

LIABILITY OF DIRECTORS FOR ENVIRONMENTAL DAMAGE AND REMEDIATION

KING 3 AND NEMA

While there exist, in South Africa, reporting requirements in terms of King 3, the scope of applicability of these requirements is far more limited than the potential liability that can be incurred in terms of the National Environmental Management Act (NEMA). King 3 deals mainly with sustainability, whereas, as will be seen from the brief analysis below, NEMA has a far broader scope.

PROVISIONS IN TERMS OF KING 3

The second King Commission report was a code of conduct, which was applicable to JSE Securities Exchange listed companies, corporations in the financial services sector and public enterprises. King 3 is applicable to “all entities regardless of the manner and form of incorporation and establishment”.

In terms of King 3, and more specifically in relation to the environment, a Board of Directors should:

- Treat strategy, risk , performance and sustainability as inseparable
- Ensure that the company is and is seen as a responsible corporate citizen (ethically, socially and environmentally responsible for sustainability)
- Take into account the possibility of sustainability as a business opportunity
- Establish internal controls to cover financial, operational, compliance and sustainability.

PROVISIONS IN TERMS OF NEMA

In brief, NEMA covers a broad range of subjects within the context of environmental law, such as:

- Sustainable development
- Environmental Justice
- A Public Trust doctrine
- A Precautionary Principle
- A Preventive Principle
- A “Polluter pays” principle

This is significantly different to King 3, in that in that report, only sustainability is addressed.

It must also be borne in mind that our Constitution provides for the right to an environment that is not detrimental to health and wellbeing.

Section 28 of NEMA provides for liability for environmental damage. This liability rests upon the 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 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 significant pollution or degradation of the environment. It should be noted that it was the specific intention of this section to apply to past pollution or degradation, as is evidenced by the 2009 amendment to the section, as contained in Section 28(1A).

In short, section 28 of NEMA provides for a general duty of care and remediation for environmental damage, and imposes this duty on all persons whose actions may cause pollution or degradation of the environment: Reasonable measure must be taken and joint and several liability applies to responsible persons.

POTENTIAL LIABILITY IN TERMS OF CURRENT LEGISLATION AND PROVISIONS

Section 43 of NEMA provides that if directors failed to take all reasonable steps to prevent the offence being committed, and monetary advantage was gained, they may be personally liable for damages or compensation, have to pay a fine, or have to comply with remedial measures determined by the Court, and may even have to pay the State's investigative costs.

Section 34(5) provides specifically for the personal liability of directors of a company.

Certain offences carry a fine of either five million rand or five years imprisonment, while "unlawfully and intentionally or negligently committing any act or omission which causes significant or is likely to cause significant pollution or degradation of the environment" carries a penalty of one million rand or one year imprisonment or both.

THE WAY FORWARD

Environmental laws are here to stay, as is evidenced by South Africa's signature of the various environmental protocols and accords on environmental issues.

It is vital that directors consider the fact that they may be personally liable for even the negligent omission in relation to certain offences in terms of NEMA. As an example, when a banking institution repossesses a property subject to a mortgage bond which has been reduced to a state that significantly impacts on the environment (even aesthetically) or is polluted, it then becomes the bank's

responsibility to remediate the property or **it and its directors** will face the fines as detailed above.

Policing of the provisions of NEMA, especially in relation to directors' liability, remain untested. It has been submitted that JSE Securities Exchange non-compliance with King 3 may well lead to the subsequent prosecution in terms of NEMA of the company and its directors.

It is important to bear in mind that the sanction is a criminal one: an offence in terms of NEMA will result in a criminal record for the director found liable for a fine in terms thereof.

The Prevention of Organised Crime Act (POCA), insofar as it relates to acquisition of assets with the proceeds of a crime, may also be applicable to an individual who, having gained financially by, for example, failing to expend money on a required Environmental Impact Assessment, is found guilty of an offence. Such an individual's assets may well be seized in terms of the provisions of POCA.

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