ICLG

The International Comparative Legal Guide to:

Environment & Climate Change Law 2018

15th Edition

A practical cross-border insight into environment and climate change law

Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer LLP, with contributions from:

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Contributing Editors
Daniel Lawrence and John Blain, Freshfields Bruckhaus Deringer LLP

Sales Director
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Oliver Smith

Sales Support Manager
Toni Hayward

Senior Editors
Suzie Levy, Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
February 2018

ISBN 978-1-911367-92-5
ISSN 2045-9661

Strategic Partners

General Chapter:

Country Question and Answer Chapters:

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EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Environment & Climate Change Law.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of environment and climate change laws and regulations.

It is divided into two main sections:

One general chapter. This chapter is entitled: "*The 'Brexatom' Conundrum*".

Country question and answer chapters. These provide a broad overview of common issues in environment and climate change laws and regulations in 24 jurisdictions.

All chapters are written by leading environment and climate change lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Daniel Lawrence and John Blain of Freshfields Bruckhaus Deringer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

South Africa

Terry Winstanley

Cliffe Dekker Hofmeyr Inc.

Valencia Govender

1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in your jurisdiction and which agencies/bodies administer and enforce environmental law?

The Constitution guarantees every person the right to an environment that is not harmful to his or her health or well-being and for the protection of the environment against pollution and degradation. This right is binding on the state and people, both natural and juristic. Importantly, environmental protection must balance against the need for sustainable development and use of natural resources in a manner which addresses past economic and social injustices.

Environmental management in South Africa is highly regulated and various authorisations are required from different spheres of government (national, provincial and local) for activities that are legally controlled. The principal act governing activities that affect the environment is the National Environmental Management Act, No 107 of 1998 (NEMA).

The administration, monitoring and enforcement of environmental law is primarily undertaken by the (national) Department of Environmental Affairs (DEA) together with the relevant provincial and local environmental authorities. Depending on the nature of activities undertaken, the Departments of Water and Sanitation; Mineral Resources; Energy; Agriculture Forestry and Fisheries; and Trade and Industry, may also be involved in the administration of environmental law.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Enforcement of environmental law is primarily undertaken by the environmental management inspectorate/ors (EMI) of the DEA. EMIs monitoring compliance and take enforcement action against transgressors by using administrative and criminal sanctions.

There has been growing enforcement of environmental law by the EMIs. The DEA's National Environmental Compliance and Enforcement Report for 2016/2017 recorded 1,092 arrests and 1,497 criminal dockets having being opened for transgressions of environmental laws.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

The right of access to information is enshrined in our Constitution. The Promotion of Access to Information Act, No 2 of 2000 (PAIA) gives effect to this Constitutional right by allowing access to information held by the State and private bodies that is required to exercise or protect any rights. Where environmentally-related information is held by a public body the requester usually does not have to justify why the document is required – the requester's entitlement to the document is presumed. A public body must therefore disclose the record to the person who submitted a request under PAIA, provided that the procedural requirements of PAIA have been met and there is no legitimate ground of refusal (such as protecting trade secrets or protecting the privacy of a third party).

Some information is automatically available to the public without requiring the submission of a PAIA request. Automatically available information includes copies of environmental authorisations (EAs), waste management licences (WMLs), atmospheric emission licences (AELs), water use licence applications, water use licences (WULs), and audit and compliance reports.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Most environmental statutes require authorisations, licences or permits before the activities they regulate may commence. There is no integrated environmental permitting system in South Africa and separate permits are often required from different environmental authorities in various spheres of government. Examples of permits and licences include WULs, WMLs, AELs and effluent discharge permits).

