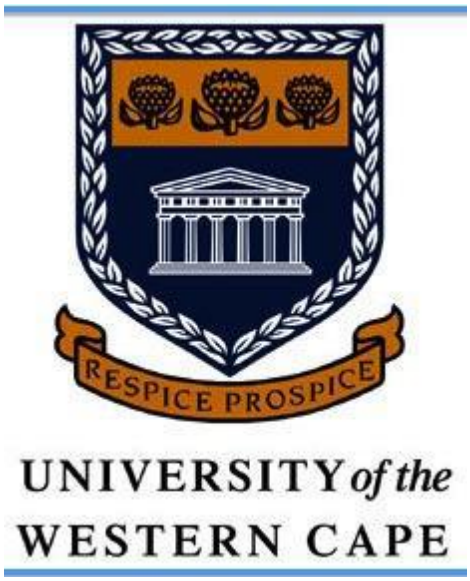

TITLE: DO EXISTING LAWS IN SOUTH AFRICA HOLD DIRECTORS PERSONALLY LIABLE FOR ENVIRONMENTAL TRANSGRESSIONS?

A MINI-THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE LLM DEGREE IN THE FACULTY OF LAW AT THE UNIVERSITY OF WESTERN CAPE

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November 2020

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PLAGIARISM DECLARATION

I declare that 'Do existing laws in South Africa hold directors personally liable for environmental transgressions?' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Li-Fen Chien

Signed: ……

Date:

Professor W Scholtz

Signed: ……

Date:

ACKNOWLEDGEMENTS AND THANKS

2020 has been an incredibly memorable year. It will forever be remembered as the year where the world slowed down in the face of a devastating global pandemic, and we were all forced to adapt and to show resilience, and to use this opportunity to grow beyond our imagination. Personally, it will be remembered as a year of incredible personal growth and perseverance: it can only be described as the ultimate race to birth my LLM mini-thesis, in preparation for the most precious birth of my first child in 2021.

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and personal achievements continue to inspire me to reach further, to not be afraid to dream, and to live boldly.

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LIST OF ABBREVIATIONS AND ACRONYMS

Airport Cold Storage case	*Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C)
Amlin case	*Amlin SA (Pty) Ltd v Van Kooij* [2007] JOL 21010 (C)
Blue Platinum Ventures case	*S v Blue Platinum Ventures 16 (Pty) Ltd and Matome Samuel Maponya* (unreported Regional Magistrates' Court case no. RN126/13 9 January 2014)
Cape Pacific case	*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* [1995] 2 All SA 535 (A)
Coetzee case	*S v Coetzee and Others 1997* (3) SA 527 (CC)
Companies Regulations	Published under GNR 351 in *GG* 34239 dated 26 April 2011
Constitution	Constitution of the Republic of South Africa Act 108 of 1996
CPA	Criminal Procedure Act 51 of 1997
CSR	corporate social responsibility
Dadoo case	*Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530
DEFF	Department of Environment, Forestry and Fisheries
Ex Parte Gore Case	*Ex Parte Gore NO and Others* [2013] JOL 30155 (WCC)

Frylinck case	*S v Frylinck and Mpofu Environmental Solutions CC* (unreported North Gauteng Regional Court Case Number: 14/1740/2010 6 April 2011)
Hűlse-Reutter case	*Hűlse-Reutter and Others v Gődde* [2001] JOL 9102 (A)
MOI	Memorandum of Incorporation
National Water Act	National Water Act 36 of 1998
NECER 2011-12	Department of Environmental Affairs *National Environmental Compliance & Enforcement Report 2011-12* (2012)
NECER 2017-18	Department of Environmental Affairs *National Environmental Compliance & Enforcement Report 2017-18* (2018)
NEM: Air Quality Act	National Environmental Management: Air Quality Act 39 of 2004
NEM: Waste Act	National Environmental Management: Waste Act 49 of 2008
NEMA	National Environmental Management Act 107 of 1998
Robinson case	*Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168
Stilfontein Gold Mining case	*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W)

Tommie Meyer case	*Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* [1977] 4 All SA 610 (T)

KEYWORDS

environmental right

environmental transgression

environmental crimes

director liability

personal liability

polluter pays principle

precautionary principle

fiduciary duty

duty of care

ABSTRACT

DO EXISTING LAWS IN SOUTH AFRICA HOLD DIRECTORS PERSONALLY LIABLE FOR ENVIRONMENTAL TRANSGRESSIONS?

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The number of environmental offences taking place continues to increase each year. Despite the special position of responsibility occupied by directors as the 'directing mind and will' of the companies responsible for the commission of these offences, directors appear to continue to be shielded unconditionally behind the separate legal personality of the company.

This thesis consists of a thorough examination of existing environmental laws, as well as the Companies Act 71 of 2008 and the King IV Report on Corporate Governance, to determine whether the provisions contained therein may be interpreted so as to depart from the principle of separate legal personality (as provided for by corporate law) in order to hold directors personally liable for environmental transgressions.

Although the provisions are not immediately or directly identifiable under the various statutes examined, the provisions nonetheless exist to be interpreted to hold directors personally liable and should be given effect. In addition, it is argued that the King IV Report on Corporate Governance may be used to strengthen a court's ability to invoke personal director liability. Despite being voluntary in nature, it is a progressive guide that may, through innovative and creative application, be used by a court of law to measure a director's actions or omissions, and to determine whether personal liability should ensue. The willingness of courts to consider the King IV Report on Corporate Governance in judgements could also result in these voluntary provisions becoming part of our common law, and thereby improving the standard of care expected of directors as well as the ability of the courts to invoke personal director liability, where such standards are failing.

The thesis concludes by discussing the shortcomings identified in existing legislation and the King IV Report on Corporate Governance, and proposes recommendations to strengthen these existing provisions.

1. CHAPTER ONE: INTRODUCTION

1.1. PROBLEM STATEMENT AND SIGNIFICANCE OF ISSUE

The Greek philosopher, Aristotle, said 'he who has never learned to obey cannot be a good commander'.[1] This aptly describes the current situation in South Africa, where those in power appear not to understand or, worse yet, choose not to obey the rule of law as witnessed by the never-ending corrupt activities being uncovered by the State Capture proceedings,[2] as well as the audacious disregard for corporate governance displayed by those leading Net1,[3] Steinhoff[4] and Tongaat Hulett[5] among others.

However, while the aftershocks of these scandals are still reverberating news headlines and everyday conversations, it is easy to forget about the growing number of environmental offences taking place each year. In the Department of

[1] Aristotle *Essential Aristotle* (2012) book III.

[2] For example, Cowan K "Agrizzi's Little Black Book of Bribes" available at *https://www.corruptionwatch.org.za/agrizzis-little-black-book-of-bribes/* (accessed on 23 July 2019).

[3] eNCA "Net1 scored R1bn from unlawful Sassa contract" available at *https://www.enca.com/south-africa/net1-scored-r1bn-from-unlawful-sassa-contract* (accessed on 23 July 2019).

[4] Lungisa A "The Steinhoff Debacle – the biggest fraud in SA history" available at *https://www.dailymaverick.co.za/opinionista/2017-12-13-the-steinhoff-debacle-the-biggest-fraud-in-sa-history/* (accessed on 23 July 2019).

[5] Prinsloo L "Ex-Tongaat official scrutinised in echo of Steinhoff scandal" available at *https://www.fin24.com/Companies/ex-tongaat-official-scrutinised-in-echo-of-steinhoff-scandal-20190627* (accessed on 23 July 2019).

Environmental Affair's (now the Department of Environment, Forestry and Fisheries (hereafter DEFF)) latest compliance and enforcement report, it reported that a total of 1257 environmental criminal dockets were registered in the 2017/2018 financial year.[6] Not surprising, only a small fraction of these – a mere 53 - resulted in successful convictions.[7]

The Constitution of the Republic of South Africa[8] entrenches the right to an environment that is not harmful to our health and wellbeing, and seeks to protect the environment for the benefit of present and future generations.[9]

The environmental right is not simply about making South Africa "greener", it is also about avoiding pollution, controlling the use of our resources and ensuring equitable distribution of environmental goods.[10] Importantly, the nature of the environmental right makes it suitable for vertical and horizontal application, and therefore the duty to protect the environment is not limited to State but extends to private individuals, too.[11]

[6] Department of Environmental Affairs *National Environmental Compliance & Enforcement Report 2017-18* (2018) 3 (hereafter *NECER 2017-18*).

[7] *NECER 2017-18*: 3.

[8] Act 108 of 1996 (hereafter the Constitution).

[9] Section 24.

[10] Sachs A "The Creation of South Africa's Constitution" (1996) 41 *New York Law School Law Review* 696.

[11] Glazewski J *Environmental Law in South Africa* (2019) 5-14.

Several statutory provisions imposing environmental duties on private persons have been created, including director liability under section 34(7) of National Environmental Management Act[12] which states that:

> 'Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, including an order under subsection (2), (3) and (4), if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection.'

Based on the polluter pays principle, 'the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment'.[13]

[12] Act 107 of 1998 (hereafter NEMA).

[13] Section 2(4)(p) of NEMA.

For certain offences, such as the illegal hunting of rhinos or abalone poaching where perpetrators often act in their individual capacities, it is appropriate (and easier) to hold the perpetrator personally liable for such offences. It is no wonder that most of the successful environmental convictions reported relate to wildlife crimes.[14] However, for environmental transgressions relating to pollution and environmental harm caused by large corporations such as mining companies, successful convictions against the companies are not always easy and directors are almost never held personally liable despite the vital role they play within a company.[15] Despite the director being a clear "polluter" in the polluter pays principle, to date, there have only been but a handful of cases in which directors were held personally liable for environmental offences.[16]

[14] For example, 32% of the total of criminal convictions for 2017-18 was enforced through the work of Cape Nature, whereas only 26% resulted from DEFF (see *NECER 2017-18*:13).

[15] Odeku KO & Gundani SR "Accentuating Criminal Sanctions for Environmental Degradation: Issues and Perspectives" (2017) 8(2) *Environmental Economics* 31.

[16] *S v Anker Coal and Mineral Holdings (Pty) Ltd* (unreported Ermelo Regional Court Case ESH8/11 Sheepmoor CAS 26/06/2009); *S v Blue Platinum Ventures 16 (Pty) Ltd and Matome Samuel Maponya* (unreported Regional Magistrates' Court case no. RN126/13 9 January 2014) (hereafter *Blue Platinum Ventures* case); *S v Frylinck and Mpofu Environmental Solutions CC* (unreported North Gauteng Regional Court Case Number: 14/1740/2010 6 April 2011) (hereafter *Frylinck* case), although the latter case relates to the duty of an environmental assessment practitioner, rather than the duty of a director within the context of polluting company. Criminal charges were also laid against 3 directors of a mining company in their personal capacity on 28 May 2015, available here http://legalbrief.co.za/diary/legalbrief-environmental/story/limpopo-refuses-aquila-steel-mining-right/pdf/ (accessed on 23 July 2019), however, it is unclear whether the matter proceeded any further. Also, in *S v Arbac Services CC and 2 Others* (unreported Germiston Magistrate Court), members of the close corporation were charged in their personal capacity for environmental crimes

A director's duty is based on common law (fiduciary) duties and statutory duties in terms of the Companies Act.[1718] As a company is essentially an artificial legal entity, it can only function through human agencies i.e. the board of directors.[19] The board is therefore the 'directing mind and will' of the company and has a duty to act *bona fide* in the interests of the company, and to practise sound corporate governance.[20]

The importance of holding directors personally liable for environmental transgressions is that natural persons are more likely to be deterred by punishment than companies are.[21] This is especially the case when the punishment is direct imprisonment because it helps to recognise the devasting impact associated with environmental crimes[22] and ensures that director's blameworthy actions are not

and successfully convicted; however, there is no information available that sentencing took place (see Department of Environmental Affairs *National Environmental Compliance & Enforcement Report 2011-12* (2012) 30-1 (hereafter *NECER 2011-12*)).

[17] Act 71 of 2008.

[18] Delport P *The New Companies Act Manual* 2 ed (2012) 102-103.

[19] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W) 351 (hereafter *Stilfontein Gold Mining* case).

[20] *Stilfontein Gold Mining* case 352.

[21] Van Der Linde "The Personal Liability of Directors for Corporate Fault – An Exploration" (2008) 20 *South African Mercantile Law Journal* 454.

[22] Department of Environmental Affairs *National Environmental Compliance & Enforcement Report 2012-13* (2013) H.

insulated from liability.[23] We must prevent corporations from believing that fines and penalties are 'licence fees for illegitimate corporate business operations'[24] or just a 'cost of doing business' and far less expensive than pollution control equipment installation and compliance with environmental standards.[25]

Due the plethora of environmental laws, it is therefore important to consider how these laws may be used, collectively and co-operatively, to hold director's personally liable for environmental transgressions so that the law is effective and useful, and serves the purpose for which they were designed.

