Environmental Liability

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“The National Environmental Management Act 107 of 1998 (NEMA) has been amended to clarify that the duty to take reasonable measures to prevent significant pollution or degradation of the environment from occurring, continuing or recurring (“the duty of care”) also applies to pollution that occurred before NEMA commenced; to pollution that might arise at a different time from the actual activity that caused the contamination and to pollution that may arise following an action that changes pre-existing contamination (NEMA section 28(1A). It is therefore no defence to say that the pollution is historic, indirect or underlying – the responsibility to take reasonable steps remains.

“The significance of these changes becomes more apparent when one remembers that section 34 of NEMA makes provision for both ‘firms’ (including companies and partnerships) and their ‘directors’ (including board members, executive committees or other managing bodies or companies or members of close corporations or of partnerships) to be held liable, in their personal capacities, for environmental crimes. This personal liability also applies to managers, agents or employees who have done or omitted to do an allocated task, while acting on behalf of their employer. In all instances, the offence in question has to be one that is listed in Schedule 3 of NEMA and the person concerned must have failed to have taken all reasonable steps necessary under the circumstances to prevent the commission of the crime.

“The sting in the tail is that NEMA section 28(14) is no listed as a Schedule 3 offence. This means that unless it can be shown that all reasonable steps necessary to prevent the crime were taken, even an unintentional (but negligent) unlawful act or omission which causes significant pollution or degradation of the environment, can make a ‘director’ personally liable”.


Is the obligation to remediate contamination retrospective?

The nature of many pollutants is such that they do not readily break down and disappear naturally in the environment. Active intervention is often required to remediate areas affected by them. The result is that South Africa is littered with a multitude of human-induced contaminated areas, some of which arose as a result of activities that took place 10, 20 or even 50 years ago. Who bares the obligation to rehabilitate such areas and to what extent is this liability retrospective?
The nature of the obligation to rehabilitate

Section 24(1) of Act 108 of 1996 of the Constitution of the Republic of South Africa guarantees the right of every person to an environment that is ‘not harmful to their health and wellbeing.” Effect is given to this right in the National Environmental Management Act 107 of 1998 (NEMA) through the imposition of a duty that requires that:

“Every 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 such harm to the environment is authorised by law or cannot be reasonably avoided or stopped, to minimise and rectify such pollution or degradation of the environment.” (Section 28(1))

Although this duty is imposed on “every person”, NEMA specifically refers to the owner of, or person who has the right to use, land or premises. The scope of what constitutes ‘reasonable measures’ is not defined, but Section 28(3) of the Act indicates that they may include but are not limited to, assessing the impacts of activities, eliminating the sources of pollution, containing pollution, or remedying the effects of pollution.

A very similar duty of care, but specific to water resources, is set out in Section 19 of the National water Act 36 of 1998 (NWA), where once again ‘reasonable measures’ must be taken to prevent or rehabilitate pollution. However, the NWA is slightly narrower than NEMA in that the obligation is imposed on owners, persons in control of or persons who occupy land.

Both NEMA and the NWA do not yet prescribe specific remediation standards. This may be addressed through the regulations established under these Acts, or alternatively, through the relevant department’s published guidelines and policies specifying standards. In the interim, confusion on the part of both the departments and polluters on other responsible parties will remain.

What is clear is that our law imposes obligations to remove pollution from the environment, and to rehabilitate affected areas. However, in light of a recent decision by the High Court (in Chief Pule Shadrack VII Bareki and Others vs Gencor Limited and Others) we need to look closely at the issue of when and how far back (retrospectively) do these statutory obligations apply.

Both NEMA and the NWA include historical contamination as one of the triggers for the obligation. As such, it was the intention of the drafters of the legislation to require reasonable measures to be taken not only where activities are currently causing pollution or where they in future cause pollution, but also where past activities have caused contamination, which contamination remains evident in our environment today.

Is the duty retrospective?

Was it the intention of our legislature to limit the obligation to take reasonable measures to only those activities that took place or to that contamination that occurred prior to the
promulgation of NEMA and/or the NWA? Or was it their intention to hold polluters and other responsible parties liable for polluting activities and resultant contamination whenever it occurred, even if this was substantially prior to the implementation of NEMA (in 1999) and the NWA (in 1998)? In so far as it relates to NEMA, this question was considered by the Transvaal Provincial Division of our High Court in the Bareki Case.