It is ordinarily not possible for the holder of an environmental permit to transfer it to another person. The statute under which the permit was issued specifies how it may be transferred, almost always with the consent of the issuing authority. The transferee will usually have to sign an undertaking to comply with the conditions of the permit and may be required to demonstrate its ability to comply with them.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

An unsuccessful applicant for an EA or an applicant who is unhappy with the conditions of an EA may appeal such decision within 20 days of notification of the decision. In addition, a person aggrieved by an authority's decision may, under the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), seek judicial review of the decision in a court. However, a judicial review may only be sought once the aggrieved person has exhausted all internal remedies provided for in the environmental legislation concerned.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Under NEMA, certain activities that are considered likely to have detrimental impacts on the environment require environmental authorisation prior to commencement. The Environmental Impact Assessment (EIA) Regulations contain lists of these activities, as well as the procedures to be followed to obtain environmental authorisation. Assessment may entail either a basic or full EIA, depending on the extent of the environmental impact of the listed activity. Examples of listed activities include: construction and expansion of facilities and infrastructure for generation and transmission of electricity; extraction or processing of gas, oil or petroleum products; bulk transportation of water; and storage of dangerous goods.

All EAs and Environmental Management Programmes (EMPrs), are subject to compliance auditing. An EA must specify the frequency of the auditing of compliance with the conditions of the EA and EMPr. The holder of the EA must ensure that compliance with its conditions and that of the EMPr, including the audit requirements.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

An EMI may issue abatement notices; compliance notices or directives. A compliance notice will set out the details of the conduct constituting non-compliance; any steps the person must take and the time periods for compliance. An EMI must give the recipient advance warning of the intention to issue such compliance notice.

If the specified measures are not taken, the competent authority may take those steps itself and recover the costs from various parties, including the landowner or the land user (regardless of fault); anyone who could have and failed to prevent the polluting activity; and anyone who indirectly contributed to, or derived a benefit from, the polluting activity.

Most environmental statutes contain criminal sanctions for breach. Penalties usually include imprisonment up to 10 years and/or fines of up to R10 million.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The National Environmental Management Waste Act, No 59 of 2008 (Waste Act) broadly defines waste "as any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of, or that is intended or required to be discarded or disposed of, by the holder of that substance, material or object, whether or not such substance, material or object can be re-used, recycled or recovered and includes all wastes as defined in Schedule 3 to the Act but ceases to be waste once it is reused or has been excluded from the definition of waste.

The Waste Act imposes a general duty upon waste-holders (which term is widely defined) to take reasonable measures to avoid waste generation and, where this is impossible, to: minimise the toxicity and quantities of waste generated; re-use, reduce, recycle and recover waste; and ensure that it is treated and disposed of in an environmentally-sound way. Additional measures may be required for wastes identified as priority wastes. These additional measures may include reuse of such waste, treatment and disposal and reporting obligations.

It is necessary to hold a WML for defined waste management activities involving both general and hazardous waste. Some waste management activities do not require a WML but a holder must comply with prescribed norms and standards.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

A producer of waste is allowed to store waste on site provided that it is not likely to cause environmental pollution or harm to human health.

Depending on the type and quantity of waste, the producer will have to obtain a WML and/or comply with norms and standards. For example, currently the disposal of general waste to land covering an area of more than $50m^2$ but less than $200m^2$ and with a total capacity not exceeding 25,000 tons will require a WML. Where more than $80m^3$ of hazardous waste or more than $100m^3$ of general waste is stored on a site, the holder of such waste will have to comply with the norms and standards for the storage of waste.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/ disappears)?

The Waste Act provides for extended producer responsibility (EPR) for certain products; however, the regulations giving effect to these responsibilities have not yet been published. Currently voluntary initiatives are typically undertaken by industry, and are usually aimed at postconsumer waste streams. An example of an effective voluntary EPR initiative is the Recycling Oil Saves the Environment (ROSE) Foundation's used lubricating oil recycling initiative.

A producer's responsibilities may include waste minimisation programmes, the financing of such programmes, conducting life cycle assessments or labelling requirements. These mechanisms means that producers retain responsibility for their waste, notwithstanding lawful transfer to a recipient. The Waste Act also places a general duty on sellers of products, that may be used by the public and which are likely to result in hazardous waste generation, to take reasonable steps to inform the public of the waste's impact on health and the environment.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The Waste Act does not require a producer to take back or recover its waste, but it remains obliged to ensure that its waste is disposed of in an environmentally-sound manner.

Under the Consumer Protection Act, No 68 of 2008, where goods contain substances that may not be disposed of in a common waste collection system, the supplier is under an obligation to accept their return from any consumer without charge and irrespective of whether they supplied the particular goods to the returning consumer.