1.2. RESEARCH QUESTION

The thesis shall examine environmental laws[26] and, to the extent applicable, the Companies Act[27] and the King IV Report on Corporate Governance,[28] to determine

[23] Van Der Linde (2008) 454.

[24] *S v Coetzee and Others* 1997 (3) SA 527 (CC) 567D (hereafter *Coetzee* case).

[25] Wolf SM "Finding an Environmental Felon Under the Corporate Veil: The Responsible Corporate Officer Doctrine and RCRA" (1993) 9 *Journal of Land Use and Environmental Law*: 1-2; Glenn MK "The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions" (1973) 11 *American Criminal Law Review*: 835-6.

[26] For the purposes of this thesis, environmental laws are limited to laws relating to water, waste and pollution, namely NEMA, National Water Act 36 of 1998, National Environmental Management: Waste Act 49 of 2008 and National Environmental Management: Air Quality Act 39 of 2004.

[27] Act 71 of 2008.

[28] Institute of Directors Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (2016).

how existing provisions contained therein may be interpreted to hold directors personally liable environmental transgressions in South Africa.

1.3. ARGUMENT

Following a thorough examination of all the applicable legislation and voluntary provisions (such as those contained in the King IV Report on Corporate Governance), this thesis argues that, despite apparent fragmentation and lack of co-ordination of applicable provisions to hold directors personally liable for environmental transgression, the provisions nonetheless exist to be interpreted and should not be ignored but rather given effect.

The thesis seeks to identify the areas of weaknesses in existing legislation, and to propose suggestions as to how these provisions may be strengthened to ensure that the provisions are able to be more easily utilised to hold director's personally liable.[29]

1.4. LITERATURE SURVEY

While many academics and practitioners have written on director liability

[29] While this thesis is focussed on personal liability of directors, it does not suggest that corporations should not continue to be held liable for environmental transgressions, or that holding corporations liable is not as effective as holding directors personally liable. This discussion is, however, outside the scope of this thesis.

generally,[30] and director liability under NEMA specifically,[31] there has not been a consolidated analysis of director liability for all environmental laws in South Africa.

Van Der Linde argues that directors can still be held criminally liable for corporate faults despite the unconstitutionality finding of section 332(5) of the Criminal Procedure Act[32] in the *Coetzee* case.[33] The unconstitutionality in *Coetzee* case related to the infringement of section 332(5) of the CPA upon the right to be presumed innocent as entrenched in our Constitution.[34] However, Van Der Linde argues that it is not necessary to rely on the CPA to hold directors personally liable because specific statutory provisions, such as section 34(7) of NEMA, make it possible to hold director's criminally liable without relying on the violating CPA provision.[35] Similarly, she argues that the Companies Act as well as the common

[30] Van Der Linde (2008) 439-61; Havenga (2006) 229-237; and Gwanyanya M "The South African Companies Act and the Realisation of Corporate Human Rights Responsibilities" (2015) 18 *PELJ* 3102-31.

[31] Glazewski (2019) 26-23; Woolley C & Costas T "Directors' Liability and Environmental Law" (2005) 12 *JBL* 2-3; and Milton J "Sharpening the Dog's Teeth: Of NEMA and Criminal Proceedings" (1999) 6 *SAJELP* 57.

[32] Act 51 of 1997 (hereafter CPA).

[33] Van Der Linde (2008) 455.

[34] Van Der Linde (2008) 453.

[35] Van Der Linde (2008) 455, 457-8. See also Kidd M 'The Use of Strict Liability in the Prosecution of Environmental Crimes' (2002) 15 *South African Journal of Criminal Justice* 25 and *S v Qumbella* 1966 (4) SA 356 (A).

law provide sufficient ammunition to hold directors criminally liable for corporate faults, too.[36]

In terms of personal civil liability, Van Der Linde argues that the law of delict, the Companies Act and NEMA provide for such liability upon directors.[37] Havenga agrees that delictual liability can be attributed to directors to prevent such a director from escaping liability and, if the elements of delict are properly applied, it will also protect the director against 'unreasonable attribution of liability'.[38]

Gwanyanya asserts that directors are required to act in the best interests of the company in terms of the Companies Act and that, traditionally, this meant being accountable to the shareholders in ensuring the profitability of a company.[39] However, Gwanyanya argues that the fiduciary duty placed upon directors to act with due care and diligence should include the duty to conform with and realise fundamental rights in the Constitution, and agrees with Roederer[40] that 'no law can

[36] Van Der Linde (2008) 457 to 457.

[37] Van Der Linde (2008) 460.

[38] Havenga (2006) 236.

[39] Gwanyanya (2015) 3109-10. Although recent case law confirms the contrary i.e. a director's duties are towards the company, and not the shareholders (see *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (1423/2018) [2020] ZASCA 83 (3 July 2020)).

[40] Roederer CJ "Post-matrix Legal Reasoning: Horizontality and the Rule of Values in the South African Law" (2003) *SAJHR* 81.

exist outside the Constitution'.[41] This would arguably include the need to respect the environmental right under section 24 of the Constitution, and the laws enacted in terms of this right,[42] although it is acknowledged the task of aligning corporate law with the Constitution will be challenging.[43]

1.5. CHAPTER OUTLINE

The first chapter of this thesis provides an introduction to the research question and the significance thereof.

The second chapter provides background into corporate personality and protection offered to directors by the corporate veil.

The third chapter explores existing environmental laws, and identifies and unpacks all the provisions contained in these laws which may be used to hold directors personally liable for environmental transgressions. For the purpose of this chapter,

[41] Gwanyanya (2015) 3121, 3124. This view is supported by Bilchitz D 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125(4) *SALJ* 780.

[42] Reddell C "Directors' Liability and Climate Risk: South Africa – Country Paper" (2018) *Commonwealth Climate and Law Initiative* 11.

[43] Jebe R et al "Fostering Corporate Sustainability through Directors' Duties" South Africa's Attempt to Align Corporate Governance with its Constitution" (2018) *ILSA Journal of International and Comparative Law* 160. The difficulty in identifying principles for determining the scope of corporate obligations in relation to human-rights / Constitutional law concerns was highlighted by Bilchitz (see Bilchitz (2008) 789).

the environmental laws to be considered shall be limited to the following: NEMA, National Water Act 36 of 1998 (hereafter National Water Act), National Environmental Management: Waste Act 49 of 2008 (hereafter NEM: Waste Act) and National Environmental Management: Air Quality Act 39 of 2004 (hereafter NEM: Air Quality Act).

The fourth chapter considers King IV Report on Corporate Governance and the extent to which this can exert pressure on directors to strive for ethical corporate governance that places value on integrity and sustainable development (referred to as the triple context in King IV Report on Corporate Governance, namely economic, society and environment). It explores how King IV Report on Corporate Governance can be used, in the absence of statutory provisions or where statutory provisions are inadequate, to measure a director's duty of care in respect of environmental compliance.

The final chapter considers the missed opportunities in existing legislation in holding directors liable for environmental transgressions, and provides suggestions for improving this.

1.6. METHODOLOGY

A desktop research of relevant laws, case law and policies which informed the research question and arguments presented in this thesis was consulted.

Academic articles and papers relevant to the research question was also critically reviewed.

2. CHAPTER TWO: LEGAL PERSONALITY OF A COMPANY AND WHEN THE CORPORATE VEIL MAY BE PIERCED

2.1. INTRODUCTION

Before we are able to dive into any discussions regarding instances when directors may be held personally liable, we need to first understand the structure and framework within which a director is appointed and operates. As such, this chapter commences by examining how a legal person is created, what rights and responsibility a legal subject acquires through its creation, and how this structure is formulated to ensure that the members of the corporation (which includes shareholders and directors) are not held personally liable for certain acts or omissions through the concept of the 'corporate veil'. Thereafter, this chapter examines the exceptional circumstances under which the corporate veil or separate existence may be 'pierced', 'lifted' or 'pulled aside'[44] to hold directors personally liable for environmental transgressions.

As an introduction, a legal subject is a subject capable of bearing rights and duties as determined by law, and can either be a natural or a legal (juristic) person.[45] While a natural person (i.e. a human being) acquires legal personality by virtue of

[44] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C): para 19 (hereafter *Airport Cold Storage* case).

[45] Delport (2012) 10.

birth, a juristic person is created artificially through an Act of Parliament by the legislature (as will be discussed in more detail below).[46]

A legal person is distinguished by its ability to acquire rights which can be enforced against others in a court of law, and will ordinarily have the same capacities and powers as a natural person.[47] It is capable of acquiring assets,[48] employing employees, being a party to a contract and to sue or be sued in a court of law.[49] A company, as a legal person, may even be entitled to the rights entrenched in the Bill of Rights.[5051]

While a legal subject enjoys such a capacity, it remains an 'artificial person' and cannot be equated to a human (natural) person in every respect because it has no physical substance and 'exists only in the contemplation of the law'.[52] A few restrictions therefore result from this artificial existence, such as those things that

[46] Beuthin RC & Luiz SM *Beuthin's Basic Company Law* 3 ed (2003): 6.

[47] Delport (2012) 11; Benade M et al *Entrepreneurial Law* 4 ed (2008) 57; and Beuthin & Luiz (2003) 7.

[48] Davis D et al *Companies and other Business Structures in South Africa* 2 ed (2011) 23. Although a company has not physical existence, it can acquire ownership in assets. See *Airport Cold Storage* case: para 17.

[49] Benade et al (2008) 57.

[50] The Constitution, Chapter 2.

[51] Benade et al (2008) 57.

[52] Beuthin & Luiz (2003) 7.

are inherently human in nature or involves the personal relationship of human beings, for example, a legal person is unable to:[53]

1. enter into a valid marriage;[54]
2. "occupy" land';[55]
3. be appointed as guardian of a minor;[56]
4. appear in court in person;[57]
5. suffer assault or have its privacy invaded;[58] or

[53] Delport (2012) 11; and Benade et al (2008) 57.

[54] Beuthin & Luiz (2003) 7; Delport (2012) 11; and Kopel S *Guide to Business Law* 5 ed (2017) 405.

[55] Beuthin & Luiz (2003) 7, and as considered in *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 1919 AD 446 where the court held that occupation of land requires physical possession and therefore a company is unable to occupy land, but rather occupies such land through individuals.

[56] Beuthin & Luiz (2003) 7, and as considered in *Ex Parte Donaldson* [1947] 3 All SA 356 (T) 358 where it was submitted that the Administration of Estates Act only recognises the validity of the appointment of a corporation as executor but does not do so in the case of a tutor or guardian, and therefore a legal person cannot be appointed as legal guardian.

[57] Beuthin & Luiz (2003) 7, and Kopel (2017) 405. This aspect was considered in *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* [1956] 1 All SA 285 (A) 286 where the court held that a legal person is unable to appear in person in court, and therefore must be represented by a duly admitted advocate.

[58] Beuthin & Luiz (2003) 7, and as considered in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* [1977] 4 All SA 610 (T) (hereafter the *Tommie Meyer* case) where the court held that a *universitas* (as a legal person) has no right of privacy, and on the facts of the case, could not be said to have been defamed in the passages of the film and no viewer was left under the impression that the university had any part in the making of the film (page 620). Particularly in the case of universities, as they are regarded as common or spiritual property of the community, the idea that a creative artist

6. be imprisoned for a crime (although it is possible for a legal person to be punished through the imposition of a fine).[59]

The documents which create the legal person as well as legislation that bestows legal personality can also further restrict the legal person's capacity and powers.[60] For example, a company (which is a legal person) is incorporated by taking several steps, including completing a Memorandum of Incorporation (hereafter MOI) that contains, among other things, restrictive conditions that limits its legal powers or capacity in some respect.[61]

should first obtain permission to depict or quote in his story the spiritual property of the community in his story is in conflict with the public viewpoint (page 620). The *Tommie Meyer* case was approved and applied in *Church of Scientology in SA Incorporated Association Not For Gain and Another v Reader's Digest Association SA (Pty) Ltd* [1980] 4 All SA 692 (C) where the court held that '…a corporation cannot sue for defamation but may recover damages should it suffer patrimonial loss as a result of unlawful attack upon its reputation…' (page 696). However, in *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A), the court disagreed with the decision taken in the *Tommie Meyer* case and held that in appropriate circumstances, an artificial person may enjoy the right to privacy and can sue for damages in respect of a defamation which injures its good name and business reputation (page 460). See also Midgley JR *The Law of South Africa – Delict* (Volume 15) 3 ed (2016) 52.

[59] Beuthin & Luiz (2003) 7.

[60] Delport (2012) 11.

[61] Section 13(a) read with section 15(1)(b) of the Companies Act.

2.2. ACQUISITION OF LEGAL PERSONALITY

Our legal system recognises three ways in which a private law body acquires legal personality, namely by way of:[62]

1. a separate Act;
2. general enabling Act; or
3. conduct.

