

# Directors' liability for negative environmental impacts

by Andrew Gilder and Marie Parramon



Marie Parramon

A number of media reports have highlighted recent actions of the environmental management inspectors of the Department of Environmental Affairs and Tourism (DEAT), the so-called 'Green Scorpions', in investigating environmental non-compliances associated with certain large industries. Examples include non-compliance with the requirements of a licence issued to a company for the purposes of controlling an operation's potential impact on an environmental medium. In such instances, while the company itself may be liable for prosecution, certain provisions of the National Environmental Management Act (NEMA, Act 107 of 1998) may also impose personal liability for corporate non-compliance on the directors, managers, agents and employees. This article briefly considers the position of directors in the NEMA regime.

## Directors' liability

NEMA provides that any person who is, or was, a director of a firm at the



time of the commission of any one of a number of criminal offences specified in Schedule Three attached to the Act, shall themselves be guilty of the offence, if the offence resulted from the failure of the director to take all reasonable steps necessary under the circumstances to prevent the offence (Section 34(7)).

Note that the terms 'firm' and 'director' are specifically defined for the purposes of this provision. Examples of Schedule Three offences include failure to hold a Registration Certificate in terms of Section 9 of the Atmospheric Pollution Prevention Act of 1965, and, unlawfully and intentionally or negligently, committing an act or omission that pollutes or detrimentally affects, or is likely to pollute or detrimentally affect, a water resource, in terms of the National Water Act of 1998.

The qualification found in the NEMA Section 34(7) that the director shall be guilty of the offence if it resulted from the failure of the director to take all reasonable steps, implies that such directors may seek to defend themselves

## INTEGRATED SHE / RISK MANAGEMENT SERVICES

SHE / Risk Training  
Legislative Compliance & Assistance  
Risk Assessments  
Behavioural Safety  
Auditing (Legal & System)  
Consulting  
Hygiene Surveys  
Contractor SHE Management File  
SHE / Risk Software Management Systems

WHY SETTLE FOR LESS IF YOU CAN HAVE THE BEST

**GSRC** MANAGEMENT Pty. Ltd.  
global sustainable risk control

Tel: 0861 11 44 00  
E-mail: [business@gsrcrisk.co.za](mailto:business@gsrcrisk.co.za)  
Web: [www.gsrcrisk.co.za](http://www.gsrcrisk.co.za)



from conviction by showing that they took necessary and reasonable steps to prevent the commission of the offence.

### Authorisation

Many of the NEMA Schedule Three offences involve the simple failure to hold a relevant licence or authorisation to conduct certain operations, such as an Atmospheric Pollution Prevention Act, Section 9 Registration Certificate.

However, those offences related to the National Water Act involve an impact or potential impact on the environment and an element of negligence on the part of the firm. The standard test for negligence is that of 'reasonableness'. While the South African courts have not, to date, offered an analysis of this notion as used in NEMA Section 34(7), they have considered the question of reasonable steps to prevent foreseeable harm on a number of occasions.

### Reasonableness

A court decision made in the context of a delictual action involving a personal injury claim made by a pedestrian against the then-Pretoria City Council, is instructive in this regard. In *Pretoria City Council v De Jager* 1997 (2) SA 46 (A), the Supreme Court of Appeal reiterated the relevance of certain 'guideline considerations' in determining the meaning of 'reasonable steps' in instances where harm has been caused. These considerations are of use in understanding the notion of 'reasonableness' in terms of NEMA Section 34(7) and relate to:

- the degree or extent of the risk created by the actor's conduct
- the gravity of the possible consequences if the risk of harm materialises
- the utility of the actor's conduct
- the burden of eliminating the risk of harm.

It is therefore possible to argue that a court is likely to consider the circumstances surrounding the steps taken, and their utility, in determining the reasonableness of such steps in terms of NEMA Section 34(7).

### The risk management question

A recommendation flowing from this discussion is that it would be beneficial to the director(s) of a firm to investigate:

- the status of the firm's compliance with relevant authorisation requirements
- the potential impact of the firm's operations on the environment
- potential actions that may prevent or ameliorate such impact.

A first step in this direction might take the form of an environmental legal audit and risk assessment aimed at identifying:

- areas of potential non-compliance with authorisations and consents
- making recommendations on how to deal with identified non-compliances
- implementation of systems and procedures that can ensure against the occurrence of future non-compliances.

Such systems and procedures may include the introduction of an environmental legal register and an annual system of environmental legal auditing with clear obligations on relevant levels of management to communicate the results and recommendations of such audits to the directors and management. 35

\* This article is not a comprehensive discussion of the topic and must not be relied upon as legal advice.

\* Andrew Gilder (BA, LLB, LLM Marine and Environmental Law) is a director, and Marie Parramon (Maîtrise en droit: French LLB, LLM Marine and Environmental Law) is an environmental legal consultant, MBEWU Enviro-Legal Specialists.



*Under the National Environmental Management Act, directors are accountable for environmental misconduct.*

CERTUS  
LEGAL COMPLIANCE SERVICES

SHE LEGAL COMPLIANCE SERVICES

(012) 807 7900