4 Liabilities

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

Liability is usually in the form of criminal liability; the commencement and continuation of a listed activity without an EA or failure to comply with the conditions of an EA is an offence and may result in imprisonment for a period not exceeding 10 years or a fine not exceeding R10 million (or both).

Further, the competent authority may direct measures that must be taken. If the specified measures are not taken, the competent authority may take those steps itself and recover the costs from various parties, including the landowner or the land user (regardless of fault); anyone who could have and failed to prevent the polluting activity; and anyone who indirectly contributed to, or derived a benefit from, the polluting activity.

Where there is a breach of environmental law, a possible defence will show that reasonable measures were taken to prevent, minimise and rectify the pollution or degradation. Reasonable measures include: assessing the impact on the environment; informing employees about the environmental risks of their work and the manner in which their tasks must be performed to avoid causing significant pollution or degradation of the environment; ceasing, controlling any act, activity or process causing the pollution or degradation; or eliminating the source of the pollution.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Despite the issue of a permit, NEMA imposes a duty of care on any person who causes, has caused or may cause significant environmental pollution or degradation, to take reasonable measures to prevent, minimise and rectify the pollution or degradation, even where it is legally authorised. There is no stipulated pollution threshold limit that triggers the remediation obligation and legislated standards to which contamination must be remediated only in certain narrow circumstances prescribed by the Waste Act. What is required is the taking of reasonable measures.

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?

Directors, employers, managers and employees of companies who caused the environmental damage may be held personally liable.

An employer can be held criminally liable for the conduct of an employee unless he is able to show that reasonable steps were taken to prevent the commission of the offence. Further, someone who was a director of a firm when the firm committed the offence is presumed to have committed the offence and may also be personally liable (unless it can be shown that all reasonable steps were taken to prevent the offence).

Joint and several liability can be imposed on directors of companies and members of close corporations for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including for damage, degradation or pollution.

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?

Share sale:

A purchaser may be liable for the target company's failure to meet its obligations under environmental law if it becomes a shareholder of the target. When acquiring a company's shares, a purchaser also generally acquires any liabilities incurred by the seller, as liabilities remain with the target company after the sale.

Asset sale:

As a general rule, a purchaser will not inherit any pre-acquisition criminal environmental liability (unless the parties agree to a different division of liabilities in the transaction agreement). However, as explained above, the purchaser may be liable for costs of remedial action incurred by competent authorities.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Under NEMA, where shareholders or lenders have material control over operations or management of a company that caused environmental harm, they may also attract liability. A greater involvement in a polluting company's daily activities is likely to increase the liability potential of such shareholders or lenders. Further, where they had the power to prevent pollution from occurring and did not do so, they may be required to contribute to clean-up costs. This issue has not been considered by a South African court.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The Waste Act regulates contaminated land (including land contaminated before the commencement of that Act) which is land that may be harmful to health or the environment due to substances present in it. The owner of land will be held liable for the contamination but could attempt to recover a share of remediation costs from any prior polluter.

Under these contaminated land provisions, an owner of land that is significantly contaminated, or a person who undertakes an activity that caused significant contamination of the land, must notify the Minister of Environmental Affairs of that contamination on becoming aware of that contamination.

While there is no positive obligation to assess a site to determine whether the site is significantly contaminated, this absence of a positive assessment obligation would not be a defence if the contamination is an obvious consequence of the activities undertaken at the site.

If the land is contaminated, a site assessment must be conducted and a site assessment report must be compiled. The Minister may order

that the land be remediated urgently, within a specific period or that the risk only needs to be monitored and managed in accordance with specified norms and standards.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Primary liability rests on the person who caused the pollution and/or the person in control of the land, but may also attach to successors in title of the entity that caused the pollution, even if it had no part in the polluting activity.

Additionally, the competent authority may take remediation steps itself and recover the costs from various parties, including the landowner or the land user (regardless of fault); anyone who could have and failed to prevent the polluting activity; and anyone who indirectly contributed to, or derived a benefit from, the polluting activity. Apportionment is at the discretion of the competent authority but must be rational.

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?

There is no specific provision for this. The Waste Act only requires that the Minister issue a remediation order containing the measures that must be taken to remediate the land or the standards that must be complied with when remediating the land.