2.2.1. LEGAL PERSONALITY ACQUIRED BY A SEPARATE ACT

The legislature is capable of creating a juristic person with its own legal personality, and this is known as a statutory corporation.[63] Examples of corporations that have acquired legal personality by way of a separate Act include: Eskom Holdings,[64] the South African National Energy Development Institute,[65] the Development Bank of Southern Africa,[66] and the South African National Space Agency.[67]

[62] Benade et al (2008) 58; and Delport (2012) 10;

[63] Benade et al (2008) 58; and Beuthin & Luiz (2003) 21.

[64] Established specifically in terms of the Eskom Act 40 of 1987 and Eskom Conversion Act 13 of 2001.

[65] Established specifically in terms of section 7 of the National Energy Act 34 of 2008.

[66] Established specifically in terms of section 2 of the Development Bank of Southern Africa Act 13 of 1997.

[67] Established in terms of 2 of the South African National Space Agency Act 36 of 2008.

2.2.2. LEGAL PERSONALITY ACQUIRED THROUGH COMPLIANCE WITH REQUIREMENTS OF A GENERAL ENABLING ACT

The legislature may also, indirectly, create the 'machinery' or 'enabling Act' which produces legal persons upon compliance with such rules for registration as prescribed.[68] One example of such an enabling Act is the Companies Act which gives legal personality to all entities that comply the requirements of the Act.[69] Another example of an Act which enables corporations to be created for certain special, specified purposes only, is the Pension Funds Act 24 of 1956.[70][71]

2.2.3. LEGAL PERSONALITY ACQUIRED THROUGH CONDUCT

The common law allows an association of persons to obtain legal personality if such association of persons conduct themselves as a legal person, provided that there are no statutes which precludes such an effect.[72]

Generally, legal personality can be acquired if the property of the members and that of the legal person are kept apart; the legal person has the capacity to incur obligations and rights; and the legal person has *locus standi* to sue in its own name

[68] Benade et al (2008) 58; Beuthin & Luiz (2003) 21; and Mongalo T, Lumina C & Kader F *Forms of Business Enterprise: Theory, Structure and Operation* (2004) 236.

[69] Benade et al (2008) 58; Beuthin & Luiz (2003) 21; and Delport (2012) 11.

[70] Section 4 prescribes the manner in which a pension fund may be registered and, upon successful registration, such pension fund becomes a juristic person (section 4B).

[71] Beuthin & Luiz (2003) 21.

[72] Benade et al (2008) 58; and Delport (2012) 10.

and be sued in that name.[73][74] If these elements appear in an agreement between the legal subjects (such as the constitution of the association), it is usually indicative of the creation of a juristic person.[75]

The Companies Act[76] precludes the acquisition of legal personality for associations formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain unless it is registered as a company under the Companies Act, is formed pursuant to another law or formed pursuant to the Letters Patent or Royal Charter before 31 May 1962.[77] As such, common law legal personality is only possible if it does not fall within the above provision.[78]

For the purposes of this thesis, our emphasis will be on the Companies Act as a general enabling Act which gives birth to a juristic person in the form of a company.

A company is defined in the Companies Act as a juristic person incorporated in terms of the relevant provisions of the Companies Act (i.e. Chapter 2, Part B) or any entity which was regarded as a company in terms of any law preceding the

[73] Delport (2012) 10.

[74] In the case of *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C), the court held that a voluntary association has *locus standi* to sue in its own name (page 540).

[75] Delport (2012) 10.

[76] Section 8(3).

[77] Delport (2012) 11.

[78] Delport (2012) 11.

current Companies Act.[79] This definition does not really describe what a company is and, in general terms, it is better understood as 'an association of persons with the common objective of the acquiring of gain' and exists as a separate entity with legal personality from the moment of registration.[80]

In terms of section 19(1)(a) of the Companies Act, 'from the date and time that the incorporation of a company is registered…the company is a juristic person (*own emphasis*)'.[81] It has all the legal powers and capacity of an individual and continues to so exist until its name is removed from the companies register in accordance with the Companies Act.[82]

2.3. CONSEQUENCES OF LEGAL PERSONALITY AND DISTINGUISHING FEATURES OF A SEPARATE LEGAL ENTITY

The effect of legal personality on companies is that it creates a separate legal subject which is independent of its constituent members, and that it acquires its own rights and duties.[83] Some of the consequences of legal personality are listed below:

[79] Section 1 of the Companies Act.

[80] Benade et al (2008) 57; Davis et al (2011) 23; and Kopel (2017) 404.

[81] As confirmed by our courts in several cases including the *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 (hereafter the *Dadoo* case) in which the court pronounced that 'a registered company is a legal persona distinct from the members who compose it' (pages 550-1).

[82] Sections 19(a) and (b).

[83] Delport (2012) 12; and Benade et al (2008) 59. This is an important company law principle as exemplified in the leading case of *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL) (hereafter the

1. It creates separate existence and the characteristics of the members constituting the entity cannot be attributed to the legal entity.[84] For example, in the *Dadoo* case,[85] the court held that a company cannot be said to be Indian just because the shareholders were Indian - a registered company is a legal persona distinct from its members who compose it.[86]

2. As a juristic person is not a natural creation, it does not experience natural death.[87] It therefore enjoys perpetual existence which continues even though individual members may change (such as in the event of a death of a member).[88] A company, for example, will only cease to exist as a juristic person by a process of law such as when the company is wound up or dissolved.[89]

Salomon case) in which the court held that, from inception, a company is separate from its members and that members cannot be held personally liable for the debts of the company, unless there was evidence of fraud or impropriety. Also confirmed in the *Airport Cold Storage* case, where the court held that '[o]ne of the most fundamental consequences of incorporation is that…a company is a juristic entity separate from its members' and therefore the members are generally not liable for the debts of the corporation (paragraph 17).

[84] Beuthin & Luiz (2003) 10; Delport (2012) 12-13; and Mongalo, Lumina & Kader (2004) 128.

[85] See footnote 86 above.

[86] Pages 550-1.

[87] Beuthin & Luiz (2003) 12; and Delport (2012) 12-13.

[88] Beuthin & Luiz (2003) 12; Delport (2012) 12-13; and Kopel (2017) 406.

[89] Beuthin & Luiz (2003) 12; and Kopel (2017) 406.

3. The entity as a legal subject is capable of having all the rights of a legal subject, including rights to privacy, being an owner of assets, being liable for debts or obligations, and suing or being sued in its own name.[90] Due to this separateness, the debts of the company are the company's debts and not of its members and, similarly, the profits and assets of the company belong to the company and not to the members.[91] However, liability is not always limited and the directors of a personal liability company registered in terms of the Companies Act,[92] for example, are jointly and severally liable for the company's contractual debts and liabilities incurred during their term of office.[93] The personal liability of the directors for payment of the company's debts does not, however, change the fact that the company retains its legal personality.[94]

4. Despite being a legal subject, it cannot act in its own name and all acts must be performed by duly appointed natural persons as agents.[95] No one

[90] Benade et al (2008) 57 & 59; Davis et al (27); Delport (2012) 12-13; Kopel (2017) 405; and Mongalo, Lumina & Kader (2004) 132.

[91] Benade et al (2008) 59; Beuthin & Luiz (2003) 11; and Mongalo, Lumina & Kader (2004) 132. See *Dadoo* case, where the court held that 'property vested in the company is not, and cannot be, regarded as vested in all or any of its members' (pages 550-1). See also *Estate Salzmann v Van Rooyen* 1944 OPD 1 in which the court held that a company is a separate entity and therefore the debts of the company cannot be regarded as the debt of the members (page 4).

[92] Section 1 and 8(2)(c).

[93] Davis et al (2011) 23.

[94] Davis et al (2011) 23.

[95] Benade et al (2008); Delport (2012) 12-13; and Mongalo, Lumina & Kader (2004) 132.

is automatically qualified or possesses implied authority to - by virtue of his or her membership - act on behalf of the company.[96] A company acts through its directors, whose powers are given to them by the incorporation documentation and they are thereby duly appointed as representatives of the company, with the authority to bind the company.[97]

5. As a juristic person, it is bound by and entitled to the Bill of Rights in terms of section 8(2) of the Constitution.[98]

2.4. LIFTING OF THE CORPORATE VEIL

The incorporation of a company creates legal personality and a separate entity, and also limits the liability of those persons behind the company.[99] This is a fundamental

[96] Benade et al (2008); Delport (2012) 12-13; Kopel (2017) 406; and Mongalo, Lumina & Kader (2004) 132.

[97] Benade et al (2008); Delport (2012) 12-13; Kopel (2017) 406; and Mongalo, Lumina & Kader (2004) 132.

[98] Delport (2012) 12-13. See however *Standard Bank v HunkDory Investments (No 1)* 2010 (1) SA 411 where the court considered section 26 of the Constitution (right of access to adequate housing). The defendant, being a company, indicated that the execution of its property would violate section 26 of the Constitution. However, in this particular case, the court held that the defendant had not submitted adequate information for the court to determine if such right would be violated and a punitive cost order was made against the defendant for having raised dilatory constitutional challenges in dispute (para 30 – 31).

[99] Davis et al (2011) 24; Kopel (2017) 405); and Mongalo, Lumina & Kader (2004) 131.

pillar that undergirds our company law, and ensures that a director of a company is not held personally liable for the company's debts, liabilities or other obligations.

However, this principle of limited liability is not inviolable, and may not be used by the members of the company to abrogate their responsibilities.[100] The courts have made it clear that the law considers the substance of things, rather than at mere legal form, and therefore there are (albeit finite and exceptional) circumstances in which the court is prepared to disregard the "sanctity" of legal personality in a process generally described as lifting or piercing of the veil of incorporation.[101] In *Amlin SA (Pty) Ltd v Van Kooij*,[102] the court referred to *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[103] in defining the meaning of 'lifting of the corporate veil' as:

> '[A] means of disregarding the dichotomy between a company and the natural person behind it (or in control of its activities) and attributing to that person where he has misused or abused the principle of corporate personality…'[104]

[100] Davis et al (2011) 24; Delport (2012) 12; and Mongalo, Lumina & Kader (2004) 132.

[101] Davis et al (2011) 24; Delport (2012) 12; and Mongalo, Lumina & Kader (2004) 132. For the purposes of this chapter, the words "lifting" and "piercing" of the corporate veil shall be used interchangeably and shall have congruent meaning.

[102] [2007] JOL 21010 (C) (hereafter the *Amlin SA* case).

[103] [1995] 2 All SA 535 (A) (hereafter the *Cape Pacific* case)

[104] Page 16.

Once lifted or pierced, the separate legal existence of the company is ignored and the directors may be treated as if they had conducted the business of the company in their personal capacities.[105]

As corporate personality is regarded as a fundamental characteristic of a company, persuading a court to lift or disregard the corporate veil is often an onerous task and a principle not lightly disregarded by the courts.[106]

Company law does, however, recognise that a company is essentially comprised of its component parts (such the board of directors and shareholders), and therefore permits a company to be viewed in its separate state (as a separate juristic person) in some circumstances, or from the point of view of its separate components in other

[105] Davis et al (2014) 26.

[106] Benade et al (2008) 61; and Mongalo, Lumina & Kader (2004) 132. This was confirmed in the *Cape Pacific* case (page 553) where the court held that:

> 'To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences attached to it…[t]he need to preserve the separate corporate identify would in such circumstances have to be balanced against policy considerations which arise in favour of piercing of corporate veil.'

This was reiterated in *Hűlse-Reutter and Others v Gődde* [2001] JOL 9102 (A) (hereafter *Hűlse-Reutter* case) where the court held that '[t]here can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances.' (page 22).

circumstances (i.e. to depart from the principle of separate legal personality and to 'lift the veil of incorporation').[107]

When the 'veil of incorporation' is lifted, the directors and shareholders become the relevant actors and may then be held personally responsible for any liabilities incurred.[108]

While the doctrine of piercing the corporate veil can be enigmatic and confusing, and the law is far from settled with regard to the specific circumstances in which it would be permissible,[109] there are generally two ways in which the corporate veil may be lifted: first, as countenanced by a court (in limited circumstances); and secondly, pursuant to statutory provisions.[110] Examples of these circumstances are discussed briefly below.

[107] Benade et al (2008) 60. For example, if a company borrows money, the entity, and not the members, is liable for repayment of the loan. However, if the same company sells land, the acts and intentions of its promoters, shareholders and directors may determine the income tax liability of the company in respect of the proceeds of the sale.

[108] Mongalo, Lumina & Kader (2004) 132.

[109] Beuthin & Luiz (2003) 13; Cassim R 'Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction' (2014) 26(2) *South African Mercantile Law Journal* 329; Cassim R 'Hiding Behind the Veil' (2013) *De Rebus* 35; Ewing C & Kleitman Y 'Piercing the Corporate Veil' (2011) *Without Prejudice* 8; and *Cape Pacific* case: page 552.

[110] Mongalo, Lumina & Kader (2004) 133.