The case concerned the Bareki tribe and an environmental concern group. The Bareki alleged that their environment had been degraded as a result of asbestos mining activities conducted by one or more of the defendants over a number of years in what is now the North West Province. The mining activities were discontinued by the mid-1980s. The plaintiffs claimed that the defendant mining company had failed to take the reasonable measures envisaged by Section 28(1) of NEMA to rectify the contamination, and that it was their obligation to do so, notwithstanding that the activities took place and the contamination arose, substantially prior to 1999.

After having considered the principal of retrospectivity in our law, the court concluded and held that the obligation in Section 28(1) of NEMA is retrospective only up to 1999, when the Act came into operation. It therefore held that it does not extend to activities that took place, or contamination that arose, prior to this date.

The basis of the court’s decision was primarily its application of the legal precept of leaning against retrospectivity where this will result in unfairness. Having decided that it would be unduly unfair, in the court’s view, to require the defendant mining company to incur substantial costs as a result of a contemporary statutory obligation to clean up and rehabilitate an environment degraded prior to 1999, the court held that ‘the unfairness of retrospective effect being given to section 28(1) and (2) is so great that it is unlikely that the legislature could have intended it.’

**Implications of the judgement**

A considerable number of sites and areas in South Africa were degraded as a result of activities that caused contamination prior to 1999. In fact, given that protection of the environment is a relatively contemporary concept, much of our most significant contamination occurred through poor business practices at a time when the environment was not considered to be a priority, and pollution was seen as a part of doing business.

Two problems arise as a result. Firstly, a number of pollutants, if left unattended, will over time and through natural or man-made forces, often migrate over wide areas, and affect a broad spectrum of the human and natural environment. The costs associated with addressing this problem, where it occurs, very often magnifies, and can run into many millions of Rands.

Secondly, companies are dynamic. They come and they go. Whether they are bought or sold, liquidated or disbanded, or simply abandoned, the perpetrator of the pollution may no longer exist today.

In the light of the court’s decision in the Bareki case, who then will bare the responsibility for the costs of the removal of the contamination caused prior to 1999?
Rationale for contamination obligations being retrospective

South Africa is no alone in having to address a legacy of contamination that precedes contemporary legislation designed to address harm caused to the environment. Much of the developed world has had to face precisely the same dilemma as that faced by our court in the Bareki case. When viewed generally, the trend overseas appears to have been to adopt a somewhat different view of the ‘unfairness’ issue considered by our court in Bareki. While conceding that it is somewhat harsh to compel a company to incur substantial costs today for activities that were not considered particularly irregular 50 years ago, foreign jurisdictions appear to view the alternative solution as far more unpalatable – namely that ordinary taxpayers, who have no connection whatsoever to the harm, and derived no benefit from it, will through the clean-up activities of their governments, be compelled to pay for the remediation of the affected environment. As a result, many foreign jurisdictions have had no difficulty in holding parties (who generally derived some direct or indirect financial benefit from the harmful activities) liable for harm caused retrospectively, even where such harm occurred substantially prior to the enabling legislation.

To be fair to our court in the Bareki case, it could only interpret and apply the law as set out in NEMA. Nevertheless, given that:

- The creation of NEMA came after similar legislation in foreign jurisdictions, and comparison of such similar legislation with NEMA suggests that our drafters borrowed heavily from laws in other countries.
- NEMA identifies a wide, but connected (to the polluter), pool of responsible parties who are liable on a joint-and-several basis.
- Clearly uses retrospective-type language
- Limits the obligation to taking ‘reasonable measures’
- In a developing country such as ours, there is even less prospect of our government, through ordinary taxpayers’ money, funding massive and numerous clean-up operations that there is in developed countries that apply similar laws retrospectively.

It could, and arguably should, be the case that the drafters of NEMA intended, in balancing unfairness towards parties connected to the polluter and who derived financial benefit from the pollution against the even greater unfairness that would result for ordinary taxpayers having to fund the clean-ups, that the retrospective provision in Section 28 was intended to apply to activities that took place and to harm that arose at any time historically whether before or after the inception of NEMA in 1999.