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; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

No person may transfer contaminated land without informing the transferee that the land is contaminated and, in the case of a remediation site, without notifying the Minister and complying with any conditions that are specified. It may be possible to institute a damages claim against a predecessor-in-title if it can be shown that it failed to take steps to prevent or alleviate the environmental harm. One cannot entirely absolve oneself from statutory environmental liability under contract, although one may limit it by way of contractual indemnities.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

The competent authority may take steps to remediate the environment itself and recover the costs from various parties including: the landowner or the land user (regardless of fault); anyone who could have and failed to prevent the polluting activity; and anyone who indirectly contributed to, or derived a benefit from, the polluting activity.

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.?

EMI's have wide search and seizures powers and may:

- question a person about any act or omission where there is a reasonable suspicion that it might constitute an offence or breach of environmental law of a condition of a permit, authorisation or other instrument issued in terms of such law;
- inspect, copy, or question a person about, any document, book or record or any written or electronic information;
- inspect, question a person about, and if necessary remove any specimen, article, substance or other item which, on reasonable suspicion, may have been used in committing an offence or breach of environmental law or a breach of a term or condition of a permit, authorisation or other instrument issued in terms of such law;
- take photographs or make audio-visual recordings of anything or anyone that is relevant for the investigation; and
- without a warrant, enter and search any vehicle, vessel or aircraft, or search any pack-animal, on reasonable suspicion that the vehicle, vessel, aircraft or pack-animal is being used to commit an offence.

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?

There is no specific obligation to notify third parties about general pollutions save for:

- notification of contaminated land once it comes to the attention of the owner under the Waste Act; and
- notification to the Minister and individuals whose health and safety may be affected of "emergency incidents" such as accidental spills or emissions under NEMA.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

While there is no positive obligation to assess a site to determine whether the site is significantly contaminated, this absence of a positive assessment obligation would not be a defence where the contamination is an obvious consequence of the activities undertaken at the site.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

There is no statutory environmental provision that deals with the obligation of a seller to disclose environmental liabilities. The Waste Act requires the seller of land to notify the buyer if the land is contaminated. However, this issue is mainly dealt with under the common law. If the seller knows of an environmental liability and does not disclose it to the buyer, this may amount to a material misrepresentation and breach of contract.

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 for that matter?

Environmental indemnities are usually included in commercial transactions to limit the exposure for environmental liability. The polluter remains liable for any pollution but could claim the costs from an 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?

South African environmental law does not contain any specific regulation regarding the dissolution of companies (but as explained, a director at the time when the dissolved company would retain personal liability). Under South African company law, creditors like those who have a claim for environmental non-compliance, may apply to prevent the dissolution of the company.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

There is no decided case law which extends the duty to comply with environmental law to persons/entities other than those that own the land, exercise control over the land or those who benefit from the polluting activity. It is conceivable that the parent company could be liable for environmental non-compliance if it exercises a material degree of control over the subsidiary.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

NEMA protects all persons who make disclosures in good faith, especially where a disclosure was made in the public interest, including where such disclosure is made to the news media.

Additionally the Protected Disclosures Act, No 26 of 2000 makes provision for the protection of employees who report unlawful or irregular conduct of their employers and fellow employees. Disclosures regarding damage to the environment are specifically protected.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

A wide range of persons is granted legal standing under NEMA and the Constitution to institute legal action for protection of the environment, including any person or group of persons with an interest in protecting the environment or persons acting on behalf of a group of persons whose interests are affected.

Exemplary damages are not typically awarded under South African environmental law, but it is possible to claim such damages under a delictual claim.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

A court hearing an environmental dispute has the discretion whether to award costs against an unsuccessful public interest litigants if the court finds that the person or group acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other methods available to it.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in your jurisdiction and how is the emissions trading market developing there?

South Africa is a party to the UN Framework Convention on Climate Control (UNFCCC) 1992, the Kyoto Protocol 1997 and most recently the Paris Agreement 2016. South Africa was classified as a developing country under the Kyoto Protocol so there is no current obligation on South Africa to reduce its greenhouse gas (GHG) emissions. As a result no national or regional trading schemes of GHG emissions have yet been developed. Some clean development mechanism (CDM) projects were implemented.