2.4.1. DISREGARDED BY THE COURTS

While our courts have confirmed (in cases such as the *Salomon* case and the *Dadoo* case) that a company is a separate legal entity distinct from its members, the reality is that companies are sometimes used as a vehicle to conceal fraud or improper conduct and therefore in exceptional (and rare) cases, the courts are willing to 'pierce the veil' of corporate personality in order to reveal the impropriety.[111]

The courts have pierced the corporate veil in the following circumstances:

1. to prevent the concealment of fraud or deception, or breach of fiduciary duties;[112]

[111] Beuthin & Luiz (2003) 13; Kopel (2017) 404-5; and Mongalo, Lumina & Kader (2004) 133.

[112] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 (hereafter the *Robinson* case) is a classic case in company law where the court held that a director was not permitted to rely on the separate personality of a company as a device in evading fiduciary duties. Briefly, a director of a mining company was instructed to purchase a farm on behalf of a mining company, The director was unsuccessful; however, when the owner of the farm died, the director managed to purchase the farm (in his personal capacity) and sold the farm to the mining company for three times the price paid. The court held that a director held a position of trust and was required to uphold his / her fiduciary duties by not using their position of trust to advance their personal interests. In this case, the court held that the director was not entitled to keep the profits made through the sale of the farm to the mining company, and was ordered to repay such amounts to the mining company. This case laid down the principles regarding fiduciary duties of any person occupying a position of trust against another whose interests he or she must protect. In *Orkin Bros Ltd v Bell* 1921 TPD 92, the directors of a company were found to be personally liable to a seller who sold goods to a company at the instance of its directors when they knew the company to be insolvent and unable to pay for the purchase, and the

2. to prevent improper evasion of existing legal obligations; and[113]
3. in public interest.[114]

Prior to the promulgation of the latest Companies Act, the sacrosanctity of the separate legal existence of a company was carefully protected. The courts were often hesitant to pierce the corporate veil where a legitimate alternative remedy was available, especially when the act of veil-piercing was being used only as a convenient alternative to obtaining the necessary legal relief.[115] As will be discussed below, the Companies Act changed this and the corporate veil may now be pierced despite other remedies being available, so long as it meets the requirements of the Companies Act.[116]

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sole purpose of the transaction was to diminish the directors' personal liability. This was regarded as fraud by the court and the seller was able to obtain judgement against the directors personally.

[113] In *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1974 (1) SA 169 (RA), a husband had failed to provide his wife with suitable alternative accommodation following his commitment of adultery and having left their matrimonial home. The matrimonial home was owned by a company, of which the husband was the sole shareholder and director. The company subsequently ejected the wife from the matrimonial home, and the court found that the company was nothing more than the husband's *alter ego* and refused to permit him to use the company's corporate personality to evade his matrimonial duties.

[114] In *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* 1916 (2) AC 307, the court held that it was entitled to look at the nationality of the members and directors of a company incorporated in England in order to determine whether the company was an enemy alien or not during the time of the First World War in Britain.

[115] Davis et al (2011) 26. This was the decision of the court in *Botha v Van Niekerk* 1983 (3) SA 513 (W); and confirmed in the *Hűlse-Reutter* case and the *Amlin SA* case.

[116] Cassim (2013) 37.

2.4.2. DISREGARDED BY THE LEGISLATURE

There are several instances where an Act enables corporate personality to be ignored and the underlying constituents deemed to be liable, as described briefly below:[117]

1. Where directors conduct business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purposes,[118] such director may be found personally liable for any loss, damages or costs sustained by the company.[119]

2. Where a director has failed to uphold its common law fiduciary duties and other duties contemplated in the Companies Act,[120] such a director may be found to be personally liable for such loss or damages.

3. Where there has been any abuse of the company which constitutes an unconscionable abuse in terms of s 20(9) of the Companies Act,[121] then the company is deemed not to be a juristic person in respect of the rights, obligations or liabilities of the company and the court may make any further order which it

[117] Delport (2012) 12-3; Kopel (2017) 405.

[118] Section 22, Companies Act.

[119] Section 77(3)(b), Companies Act.

[120] Section 77, Companies Act.

[121] Section 20(9) says that 'on application by an interested person or in any proceedings which a company is involved' a court may find that the 'incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity'.

considers appropriate.[122] This section of the Companies Act was utilised in *Ex Parte Gore NO and Others*[123] (hereafter *Ex Parte Gore* case), where it was held that the new statutory provision in the Companies Act introduces a firm and flexible basis for piercing the veil – which may have the effect of eroding the previous diffident approach to the piercing of the corporate veil.[124] The court held that 'when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional (*own emphasis*)'.[125] The *Ex Parte Gore* case demonstrates that piercing of the corporate veil is no longer used only as a last resort.[126]

4. NEMA specifically provides for the personal liability of directors for offences and penalties prescribed by NEMA.[127] This is quite an unusual and unique provision not found in any other piece of legislation, which demonstrates the importance of the duty to protect the environment and to ensure that the directing mind and will of the company exercises due care.

[122] Section 20(9)(a) & (b), Companies Act.

[123] [2013] JOL 30155 (WCC).

[124] Paragraph 34.

[125] Paragraph 34. This position was followed in *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC; Minister of Environmental Affairs v Kusaga Taka Consulting (Pty) Limited* [2017] JOL 39217 (WCC).

[126] Cassim (2014) 335.

[127] Section 34.

2.5. CONCLUSION

As has been discussed in this chapter, a company is a legal person artificially created through the Companies Act. As a legal person, the company is capable of bearing most of the rights, obligations and duties of a natural person, subject to certain limitations.

The separate legal existence of the company from its members is embedded in our company law, and protects the constituent members – such as the directors – from being held personally liable for the company's debts, liabilities and other obligations.

As demonstrated, our courts have indicated that such separateness is not absolute and, since the promulgation of the latest Companies Act and NEMA, the instances when the corporate veil may be disregarded have become (slightly) clearer. These provisions arguably create more opportunities for directors to be held personally liable, especially for environmental transgressions through the use of section 34 of NEMA.

3. CHAPTER THREE: EXISTING ENVIRONMENTAL LAWS AND HOW THEY MAY BE USED TO HOLD DIRECTORS PERSONALLY LIABLE

3.1. INTRODUCTION

This chapter aims to unpack the provisions available in existing environmental laws to hold directors personally liable for environmental transgressions. For the purpose of this thesis, the review shall be limited to the following environmental laws only:

1. NEMA;
2. National Water Act;
3. NEM: Waste Act; and
4. NEM: Air Quality Act.

As a director's rights and duties are governed by the Companies Act, it is pertinent to commence this chapter by considering a director's general duties under the Companies Act and circumstances when directors may find themselves personally liable for breaching such duties. Using this method, the chapter aims to demonstrate that existing laws are unfortunately unconnected and uncoordinated, and argues for a more cohesive and interconnected way of utilising our existing laws, even if done so indirectly, to augment our ability to protect the environment through decisive accountability.

3.2. COMPANIES ACT

The Companies Act defines a director as someone who is a -

> '…member of the board of a company, as contemplated in section 66 [of the Companies Act], or an alternate director of a company and includes any person occupying the position of a director or alternative director, by whatever name designated (*own emphasis*).'[128]

From this definition, it is clear that the word 'director' is applied in a much wider sense and therefore not limited only to someone who has been formally appointed as a director in terms of the Companies Act, but would include a *de facto* director.[129] For example, the CEO of a government department is usually regarded as an *ex officio* director because of the office that person holds (and not because such a director was appointed by shareholders).[130] Therefore, an *ex officio* director or even a non-executive director would still have all the duties of, and be subject to the same liabilities as an executive director.[131]

[128] Section 1.

[129] Davis et al (2011) 106; Delport (2012) 7; and Delport P & Vorster Q *Henochsberg on the Companies Act 71 of 2008* (2019) 258(1). See section 66(4)(a)(ii) of the Companies Act.

[130] Davis et al (2011) 108. See section 66(4)(a)(ii) of the Companies Act.

[131] Bidie SS 'Director's Duty to Act for a Proper Purpose in the Context of Distribution under the Companies Act 71 of 2008 (2019) 22 *PELJ* 36; Davis et al (2011) 107; Delport (2012) 10 & 92; and Delport & Vorster (2019) 258(1) & 263(2). See section 66(5) of the Companies Act and *Howard v Herrigel NO* 1991 (2) SA 660 (A): page 678.

However, while the onerous duties contained in the Companies Act are applicable to all directors, in practice, non-executive directors are not involved in the day-to-day management of the company i.e. they do not perform any executive functions in the company.[132] A non-executive director would predominantly be involved in the formulation of management policies and providing independent judgement of management issues, while the day-to-day execution of the affairs of the company would be undertaken by executive directors.[133] It is therefore submitted that a non-executive director's risk for attracting personal liability would be substantially lower compared to executive directors.[134]

As discussed in Chapter 2, a director ordinarily enjoys protection against personal liability due to the established principle of separate legal personality.[135] However, the corporate veil may be disregarded pursuant to statutory provisions,[136] and the

[132] Davis T 'Fiduciary Duties of Non-Executive Directors' (1984) 101:3 *SALJ* 567; and Deloitte 'The Different Types of Directors' available at *https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/the-different-types-of-directors.html#* (accessed on 15 October 2020).

[133] Botha MM 'Are Senior Managerial Employees Prescribed Officers in Terms of the Companies Act 71 of 2008 and Are They Treated the Same as Executive Directors' (2012) 4 *Journal of South African Law* 788; and Davis T (1984) 567.

[134] However, Bidie notes that it is not clear from the Companies Act whether this also means that the level of skills, knowledge, expertise and experience of non-executive directors should be distinguished from executive directors, especially because the Companies Act contemplates holding directors individually liable for their actions or omissions; however, the courts will need to clarify and give direction in this regard and this issue is not specifically pursued here (Bidie (2019) 36-7).

[135] See consequences of legal personality as discussed in paragraph 2.3 above; Havenga (2006) 229; and the *Salomon* case.

[136] See paragraph 2.4.2 above.

Companies Act contains provisions which may be used to hold directors personally liable for their failure to meet their duties, or to act according to certain standards. While the company (as a juristic person) may be fined for a criminal offence, it is possible to find a director/s to be the directing mind and will of a company, and therefore personal liability may ensue.[137]

The previous Companies Act did not contain clear rules regarding the duties and liabilities of directors and, as a result, one was required to rely upon the common law and the court's interpretation for guidance.[138] However, these duties are now codified, albeit partially, under the current Companies Act - although the codification does not represent an exclusive list of a director's statutory duties.[139] A director's duties must still be read in the context of the common-law principles which continue to apply in the absence of any contrary statutory provisions and does not substitute any residual duties which a director may continue to have under common law.[140] An example of this is the common law duty which requires a director to exercise an 'independent and unfettered discretion'.[141]

[137] Kopel (2017) 405. See *Leonards Carrying Co Ltd v Asiatic Petroleum Co Ltd* 1915 AC 705 (HL) and *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A).

[138] Davis et al (2011) 110.

[139] Delport (2012) 90 & 92.

[140] Davis et al (2011) 110 – 11; Delport & Vorster (2019) 296. See *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another* [2015] JOL 33744 (WCC).

[141] Delport (2012) 93.

3.2.1. GENERAL DUTIES OF DIRECTORS

Section 76 of the Companies Act partially codified a director's general duties, and can essentially be divided into the following two categories of duties, namely:[142]

1. a fiduciary duty to act honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, the company (this duty involves an element of trust); and

2. a duty to exercise the degree of care, skill and diligence that would be exercised by a reasonably diligent individual who has: 1) the general knowledge, skill and experience that may reasonably be expected of an individual carrying out the same functions as are carried out by that director in relation to the company; and 2) the general knowledge, skill and experience of that director (this duty differs from the fiduciary duty, and centres on the issue of competence).

In addition to the two categories of duties described above (i.e. fiduciary duty and general duty of care), a director is also required to:[143]

[142] Davis et al (2011) 111; Kopel (2017) 419; and Reddell (2018) 6.

[143] Davis et al (2011) 114; and Kopel (2017) 420. It is useful to note that a director's duties are owed to the company, and not extended to the shareholders, as confirmed in recently in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (1423/2018) [2020] ZASCA 83 (3 July 2020). In this case, the court confirmed that, in terms of section 218(2) of the Companies Act, a director's duties are limited to the company and does not necessarily extend to shareholders.

1. comply with the Companies Act and the company's MOI;[144] and

2. communicate all material information to the board that comes to the director's knowledge as soon as practicably possible, unless the director reasonably believes that the information is generally available to the public or known to other directors, or they are bound not to disclose such information by a legal or ethical obligation of confidentiality.[145]

We will expand on the fiduciary duty and reasonable duty of care in more detail below.

3.2.1.1. FIDUCIARY DUTY

As discussed above, the fiduciary duties of directors have been partially codified in the Companies Act (under section 76), and prescribes the standards of conduct expected from a director.[146]

Subsections (3)(a) and (b) specifically requires a director to perform his or her functions as a director:

> '(a) in good faith and for a proper purpose; [and]
> (b) in the best interests of the company…'

[144] Sections 77(2)(b)(ii) and (iii) of the Companies Act.

