable for the remediation costs. Our courts have also not yet considered these provisions.

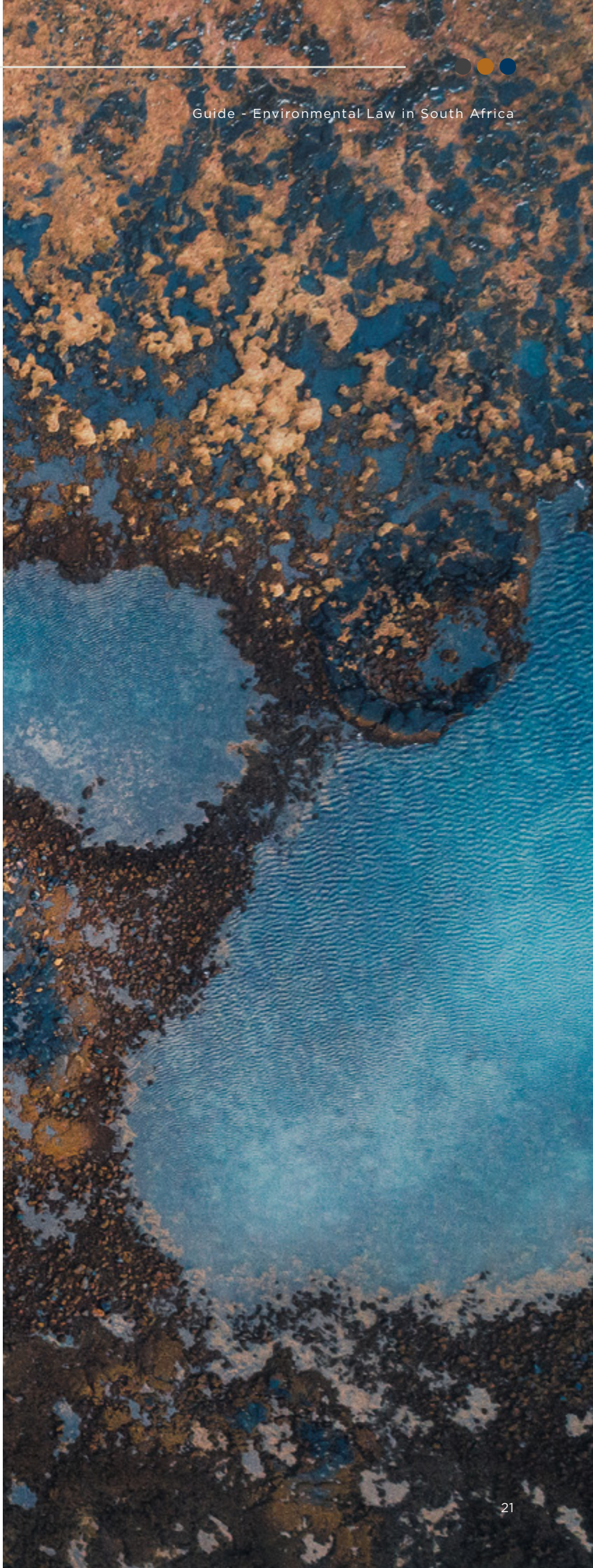
The same liability principles under NEMA and the National Water Act could potentially apply in appropriate circumstances to lenders, in particular where a lender has a high degree of oversight over the borrower's operations.

Civil liability in delict (tort) for damage and cleanup costs may apply to a parent company under certain circumstances where there is damage wrongfully caused by an intentional or negligent act to a person or the property of another.

In certain circumstances, a director of a South African company could potentially be delictually liable for damage caused to third parties by the company.

The possibility of common law actions, such as damages claims in delict, are not the only common law risk, as interdicts (injunctions) in relation to ongoing environmental transgressions and polluting activities may be commenced by neighbours, environmental interest groups or by the environmental authorities.

The risk around civil and criminal litigation extends beyond directly affected persons, as environmental interest groups could also establish legal standing to approach the courts due to the broadened provisions relating to legal standing under NEMA. There is increasingly active involvement of non-governmental organisations, environmental associations and interest groups in litigation on environmental issues, including a recent successful private prosecution in terms of NEMA.





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