However, Government recently released the draft Regulations on Carbon Offsets under the Carbon Tax Bill for comment. The Proposed Carbon Offsets will give effect to one of a number of tax allowances in the Carbon Tax Bill, to lower these companies' tax liability and establish a carbon-offset scheme for South Africa (the Scheme).

The Designated National Authority (initially tasked with administering CDM projects under the UNFCCC) will administer the Scheme and manage the South African registry. This will include assessing projects to ensure compliance with local eligibility criteria prior to implementation or transfer of certified emission reduction (CERs) to the South African registry, registering projects and issuing offset certificates.

Treasury has stated that it has not yet decided whether SA's CERs should be traded on international platforms or whether to develop a local trading platform. If trading on international platforms is agreed to, the international market for CERs under the Paris Agreement is presently unclear.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Carbon tax is one of the mechanisms that government will use to control and ultimately mitigate global GHG emissions and is expected to be implemented soon. A draft Carbon Tax Bill has been published.

The Pollution Prevention Regulations published under the National Environmental Management Air Quality Act, No 39 of 2004 require that anyone who emits priority pollutants (GHGs) above the threshold of 0.1 megatonnes of carbon dioxide equivalent must prepare and submit a pollution prevention plan before December 2017. These entities must also report annually on progress made in implementing pollution prevention plans. Industries that are required to prepare plans include mining, oil refining, paper and pulp, glass production, cement production, iron and steel industries.

The GHG Gas Emission Reporting Regulations (GHG Regulations) require industries undertaking specified activities to report annually on the amounts of fuels used and their GHG emissions (including all process and fugitive emissions). Examples of specified activities include: energy generation, manufacturing industries and construction, food processing, beverages and tobacco and transport industries.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

South Africa has also adopted a Climate Change Response policy. South Africa's response to climate change has two objectives which unpin climate change regulation:

- effectively to manage the inevitable climate change impacts through interventions that build and sustain South Africa's social, economic and environmental resilience and emergency response capacity; and
- to make a fair contribution to the global effort to stabilise GHG concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe that enables economic, social and environmental development to proceed in a sustainable manner.

A Climate Change Act is currently being drafted and is expected to be promulgated soon.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos litigation has declined since the establishment of trusts who process claims of employees of mines and others who were exposed to asbestos. The Asbestos Relief Trust and Kgalagadi Relief Trust arose from an out-of-court settlement, i.e. an agreement between several claimants who were ill with asbestos related diseases and various companies that historically owned asbestos mines/mills in different provinces of South Africa.

The trusts process claims from former employees, their dependents and people who have had environmental exposure to asbestos from the mines/mills. The trusts are accessible to potential claimants and provide information to claimants and all other stakeholders.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Asbestos has effectively been banned in South Africa since 2008. No person may acquire, process or repackage, import or export asbestos and may not manufacture or distribute asbestos and asbestos-containing materials.

The continued use of asbestos-containing materials (such as asbestos cement roof sheets or ceilings) that currently exist is not prohibited. However, these should be replaced over time with asbestos-free materials.

Employers have a legal obligation to perform a survey of buildings to ascertain and quantify the presence of asbestos and must assess the risk of exposure to the asbestos. Employers (and therefore possibly owners of buildings) may be required to repair sections containing asbestos, have it removed completely or encapsulated so that it no longer poses a threat to the employees. Where asbestos must be removed, this must be done by an authorised asbestos contractor.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in your jurisdiction?

It is possible to obtain environmental risk insurance. However, because of the difficulty of predicting the consequences of environmental damage and the costs of repairing that damage, this type of insurance is very expensive and so rarely used in practice.

Insurance cover is more likely to be used where an event can be specifically defined, both in time and area. Insurance companies do insure against ongoing environmental damage, but this is also prohibitively expensive.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Environmental insurance claims are currently very limited and indemnity is usually claimed in terms of general insurance policies held, as was the case in *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC and Another* 2007 (2) SA 26 (SCA). In this case the Supreme Court of Appeal found an insurer liable to indemnify the insured party under a vehicle insurance policy for the costs incurred by a diesel spill from its vehicles. Liability arose out of clause in the policy which provided that the Insurer would indemnify the insured party for any costs arising out of an accident involving the insured vehicles for which it was legally liable. The insurer argued that clean up measures under NEMA did not constitute a legal liability for purposes of the insurance contract. The Court found that an environmental legal obligation constituted a legal liability and was covered by the relevant clause of the agreement.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in your jurisdiction.