[145] Section 76(2)(b) of the Companies Act.

[146] Davis et al (2011) 111; and Reddell (2018) 6.

The duty to act in good faith depends largely on honesty, which is a subjective inquiry.[147] The Companies Act therefore re-emphasises the common law fiduciary duties of a director to act in good faith for the benefit of the company as a whole so as to avoid situations where the director's personal interests would conflict with that of the company.[148]

A director's judgement of whether something is in the 'best interest of the company' is considered to be reasonable if that director has taken reasonably diligent steps to become informed on the issue, and does not have a personal financial interest in the issue.[149] New corporate law also recognises that the best interest of the company is no longer limited to the interests of the shareholders only, but involves an inclusive approach that takes into account the legitimate interests and expectations of key stakeholders in making decisions in the best interest of the company, including interests of the employees, customers, the community in which it operates and, arguably, the environmental interests, too.[150] Furthermore, it should also be shown that a reasonably prudent individual in a similar position would also hold the same view in comparable circumstances.[151] For example, a director who fails to take diligent steps to become informed on the issue of environmental degradation occurring at a mine owned by the company, as well as the interests of the community in which it

[147] Cassim F et al *Contemporary Company Law* 2 ed (2012) 524; and Reddell (2018) 6.

[148] Davis et al (2011) 111 – 12. See also *Robinson* case.

[149] Kopel (2017) 420.

[150] Botha MM 'Responsibilities of Companies towards Employees' (2015) 18 *PELJ* 3.

[151] Botha (2015) 21; Davis et al (2011) 115; and Kopel (2017) 420.

operates, will risk being held personally liable for breaching of his or her fiduciary duties.

3.2.1.2. REASONABLE DUTY OF CARE

Section 76(3)(c) of the Companies Act requires a director to act:

> '(c) with the degree of care, skill and diligence that may reasonably be expected of a person –
>
> (i) carrying out the same functions in relation to the company as those carried out by that director; and
>
> (ii) having the general knowledge, skill and experience of that director'.

While the above provisions appear to impose objective limits, the test is not entirely objective and would be influenced by certain factors, such as the size and nature of the company, and the position and responsibilities of the particular director.[152] It is clear that an objective and a subjective test must be passed in order for a director to be regarded as having acted with the required care, skill and diligence.[153]

An objective test is applied to determine whether a reasonable director would have acted in the same manner in the same situation, while the subjective test is applied by taking into account the general skill, knowledge and experience of a particular

[152] Cassim (2012) 558; and Reddell (2018) 13.

[153] Bidie (2019) 37; and Davis et al (2011) 115.

director.[154] The objective standard would also be the common law standard, which is seen as the minimum duty required of a director.[155]

It should be noted that the subjective standard can increase beyond (but not below) that of the objective standard, and therefore a director qualified in law and more experienced with environmental law compliance issues would be measured against a higher standard compared to a new and inexperienced director, with no legal training or understanding of environmental impacts.[156] It is clear that the facts of each case will be important in determining whether a director has breached the duty of care owed to his or her company, and courts have a responsibility to make a value judgement in this regard.[157]

3.2.2. ESTABLISHING LIABILITY

Directors are ultimately the primary agents of the company and the law places onerous duties upon directors to act with integrity and responsibility for the efficient and responsible management of companies.[158] Section 77 of the Companies Act enables a company to recover loss, damages or costs sustained by the company from a director who has failed in the performance of his or her duties.[159]

[154] Davis et al (2011) 115; Delport & Vorster (2019) 298(8).

[155] Delport &Vorster (2019) 298(8); and Reddell (2018) 24.

[156] Davis et al (2011) 115; and Delport & Vorster (2019) 298(9).

[157] Bidie (2019) 31; and Davis et al (2011) 116.

[158] Bidie (2019) 37; Botha (2012) 799.

[159] Davis et al (2011) 118.

3.2.2.1. BREACH OF DUTIES

Sections 77 of the Companies Act deals with the liability of directors in subsections (2)(a) and (b) as follows:

'(2) A director of a company may be liable –

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b); or

(b) in accordance with the principles of common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of –

(i) a duty contemplated in section 76(3)(c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.'

In other words, a breach of fiduciary duties will result in director liability under section 77(2)(a), and a breach of the duty of care will result in director liability under section 77(2)(b).

The liability for breach of duty of care is based on delict, and therefore all the elements of a delict would need to be proved in order to hold such a director personally liable, namely:[160]

1. an act or failure to act;
2. wrongfulness;
3. fault (intention, negligence or gross negligence / recklessness);
4. damage or loss (must be patrimonial loss i.e. measurable in money); and
5. causation (legal and factual causation).

When the elements of delict are properly applied, it should both protect a director against unreasonable attribution of liability while also preventing a director from escaping from such liability where it should be imposed.[161] The requirement of wrongfulness, namely, the consideration of whether a breach of duty is recognised in law as wrongful, is a matter of judicial determination according to public and legal policy consistent with constitutional norms, and should reflect the fundamental legal

[160] Delport (2011) 92; and Glazewski (2019) 20-7. See also *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] 3 All SA 233 (GJ) where the elements that are required for a successful delictual action was discussed.

[161] Havenga (2006) 236.

values accepted in our society.[162] This interpretation is supported as the purpose of the Constitution should not be ignored during judicial determination: it must be given effect, and it is argued that under such circumstances it should include protecting the constitutional right to a healthy environment.[163] It is worthwhile noting that statutory provisions, as outlined in the forthcoming sections, have since modified, refined or removed with some of these elements.[164] Where certain elements have been removed, as provided for under NEMA, this makes it easier for a director to be found personally liable.

Section 77 is clear in confirming that a causal link must be established between the director's breach of duty and the actual loss sustained by the company.[165] For example, to establish the personal liability of a director of a factory that causes water pollution through unlawful discharge of chemicals, it would need to be established that there was a foreseeable and material pollution-related risk that the director failed to deal with (or failed to adequately deal with) in breach of his or her duties, and such failure resulted in the loss complained of.

Where a director is found to have breached his or her duties, the quantum is calculated as being the amount equal to the benefit received by the director and/or the loss

[162] Midgley (2016) 81; and Havenga (2006) 236.

[163] Bilchitz argues states that while this area of law requires further development, because the Constitution is the supreme law, actions of private bodies such as companies, are equally constrained by the Constitution and must conform to the Bill of Rights (see Bilchitz (2008) 779-80).

[164] Glazewski (2019) 20-7.

[165] Reddell (2018) 24.

suffered by the company.[166] However, the absence or presence of the one does not influence the other, in other words, if the company does not suffer a loss but the director receives a benefit – liability would still exist.[167]

3.2.2.2. OTHER LIABILITY

Section 218(2) of the Companies Act provides that –

> '[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention (*own emphasis*).'

This remedy is broad and available to any person, including the company itself (which is defined as 'person' in terms of section 1 of the Companies Act). Interestingly, this provision may be used even if the director acted innocently as it is not necessary to prove fraud or gross negligence as required in delictual claims in terms of section 77 of the Companies Act.[168]

[166] Delport (2012) 90, footnote 70.

[167] Delport (2012) 90, footnote 70. See *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA).

[168] Delport (2012) 158.

3.2.3. DEFENCE: BUSINESS JUDGEMENT CASE

While the Companies Act partially codified directors' duties, this did not add anything new to the law as it existed prior to the commencement of the Companies Act.[169] It is argued that the codification may have narrowed a director's duties because it created a statutory defence open to directors through the introduction of the so-called 'business judgement test' under section 76(4) of the Companies Act.

This particular defence states that a director should not be liable for any decisions that result in undesirable results if such decisions were taken in good faith, with care and on an informed basis which the director believed were in the best interest of the company.[170] In this regard, a director is entitled to rely on the advice of any suitable person, including employees or professionals (such as legal counsel or accountants) whom he believes to be reliable and competent on the particular subject matter.[171]

In *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA v AWJ Investments (Pty) Ltd*[172], the court held that the extent of a director's duty of skill and care largely depends on the nature of the company's

[169] Davis et al (2011) 111.

[170] Davis et al (2011) 117.

[171] Section 77(5) of the Companies Act.

[172] 1980 (4) SA 156 (W).

business.[173] The law does not require directors to have special business acumen and directors are permitted to assume that officials perform their duties honestly.[174]

Therefore, if a director of a mining company takes a decision to proceed with mining within a sensitive environment without having taken any advice from appropriate professionals regarding the legality of such an action or the consequences thereof, then such a director may be held personally liable for any environmental damage that ensues from such a decision or any loss of profit suffered by the company as a result of this unadvised decision. However, if the director had taken the decision upon the advice of competent professionals and, in good faith believed that it would be in the best interest of the company to do so, then the business judgement test may be used as a defence against any personal liability. A director is therefore permitted to take risks, but only to the extent that such risks are not taken in a reckless manner.[175]

Those that support the above rule argue that the rule serves as motivation for capable persons to accept directorships and encourages directors to engage safely in risk-taking activities.[176] It accords protection to directors who act prudently, and are reliable and sincere in the performance of their obligations, because such directors effectively strengthens corporate governance.[177]

[173] Davis et al (2011) 118.

[174] Davis et al (2011) 118.

[175] Botha (2015) 25.

[176] Davis et al (2011) 118.

[177] Bidie (2019) 37.

Those opposed to the rule argue that the rule may result in the acceptance of a standard of conduct which is below an acceptable standard required of directors, especially since the rule is often difficult to define.[178]

3.2.4. INDEMNIFICATION AND DIRECTOR'S INSURANCE

A company is required, in terms of the Companies Act, to hold a director liable for breach of fiduciary duties, and may not assist a director convicted of an offence with paying any fines imposed or indemnifying such a director for such liability.[179]

A company may only assist in advancing expenses to a director to defend any such litigation and may also take out indemnity insurance to protect a director against any liability or expenses for which the company is permitted to indemnify a director.[180]

As a company is prohibited from paying any fine imposed on a director as a consequence of being convicted of an offence,[181] should a director be found criminally liable for an offence under NEMA, such director would be liable for payment of the fine imposed. It is submitted that the restrictions imposed upon companies in indemnifying directors against payment of such fines should serve to (ideally) deter directors from managing companies in a manner that may result in personal liability.

[178] Davis et al (2011) 118.

[179] Davis et al (2011) 120. See section 78 of the Companies Act.

[180] Davis et al (2011) 120. See section 78 of the Companies Act.

[181] Section 78(3) of the Companies Act.

3.3. NEMA

To ensure environmental protection, NEMA includes judicial measures entailing court procedures involving criminal or civil measures.[182] NEMA specifically contains provisions to hold directors liable in terms of criminal and civil law, as discussed in further detail below.

3.3.1. CRIMINAL LIABILITY

Criminal law is said to be the 'ultimate enforcement tool' for ensuring environmental compliance, with criminal prosecution essentially aimed at:[183]

1. retribution;

2. individual and general deterrence (due to the stigma attached to a criminal conviction, the disapproval and indignation that results from this stigma, and reputational loss);

3. ensuring that the cost of prevention and rehabilitation is carried out by the perpetrator (polluter pays principle); and

[182] Glazewski (2019) 26-4; and Van Der Linde (2008) 457.

[183] Glazewski (2019) 26-16 and 26-17; Ongeso JP 'Corporate Accountability in South Africa: Sharpening the Role of Criminal Law' (2016) 29 *South African Journal of Criminal Justice* 228.

4. ensuring that any advantage gained by the commission of the offence is taken away.

While criminal cases do often have the most significant impact, it has been exhaustively demonstrated as being bedevilled by a number of weaknesses including, among others, low success rates due to it being a resource-intensive process (requiring intensive investigation and case development), the high burden of proof required, the reactive nature of criminal law, lack of expertise among the prosecutors and the judiciary, poor detection and investigation skills and general weakness of the South African criminal justice system.[184] Despite its weaknesses, alternative enforcement mechanisms are not necessarily efficacious and, any mechanism that requires enforcement will ultimately result in criminal sanction.[185]

Section 34(7) of NEMA provides that -

> 'any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself

[184] Glazewski (2019) 26-17; Kotze LJ & Paterson AR *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 194; Leggett T 'The Sieve Effect: South Africa's Conviction Rates in Perspective' (2003) *South African Crime Quarterly* 11 & 14; Pelser E 'We really got it Wrong: Understanding the Failure of Crime Prevention' (2007) *South African Crime Quarterly* 1-3 ; Mueller G 'An Essay on Environmental Criminality' in Edwards SM, Edwards TD and Fields CB (eds) *Environmental Crime and Criminality: Theoretical and Practical Issues* (2013) 7; and Murombo T & Munyuki I 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' (2019) 22 *Potchefstroom Electronic Journal* 3.

[185] Murombo & Munyuki (2019) 5.

> and herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, including any order under subsection (2), (3) and (4), if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection.'

Therefore, whenever a firm[186] is found to have committed an offence under Schedule 3 of NEMA,[187] any person who is or was a director at the time of the commission of the offence by the firm will be personally liable for the offence if it is shown that they had failed to take all reasonable steps under the circumstances to prevent the commission of the offence.

In South Africa, the two main cases where directors have been found personally liable for an offence committed by a company, are the *Frylinck* case and the *Blue Platinum Ventures* case.

[186] A firm is defined under section 34(9)(a) of NEMA as 'a body incorporated by or in terms of any laws as well as a partnership', and therefore includes companies incorporated under the Companies Act.

[187] Schedule 3 of NEMA consists of an extensive list of offences in terms of a number of environmental laws in South Africa. For purposes of this thesis, these include offences under NEMA, the National Water Act, NEM: Waste Act and NEM: Air Quality Act.

In the *Frylinck* case, both the firm and the director were found guilty of contravening regulation 81(1)(a) of the 2006 Environmental Impact Assessment Regulations;[188] while the director of a mining company was found personally liable for an offence under NEMA in the *Blue Platinum Ventures* case.[189] The *Blue Platinum Ventures* case is regarded as a landmark court ruling because it was the first case where a director was handed a prison sentence without the option of a fine and therefore demonstrates our courts willingness to pierce the corporate veil where a director knew or reasonably should have known of the environmental degradation being caused by the company.[190] However, it should be noted that the plea and sentence process used in the *Blue Platinum Ventures* case often leads to leniency of penalties and remediation orders, which suggests a propensity to treat environmental crimes as 'less heinous

[188] Regulations published under GNR 385 on 21 April 2006.

[189] Glazewski (2019) 26-23 and 26-24. See also Kings S 'Mining boss found liable for company's environmental damage' *The Mail & Guardian* 4 February 2014 available *at https://mg.co.za/article/2014-02-04-director-found-liable-for-companys-environment-damage/* (accessed on 26 September 2020); and Truter J 'Environmental law compliance – the noose is tightening' *Legalbrief* 3 June 2014 available at *http://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/* (accessed on 26 September 2020).

[190] Glazewski (2019) 26-24; Odeku & Gundani (2017) 31; and Truter J 'Environmental law compliance – the noose is tightening' *Legalbrief* 3 June 2014 available at *http://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/* (accessed on 26 September 2020). However, it should be noted that the plea and sentence process used in the *Blue Platinum Ventures* case often lead to leniency of penalties and remediation orders, which suggests a propensity to treat environmental crimes as 'less heinous than other crimes' and could negatively affect the efficacy of the criminal justice system as a tool to enforce environmental laws.

than other crimes' and could negatively affect the efficacy of the criminal justice system as a tool to enforce environmental laws.[191]

3.3.2. CIVIL LIABILITY

As discussed above, directors convicted of criminal offences under NEMA are ordinarily liable for a fine and/or imprisonment.[192] However, in addition to such penalties, the state or any other person concerned who suffered loss or damage as a result of the commission of such an offence may have a civil liability claim against such a director.[193]

If successful, the state or any other concerned party may recover or claim the following costs:

1. Recovery of advantage: The court may award compensation or punitive damages in cases where the convicted director is found to have gained or stood to gain financially from the commission of an offence.[194]

[191] Murombo & Munyuki (2019) 31.

[192] Glazewski (2019) 26-21.

[193] Van Der Linde (2008) 457.

[194] Section 34(3) of NEMA states that a court may -

> 'summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such a person in consequence of that offence and, in addition to any other punishment imposed in respect of that offence, the court may order – (a) the award of damages or compensation or a fine equal to the amount so assessed; or (b) that such remedial measures as the court may determine must be undertaken by the convicted person.'

2. Costs of investigation: Reasonable costs incurred by the public prosecutor and the state concerned in the investigation and prosecution of the offence may be recovered.[195] In *Government of South Africa v Trustees of the Mandara Trust and Six Others*,[196] the court held that costs may not be recovered in advance of an anticipated action which is unfortunate because this inevitably results in hesitation by environmental authorities to take measures themselves due to the risk of only being able to recover their costs after the event.[197]

3. Damage for loss: Costs incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage may be recovered, too.[198]

While criminal sanctions under NEMA have been described as merely a reaction to offences that have already been committed,[199] the deterrent effect of the above provisions for restitution and rehabilitation of environmental damage following a criminal conviction must be recognised and not underestimated, especially where it holds those who make the decisions that cause such damage, such as directors, personally accountable.[200]

[195] Section 34(4) of NEMA.

[196] Unreported case no 688/04 ECD, Grahamstown High Court, 4 April 2005.

[197] Glazewski (2019) 26-22; and Kotze & Paterson (2009) 58.

[198] Section 34(1) of NEMA.

[199] Kidd M 'Environmental Crime: Time for a Rethink in South Africa' (1998) 5(2) *SAJELP* 181.

[200] Glazewski (2019) 26-30 & 26-31; and Kings S 'Mining boss found liable for company's environmental damage' *The Mail & Guardian* 4 February 2014 available *at*

Section 34 of NEMA also creates an easier mechanism to claim for damages for loss suffered, as it does not require proof of all the elements of a delictual claim.

3.3.3. USING THE COMPANIES ACT TO HOLD DIRECTOR'S PERSONALLY LIABLE FOR ENVIRONMENTAL TRANSGRESSIONS

While NEMA contains significantly progressive provisions to hold director's personally liable, the duty to act for a proper purpose and its regulation by the Companies Act can still play a meaningful role in restraining directors in the exercise of their powers.[201]

Directors, as primary agents of the company, have a constitutional, fiduciary and statutory obligation to act with integrity and responsibility for the efficient and responsible management of companies.[202] Therefore, in addition to the using NEMA to hold director's personally liable for Schedule 3 offences and to recover costs associated with such offences, the Companies Act may also be used to hold director's accountable for failing to exercise his or her fiduciary duties, such as failing to act in the best interest of the company.[203]

https://mg.co.za/article/2014-02-04-director-found-liable-for-companys-environment-damage/

(accessed on 26 September 2020).

[201] Bidie (2019) 37.

[202] Bidie (2019) 37.

[203] A director's fiduciary duty is discussed in detail under paragraph 3.2.1.1 above.

A director's statutory obligation to manage a company in an environmentally manner therefore extends beyond NEMA. The Companies Act require directors to act in the best interest of the company in exercising its fiduciary duties and must reflect the fundamental legal values accepted in our society, which should be interpreted to include the constitutional right to a healthy environment.[204] A court may, and should, therefore consider the failure of a director to act prudently or to seek the necessary advice of competent professionals when making decisions on behalf of the company that resulted in contravention of NEMA, as evidence of the director's failure to properly exercise his or her fiduciary duty towards the company. The director's actions in such circumstances would not be protected under the business judgement rule,[205] and would result in a director being found personally liable for breach of fiduciary duty in terms of section 77(2)(a) of the Companies Act.[206]

In addition, any person who has suffered loss or damage as a result of a director's contravention of the Companies Act, may bring a civil action against such an offending director in order to recover such losses or damages.[207]

A director that is convicted of a Schedule 3 offence in terms of NEMA may, in addition to such personal criminal liability, be personally liable for any costs in terms of NEMA, as well as liability for his or her failure in exercising his or her fiduciary duties in terms of the Companies Act. Civil damages may also be claimed from them personally,

[204] As proposed under paragraph 3.2.1.1 above.

[205] Section 76(4) of the Companies Act, as discussed under paragraph 3.2.3 above.

[206] Read with sections 76(3)(a) and (b) of the Companies Act.

[207] Section 218(2) of the Companies Act, as discussed under paragraph 3.2.2.2 above.

where another person (including the company itself) has suffered loss or damages as a result of the director's contravention of the Companies Act.

3.4. NATIONAL WATER ACT

The National Water Act reaffirms the constitutional focus on sustainable use of natural resources and ecological integrity,[208] and is aimed at managing and controlling the nation's water resources through several factors, including promotion of sustainable water use that serves public interest, and reducing and preventing pollution and degradation of water resources, amongst other things.[209]

Offences and penalties are provided under chapter 16 of the National Water Act, and includes water-related criminal offences as well as the ability of the court to award damages for harm suffered or damage caused to a water resource.[210] The relevant provisions relating to a director's personal liability are discussed in more detail below.

[208] Murombo & Munyuki (2019) 8. It should be noted that 'ecological integrity' is not what many popularly want it to be. While 'integrity' implies an imagery of wholeness, perfect and unimpaired (see Pimental D, Westra L & Noss RF 'Ecological Integriy and the Aims of the Global Integrity Project' in Pimentel D, Westra L and Noss RF (eds) *Ecological Integrity: Integrating Environment, Conservation, and Health* (2000) 20), there is no consensus on what precisely 'ecological integrity' means (see Bridgewater P, Kim RE & Bosselmann K 'Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?' (2014) *Yearbook of International Law Commission* 64).

[209] Section 2.

[210] Sections 152 and 153. Glazewski (2019) 16-45 & 26-33.

3.4.1. CRIMINAL LIABILITY

The National Water Act imposes a general obligation on an 'owner of land, a person in control of land or a person who occupies or uses the land' to 'take all reasonable measures to prevent any such pollution from occurring, continuing or recurring'.[211]

When considering what would be regarded as 'reasonable measures', the National Water Act provides examples of a wide range of measures, including measures to:

> '(a) cease, modify or control any act or process causing the pollution;
>
> (b) comply with any prescribed waste standard or management practice;
>
> (c) contain or prevent the movement of pollutants;
>
> (d) eliminate any source of the pollution;
>
> (e) remedy the effects of the pollution; and
>
> (f) remedy the effects of any disturbance to the bed and banks of a watercourse.'[212]

Section 19 is regarded as being particularly wide-ranging and imposes strict liability on the stipulated persons who fail to take the reasonable measures prescribed under the National Water Act.[213] Despite being wide-ranging, the harm suffered as a result of an environmental crime is often diffuse and it can sometimes be difficult to attribute

[211] Section 19(1).

[212] Section 19(2).

[213] Glazewski (2019) 24-23.

liability to any particular person or company, especially in cases of non-point source water pollution.[214]

Where a person has failed to take the reasonable measures prescribed under section 19, they may be found to have unlawfully and unintentionally or negligently committed an act or omission which pollutes or is likely to pollute a water resource,[215] or to have unlawfully and intentionally or negligently committed an act or omission which detrimentally affects or is likely to affect a water resource,[216] and therefore guilty of an offence under the National Water Act.

The criminal provisions under the National Water Act are further strengthened by section 34 of NEMA which confers certain powers upon the court where a person is convicted of an offence listed under Schedule 3 of NEMA.[217] As the above-mentioned offences are listed under Schedule 3 of NEMA, section 34(7) of NEMA makes it possible for a director of a firm at the time of the commission by that firm of the offence under sections 151(1)(i) or (j) of the National Water Act to be personally guilty of the offence, too, unless they are able to show that all reasonable steps were taken under the circumstances to prevent the commission of the offence.[218]

[214] Murombo & Munyuki (2019) 15-16.

[215] Section 151(1)(i).

[216] Section 151(j).

[217] Glazewski (2019) 26-34.

[218] Section 34(7) of NEMA. Upon conviction, such a director would be personally liable for the applicable penalties prescribed in terms of the National Water Act.

While the justice of imprisoning a director for crimes of the company has been described as constitutionally questionable,[219] it is provided for specifically in NEMA and our courts have highlighted the justification for corporate criminal liability, stating that:

> 'Directors, of course, occupy a special position of responsibility, not only in relation to the corporate body but also with regard to the public in general. The State consequently has an important interest in ensuring that the affairs of corporate bodies are properly and honestly conducted. The corporate body itself has to be protected against the dishonesty and other criminal conduct of those in charge of its affairs or who are involved with them. It would not in itself be unreasonable to provide special measures to enable the prosecution to overcome the difficulty of gathering evidence against corporate activities. This would be consistent with the State's duty to protect society.'[220]

The courts therefore have a duty to ensure that directors properly conduct themselves in the running of a company, and that a company as well as the society be protected against any criminal conducts by directors. One of the ways to protect the company and society, is to ensure that personal accountability is possible, as held in the *Coetzee* case.

In the *Stilfontein Gold Mining* case, where five directors of the company failed to comply with a High Court order in terms of the National Water Act and resigned

[219] Murombo & Munyuki (2019) 16. See *Coetzee* case.