In addition to various regulations regarding GHG emissions promulgated this year (as discussed above), one of the main issues raised was the fact that climate change considerations may now need to be taken into account when applying for an EA and undertaking and environmental impact assessment. This is following the case of *Earthlife Africa Johannesburg and Another v Minister of Energy and Others (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017)*.

This is the county's first judgment dealing with the impacts of activities on climate change. The case involved the grant of an EA for the construction of a 1200MW coal-fired power station. An environmental NGO appealed against the grant based on various grounds including that the DEA did not take into account the impacts that the power station will have on climate change before issuing the EA.

The court found that the impact of the power station on climate change should have been taken into account in deciding whether to grant the EA.

There is no express provision in our law that requires a climate change impact assessment (CCIA) before an authorisation under NEMA or anyone of its specific management acts is granted. The

judgment addresses the issue regarding a CCIA narrowly by asking whether a CCIA is necessary before authorising a coal-powered station. It is, however, now conceivable, that all projects having an impact on climate change may require a CCIA as part of its application for an EA.

Terry Winstanley
Cliffe Dekker Hofmeyr Inc.
11 Buitengracht Street
Cape Town, 8001
South Africa

Tel: +27 21 481 6332
Fax: +27 21 481 9516
Email: terry.winstanley@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

Terry Winstanley is a director and national head of Cliffe Dekker Hofmeyr's Environmental Law practice. She is one of the leading environmental lawyers in South Africa and has wide experience in environmental law and policy in Southern Africa; a field in which she has worked exclusively for more than 20 years. Her commercial clients are drawn from the energy, forestry, petro-chemicals, pulp and paper, mining and manufacturing sectors. Her government clients include national, provincial and local governments including those of Namibia, South Africa, Swaziland, the Western Cape, KwaZulu-Natal, Cape Town, Durban and Johannesburg.

Market Recognition:

- *Chambers Global* 2015–2017 ranked Terry in Band 1 for environment and she was named a 'Star Individual' – given to practitioners with exceptional recommendations in their field.
- *The Legal 500 EMEA* 2014–2017.
- *Best Lawyers International* 2013–2018 listed her for environmental law.
- Terry was also recommended by *IFLR1000* 2012, 2015 and 2017 for energy and infrastructure and for project development.

Valencia Govender
Cliffe Dekker Hofmeyr Inc.
11 Buitengracht Street
Cape Town, 8001
South Africa

Tel: +27 21 481 6419
Fax: +27 21 481 9516
Email: valencia.govender@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

Valencia Govender is an associate in our Environmental law practice. She has an in-depth understanding of the various pieces of environmental legislation and her experience includes preparing legal opinions on environmental issues, drafting due diligence reports and assisting clients in administrative appeal processes. Her expertise also includes conducting environmental legal compliance audits and advising on various aspects of health and safety law, preparing legal registers and risks assessments.

Valencia's general environmental and mining work includes preparing applications for rights and authorisations, interpreting various mining and environmental statutes and the preparation of opinions.

Valencia advises various project proponents and lenders in respect of renewable energy projects and has a particular interest in carbon and climate change law.

CDH
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Cliffe Dekker Hofmeyr, a full-service law firm, has one of the leading environmental legal teams in South Africa. The fact that the environmental law team continually attract and retain quality and industry-leading clients is evidence that they practice in the highest echelon of the environmental law field.

DealMakers has ranked Cliffe Dekker Hofmeyr first for South African M&A deal flow (number of deals) for the past eight years in a row, with a M&A market share of more than 26%. Our firm has been key to a number of the largest and most prominent transactions in South Africa. The work undertaken by our Environmental team played an important part in this unprecedented track record, as they are able to quickly and effectively identify key environmental liability risks to clients, particularly regarding liability for historical land and water pollution, and ensure appropriate contractual provisions are included to protect them from potential liabilities.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com