[220] *Coetzee* case para 48.

simultaneously, the court was particularly disappointed by the behaviour of the directors and remarked that it was the '…most unusual occurrence. I have not come across a case, in the corporate history of this country, where all directors of a listed company resigned at once.'[221] The court further held that:

> 'The object of the directives [was]…to prevent pollution of valuable water resources. To permit mining companies and their directors to flout environmental obligations is contrary to the Constitution, the Minerals and Petroleum Resources Development Act and to the National Environmental Management Act. Unless courts are prepared to assist the State by providing suitable mechanisms for enforcement of statutory obligations, an impression will be created that mining companies are free to exploit the mineral resources of the country for profit, over the lifetime of the mine; thereafter they [the directors] may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognises the right of all of its citizens to be protected from the effects of pollution and degradation.'[222]

The manner in which the court admonished the directors in the *Stilfontein Gold Mining* case is significant in the environmental law context because it demonstrated that directors will not always enjoy impunity, and serves as a pristine example of a court's willingness to disregard the corporate veil so as to ensure that citizens are protected especially from the effects of environmental pollution and degradation. While a director

[221] At para 16.1 of the judgement.

[222] At para 16.9 of the judgement.

is ordinarily entitled to resign unilaterally from a company, where such resignation takes place *en masse* (to evade complying with certain legal duties to prevent water pollution for which they would ultimately be responsible), and to incapacitate themselves from discharging their duties towards the company and its members through such resignation, the directors' conduct would fail to meet the fiduciary obligations required of directors.[223] This judgement therefore continues to remind directors that they are not immune to personal liability, and that they may not simply 'walk away' from their responsibilities as directors.[224]

3.4.2. CIVIL LIABILITY

Where a person is convicted of an offence under the National Water Act relating to freshwater pollution, the court is empowered to enquire into the harm or loss suffered

[223] Cassim R 'Post-Resignation Duties of Directors: The Application of the Fiduciary Duty Not to Misappropriate Corporate Opportunities' (2008) 125(4) *SALJ* 735-6. While the case appears to indicate that directors may only exercise their right to resign if it is in the best interest of the company, some authors have opined that the right to resign is not tempered by a director's fiduciary obligations – although resignation itself cannot protect a director from any liability he may have incurred, nor protect him from the consequences of his criminal conduct (see Luiz S & Taljaard Z 'Mass Resignation of the Board and Social Responsibility of the Company: Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd' (2009) 21:3 *South African Mercantile Law Journal* 423-4).

[224] Similarly, in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* ZAGPPHC 127 (29 June 2012) para 39, the court held that a director's failure to comply with his duties does not become erased by him merely 'walking away' from the affected land without fulfilling the outstanding obligations; the obligations remain notwithstanding that legal connection to the land had been severed.

by a person or into the damage caused to a water resource, and can thereafter make an award of damages against the accused accordingly.[225] As the company will ordinarily be the accused in these cases, the company will ultimately be liable for any damages awarded in terms of the National Water Act.

As discussed under paragraph 3.3.2 above, costs may be recovered in terms of section 34 of NEMA for Schedule 3 offences, and this includes offences in terms of the National Water Act.[226] Essentially, the costs which are recoverable include recovery of advantage, damage for loss and costs for investigation. It is argued that, because a director may be held personally liable for a Schedule 3 offence;[227] it is possible for such costs to be claimed from a director convicted for any of the applicable offences under the National Water Act.

3.4.3. USING THE COMPANIES ACT TO HOLD DIRECTOR'S PERSONALLY LIABLE FOR WATER-RELATED TRANGRESSIONS

As discussed under paragraph 3.3.3 above, in addition to the criminal and civil liability provisions available under the National Water Act, a director is required to act prudently in terms of the Companies Act.

A director's failure to act prudently would evidence his or her failure to exercise his or her fiduciary duties in terms of the Companies Act, and may therefore result in

[225] Sections 152 and 153.

[226] Namely, offences under sub-sections 151(1)(i) and (j) of the National Water Act.

[227] As per section 34(7) of NEMA.

personal liability.[228] In addition, a civil action may also be brought against such an offending director, by any person, to recover any losses or damages suffered as a result of the director's contravention of any provision of the Companies Act.[229]

Therefore, a director that is found to be personally liable for a Schedule 3 offence relating to the National Water Act may, in addition to such personal criminal liability, be personally liable for any costs in terms of NEMA, as well as liability for his or her failure in exercising his or her fiduciary duties in terms of the Companies Act. Civil damages may also be claimed from them personally, where another person (including the company itself) has suffered loss or damages as a result of the director's contravention of the Companies Act.

3.5. NEM: WASTE ACT

The NEM: Waste Act is aimed at protecting health, well-being and the environment, through reasonable measures such as preventing pollution and ecological degradation, and generally promoting section 24 of the Constitution to ensure an environment that is not harmful to health or well-being.[230] It acknowledges that the 'waste management practices in many areas of the Republic are not conducive to a healthy environment and the impact of improper waste management practices are

[228] Section 77(2)(a) read with sections 76(3)(a) and (b) of the Companies Act.

[229] Section 218(2) of the Companies Act.

[230] Section 2.

often borne disproportionately by the poor',[231] and thus is it argued that it is important for those responsible for such poor practices be held liable, including directors.

The NEM: Waste Act establishes a substantial number of offences under section 67. These offences are discussed in further detail below, and consideration shall be given to those offences that may result in personal liability for directors.

3.5.1. CRIMINAL LIABILITY

The NEM: Waste Act contains an extensive list of offences, many of which are listed as Schedule 3 offences under NEMA. These include:

1. failure to comply with certain measures relating to waste that has been declared a priority waste;[232]
2. failure to comply with the general duties prescribed relating to waste management, including ensuring that waste that is treated and disposed in an environmentally sound manner, and does not endanger the health or the environment;[233]
3. commencing a waste management activity without a waste management licence or without compliance with prescribed requirements or standards;[234]

[231] Preamble.

[232] Section 15 read with section 67(1)(a).

[233] Sections 16(1)(c), (d), (e) and (f) read with section 67(1)(a).

[234] Sections 20(a) and (b) read with section 67(1)(a).

4. failure to dispose of waste in an authorised manner, or in a manner that is likely to cause pollution or harm to health and well-being;[235]
5. failure to comply with a remediation order or with any measures specified in respect of an investigation area;[236]
6. failure to comply with a notice to reduce, re-use, recycle or recovery certain products;[237]
7. failure to comply with a notice relating to products identified as requiring extended producer responsibility;[238]
8. failure to comply with general waste storage requirements;[239]
9. unauthorised collection of waste;[240]
10. discard litter except as prescribed;[241]
11. failure to notify the relevant authorities regarding significantly contaminated land;[242]
12. failure to notify of the transfer of any contaminated land or to comply with any conditions relating to a remediation site prior to transfer;[243]

[235] Sections 26(1)(a) and 9(b) read with section 67(1)(a).

[236] Sections 38(2) and (3) read with section 67(1)(a).

[237] Section 17(2) read with section 67(1)(a).

[238] Section 18(1) read with section 67(1)(a).

[239] Sections 21 and 22(1) read with section 67(1)(b).

[240] Section 24 read with section 67(1)(b).

[241] Section 27(2) read with section 67(1)(b).

[242] Section 36(5) read with section 67(1)(b).

[243] Section 40(1) read with section 67(1)(b).

13. failure to submit an industry waste management plan or to comply with such a plan; [244]
14. failure to comply with any waste management measures specified in terms of section 14(4) or section 33(1);[245]
15. failure to comply with any norms or standards established in terms of the NEM: Waste Act;[246]
16. failure to conduct or submit the required site assessment report;[247]
17. failure to comply with any condition of a licence issued in terms of the NEM: Waste Act;[248]
18. failure to submit a waste impact report;[249]
19. failure to comply with a condition of an exemption granted;[250]
20. supplying false or misleading information in any applications made, or to an officer or inspector in terms of the NEM: Waste Act;[251]
21. failure to provide information as requested by the authorities;[252] and

[244] Section 28 read with sections 67(1)(c) and (d).

[245] Section 67(1)(e).

[246] Section 67(1)(f).

[247] Section 37(1) read with section 67(1)(g).

[248] Section 67(1)(h).

[249] Section 66 read with section 67(1)(i).

[250] Section 76(3)(c) read with section 67(1)(j).

[251] Sections 67(1)(k) and (l).

[252] Sections 29(5) and 63(4) read with section 67(1)(m).

22. offloads waste from a vehicle in contravention of the NEM: Waste Act, including disposing at an unauthorised side, intentionally littering or failing to take steps to prevent spillage.[253]

As these offences are listed under Schedule 3 of NEMA, when a firm is found guilty of any of these offences, a director of a firm at the time of the commission by that firm of such an offence can found personally liable for the offence unless they are able to show that all reasonable steps were taken under the circumstances to prevent the commission of the offence.[254]

3.5.2. CIVIL LIABILITY

As the above offences fall under Schedule 3 of NEMA, this provides for the recovery of costs in the same manner as if it had been given in a civil action.[255]

Therefore, as with the National Water Act, costs may be recovered from a director who is found to be criminally liable for a Schedule 3 offence in terms of the NEM: Waste Act.[256]

[253] Sections 67(2)(a) to (e).

[254] Section 34(7) of NEMA. Upon conviction, such a director would be personally liable for the applicable penalties prescribed under section 68 of the NEM: Waste Act.

[255] As discussed in more detail under paragraph 3.3.2 above.

[256] As per section 34(7) of NEMA.

3.5.3. USING THE COMPANIES ACT TO HOLD DIRECTOR'S PERSONALLY LIABLE FOR TRANGRESSIONS RELATING TO WASTE MANAGEMENT

As discussed under paragraph 3.3.3 above, in addition to the criminal and civil liability provisions available under the NEM: Waste Act, a director is still required to act prudently in terms of the Companies Act.

A director's failure to act prudently would be viewed as a breach of fiduciary duties.[257] In addition, any losses or damages suffered as a result of the director's contravention of any provision of the Companies Act are also recoverable from such a director through a civil action.[258]

Therefore, a director convicted of a Schedule 3 offence may, in addition to such personal criminal liability, be personally liable for any costs in terms of NEMA, as well as liability and civil damages in terms of the Companies Act.

3.6. NEM: AIR QUALITY ACT

The NEM: Air Quality Act is aimed at protecting the environment by prescribing measures that enhance of air quality, as well as preventing air pollution and ecological degradation.[259] The measures prescribed represents a significant departure from the

[257] Section 77(2)(a) read with sections 76(3)(a) and (b) of the Companies Act.

[258] Section 218(2) of the Companies Act.

[259] See sub-sections 2(a)(i) and (ii).

previous statute because it places onerous obligations not only on polluting industries but all spheres of government, too.[260] These include measures to take reasonable steps to prevent the emission of offensive odour caused by specified activities,[261] measures relating to controlled emitters and fuels,[262] and the need to obtain an atmospheric emission licence for specific activities listed under the NEM: Air Quality Act.[263]

Liability can be attracted as a result of the failure to take any measures required under the NEM: Air Quality Act, as well as various other offences prescribed;[264] and those that may be applicable to directors of companies are discussed in more detail below.

3.6.1. CRIMINAL LIABILITY

The NEM: Air Quality Act prescribes a number of offences under section 51, all of which are regarded as Schedule 3 offences under NEMA. These include:

1. contravention of measures prescribed;[265]
2. failure to submit or implement a pollution prevention plan;[266]

[260] Glazewski (2019) 22-24.

[261] Section 35(2).

[262] Sections 25 and 28.

[263] Section 22.

[264] Section 51.

[265] Sections 22, 25, 28 or 35(2) read with section 51(1)(a).

[266] Sections 29(1)(b) or (2) read with section 51(1)(b).

3. failure to submit an atmospheric impact report;[267]
4. failure to notify the Minister as required;[268]
5. failure to comply with any condition of a licence issued or exemption granted;[269]
6. supplying false or misleading information in any licence application process, or to an air quality officer;[270]
7. failure to comply with prescribed standards relating to the operation of a controlled emitter;[271] or
8. emitting emissions that exceed the limits specified in an atmospheric emission licence.[272]

As with the National Water Act and NEM: Waste Act, because these offences are listed under Schedule 3 of NEMA, when a firm is found guilty of any of these offences, a director may be found personally liable for the offence, too, unless they are able to show that all reasonable steps were taken under the circumstances to prevent the commission of the offence.[273]

[267] Section 30 read with section 51(1)(c).

[268] Section 33 read with section 51(1)(d).

[269] Sections 51(1)(e) and (h).

[270] Sections 51(1)(f) and (g).

[271] Section 24(1) read with section 51(2).

[272] Section 51(3).

[273] Section 34(7) of NEMA. Upon conviction, such a director would be personally liable for the applicable penalties prescribed under section 68 of the NEM: Waste Act.

3.6.2. CIVIL LIABILITY

As the offences described in the paragraph above are regarded as Schedule 3 offences under NEMA, it is possible for any person to recover costs in the same proceedings.[274]

Therefore, as with the National Water Act and the NEM: Waste Act, costs are recoverable from a director who is convicted of a Schedule 3 offence in terms of the NEM: Waste Act.[275]

3.6.3. USING THE COMPANIES ACT TO HOLD DIRECTOR'S PERSONALLY LIABLE FOR TRANGRESSIONS RELATING TO AIR QUALITY

As discussed under paragraph 3.3.3 above, in addition to the criminal and civil liability provisions available in terms of the NEM: Air Quality Act, a director's fiduciary duties in terms of the Companies Act remains applicable and relevant.

A director's failure to exercise his or her fiduciary obligations in terms of the Companies Act may therefore result in personal liability,[276] as well as a civil action for any losses

[274] As discussed in more detail under paragraph 3.3.2 above.

[275] As per section 34(7) of NEMA.

[276] Section 77(2)(a) read with sections 76(3)(a) and (b) of the Companies Act.

or damages suffered as a result of the director's contravention of the Companies Act.[277]

Therefore, apart from personality liability which a director may attract in terms of the NEM: Air Quality Act and NEMA, liability may also result from contravention of the Companies Act.

3.7. CONCLUSION

The nature of environmental governance structure in South Africa has been described as highly fragmented, apart from being constrained with inadequate enforcement capacity and resources.[278] This fragmentation is clearly demonstrated under this chapter where the provisions which may be used to hold directors personally liable are

[277] Section 218(2) of the Companies Act.

[278] Feris L & Kotze LJ 'The Regulation of Acid Mine Drainage in South Africa: Law and Governance Perspectives' (2014) 17(5) *PELJ* 2111; and Lund-Thomsen 'Corporate Accountability in South Africa: The Role of Community Mobilizing in Environmental Governance' (2005) 81 *Royal Institute of International Affairs* 625 - 6. See, for example, in *S v Arbac Services CC and 2 Others* (unreported Germiston Magistrates Court), where an environmental complaint (received in 2004) only reached the court in 2008, and took another 3 years before the accused was convicted (see *NECER 2011-12*:30-2). EMIs are thus required to 'work "smarter" in order to make up for the lack of human and financial resources' (see *NECER 2017-18*: 94).For an extended discussion on the general issue of fragmented environmental governance in South Africa, see, *inter alia*, Kotze LJ 'Revisiting the South African Integrated Pollution Prevention and Control (IPPC) Regime: A Critical Survey of Recent Developments' (2007) *SAPL* 34-60; Kotze LJ et al 'Strategies to Integrate Environmental Policy at the Operational Level: Towards an Integrated Framework for Environmental Authorisations' (2007) *SAJELP* 57-81; and Kotze (2009) 103-125.

not immediately or directly identifiable under the various statutes, but are rather scattered or disguised in an uncoordinated fashion.

However, despite the lack the coordination, the provisions nonetheless exist to be interpreted to hold directors personally liable. This is demonstrated through the use of section 34(7) of NEMA to hold directors personally liable for offences under NEMA, the National Water Act, the NEM: Waste Act and the NEM: Air Quality Act; while simultaneously using the Companies Act to recognise that the environmental transgressions committed by directors under environmental laws should be viewed as a failure of such directors to exercise their fiduciary duties and therefore sufficient grounds for departing from the principle of separate legal personality to hold such directors personally liable.

While the provisions permitting departure from the principle of separate legal personality may not have initially been created with environmental transgressions in mind, the interpretation of statutes should not remain stagnant and it is argued that they should evolve in the face of changing climate to ensure alignment with society's values. The interpretations proposed under this chapter therefore seeks to recognise that constitutional norms, such as the need to protect the environment for current and future generations, must and should not be ignored but rather given effect.

4. A DIRECTOR'S DUTIES IN TERMS OF THE KING IV REPORT ON CORPORATE GOVERNANCE

4.1. INTRODUCTION

Traditionally, a director was expected to manage a company in the best interests of the shareholders only, to whom their fiduciary duties were owed.[279] However, this position is no longer legally justifiable or acceptable in terms of public policy.[280] A director is no longer only accountable to the shareholders of a company, but is required to take into account the interests of all key stakeholders including, amongst others, the customers, the environment and the community at large.[281] The need to consider a wider spectrum of interests is commonly known as corporate social

[279] Gwanyanya (2015) 3110; Luiz & Taljaard (2009) 424; and Sampson I *Introduction to a Legal Framework to Pollution Management in South Africa* (2001) 23.

[280] Sampson (2001) 23.

[281] Botha (2015) 3; Esser I & Dekker A 'The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles' (2008) *Journal of International Commercial Law and Technology* 157; Gwanyanya (2015) 3110; Luiz & Taljaard (2009) 424; and Sampson (2001) 23. Despite the growing body of law that recognises that it is in the long term interests of the company that directors have regard to other stakeholders, this does raise some concerns in terms of resolving conflicting interests (for a more substantive discussion on this topic, see Katzew J 'Crossing the Divide Between the Business of the Corporation and the Imperatives of Human Rights – the Impact of Section 7 of the Companies Act 71 of 2008' (2011) 128(4) *SALJ* 686-711.)

responsibility (hereafter CSR)[282] and it may be argued that this can help to positively shift the manner in which directors manage businesses: from taking decisions with the goal of maximising profits only, at all costs (even if such practices are inimical to the environment), to embracing the concept of responsible corporate citizenship which requires a company to consider the impact of its business on the economy, society and the environment, and to not abrogate the interests of this wider group of stakeholders.[283]

Despite the Companies Act introducing a number of new concepts, it makes no direct references to CSR.[284] CSR is, however, considered substantially in the King IV Report on Corporate Governance.[285] While the application of the King IV Report on Corporate Governance is voluntary and not binding law (and therefore the type of behaviour or actions by a director which may be regarded as being done in 'the best interests of the company' remains largely unclear and an elastic concept); it is submitted that the King IV Report on Corporate Governance is, at the very least, persuasive.[286]

[282] Esser & Dekker (2008); Gwanyanya (2015) 3110; Kloppers HJ 'Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee' (2013) 161 *PELJ* 166; and Luiz & Taljaard (2009) 424.

[283] Luiz & Taljaard (2009) 425; and King IV Report on Corporate Governance 25.

[284] Kloppers (2013) 166.

[285] Gwanyanya (2015) 3110.

[286] Gwanyanya (2015) 3110.

This chapter aims to examine the extent of a director's obligations in respect of the King IV Report on Corporate Governance. It also aims to determine whether the King IV Report on Corporate Governance, despite its voluntary nature, can serve as a tool to reinforce the strength of existing legislation that may be used to hold director's personally liable for environmental transgressions, especially in the absence of clear or strong provisions under existing legislation.

As the source of a director's duties is an interplay of the common law, legislation, the company's constitution and the requirements of various codes, such as the King IV Report on Corporate Governance,[287] this chapter shall commence by examining the extent to which the Companies Act recognises the role of CSR and whether this creates an obligation upon directors to exercise their duties in a manner that inculcates better, more sustainable practices to ensure that environmental imperatives are promoted.

4.2. CORPORATE SOCIAL RESPONSIBILITY AND THE COMPANIES ACT

4.2.1. CORPORATE SOCIAL RESPONSIBILITY AND THE FUNCTIONS OF A SOCIAL AND ETHICS COMMITTEE

The International Organisation for Standardisation defines CSR as:[288]

[287] Katzew (2011) 704.

[288] International Standards Organisation 'Guidance on Social Responsibility' available at *https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en* (accessed on 22 October 2020).

> 'The responsibility of an organisation for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organisation and practised in its relationships.'

While not specifically or directly referring to CSR, the Companies Act does attempt to ensure that CSR forms part of a company's governance structure through the introduction of section 72.[289] It requires the appointment of social and ethics committees, in certain companies, and for these committees to perform certain functions promulgated in terms of relevant regulations, including, *inter alia*, monitoring good corporate citizenship.[290]

These functions are described (somewhat broadly) under regulation 43(5) of the Companies Regulations,[291] and the following is of particular relevance for the purposes of this thesis:

> '(5) A social and ethics committee has the following functions –

[289] Kloppers (2013) 167.

[290] Sections 72(4) to (10) of the Companies Act. See Borg-Jorgensen & Van der Linde K 'Corporate Criminal Liability in South Africa: Time for Change (Part 2)' (2011) *TSAR* 701.

[291] Published under GNR 351 in *GG* 34239 dated 26 April 2011 (hereafter Companies Regulations).

> (a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to –
>
> …
>
> (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services (*own emphasis*).'[292]

As such, members of a social and ethics committee are charged with monitoring company activities along a variety of topics, including the impact of company activities on the environment, and therefore expected to have a working knowledge of 'relevant legislation, other legal requirements or prevailing codes of best practice' relating thereto.[293]

The inclusion of environmental considerations by the social and ethics committee demonstrates alignment with the purposes of the Companies Act as reflected under section 7. Section 7(a) specifically includes the purpose of promoting 'compliance with the Bill of Rights as provided for in the Constitution, in the application of company law', which can be interpreted as reflecting the need to consider social and environmental rights as embodied in the Bill of Rights.[294] Furthermore, the Companies Act also seeks to 'reaffirm the concept of the company as a means of

[292] Regulation 43(5)(a)(iii) of the Companies Regulations.

[293] Jebe et al (2018) 133; and Kloppers (2013) 178.

[294] Jebe et al (2018) 131-2; and Katzew (2011) 691.

achieving economic and social benefits (*own emphasis*)',[295] which demonstrates the extension of the Companies Act beyond the limited traditional goals of shareholder protection and maximisation of profits.[296] The imposition of positive duties on companies (and therefore directors) to exercise corporate responsibility and to contribute to the advancement of the wider community, can arguable be imputed from section 7 to be one of the purposes of the company.[297] The purposes of the Companies Act therefore buttresses a company's obligation to consider social and environmental impacts of its activities, making it mandatory, rather than voluntary, and confirming that the pursuit of profit at the expense of things such as environmental rights (which is a fundamental human right) is no longer legally tenable.[298]

As the functions of a social and ethics committee are fulfilled by existing directors of a company who are elected to sit on the committee, the exercise of their functions would be measured by the same standards as those required of any other director of a company.[299]

[295] Section 7(e).

[296] Bilchitz (2008) 779-80; Jebe et al (2018) 131; and Katzew (2011) 691.

[297] Katzew (2011) 697.

[298] Bilchitz (2008) 772-81; Gwanyanya (2015) 3114; and Jebe et al (2018) 132.

[299] As per sections 76(3)(a) to (c) of the Companies Act, a director must always exercise his or her fiduciary duties and general duty of care when fulfilling any functions under the Companies Act (discussed in detail under paragraph 3.2.1 of this thesis). See also Kloppers (2013) 186.

A director of a mining company, serving on the social and ethics committee, would therefore be required to ensure that they monitor the company's mining operations, by having regard to all applicable legislation to the environment. However, as the term 'environment' is not defined in the Companies Regulations, and no further guidance is provided on the extent of monitoring required, these provisions are weak and it is submitted that committee members are unlikely to know exactly what is expected of them, or the extent to which the company's activities should be monitored in respect of the environment.[300]

4.2.2. CONSEQUENCES FOR THE FAILURE OF A DIRECTOR TO FULFIL HIS OR HER OBLIGATIONS AS A MEMBER OF A SOCIAL AND ETHICS COMMITTEE

If a director serving on the social and ethics committee fails to fulfil the functions and obligations expected of that director, it is argued that such a director would be deemed to have breached his or her fiduciary duties (i.e. to act in good faith and in the best interests of the company) and could be held liable for any loss, damages or costs sustained by the company as a consequence of the breach.[301] Similarly, delictual claims can be made against a committee member who neglects to act with the degree of care, skill and diligence required in terms of the Companies Act.[302]

[300] Kloppers (2013) 180.

[301] Section 77(2)(a) read with sections 76(3)(a) and (b) of the Companies Act.

[302] Section 77(2)(b) read with section 76(3)(c) of the Companies Act.

A director's only defence for escaping liability in such instances is through the utilisation of the business judgement rule,[303] provided that the director is able to demonstrate that reasonably diligent steps were taken by them to become informed on the matter, or that they had a rational basis for believing that the decision taken was in the best interest of the company.[304] This may, however, reduce the duties of corporate directors to mere due diligence, often leaving the decision of such a director largely unquestioned so long as adequate processes are shown to have been in place around the making of such decisions, thereby 'window dressing' a director's failure to honour his or her fiduciary duties.[305]

The introduction of a social and ethics committee represents a welcome move towards ensuring that directors takes into account the impacts of their decisions on not only the company, but other parties affected by the corporation's conduct such as on the community and environment.[306] It is submitted that section 72 makes it possible for directors to be held personally liable for their failure to monitor environmental legislation that thereafter result in environmental transgressions.

While the Companies Act does provide a statutory statement of a director's duties, the relevant sections and the regulations promulgated have been drafted at a relatively high level of abstraction, referring to vague, broad standards rather than precise rules or terms of references, and may result in directors being unsure of what

[303] Discussed in detail under paragraph 3.2.3 above.

[304] Section 76(4)(a)(i) and (iii) of the Companies Act.

[305] Jebe et al (2018) 158.

[306] Kloppers (2013) 187.

exactly is expected of them, and it may be equally difficult for a court of law to determine when such obligations have in fact been met.[307]

As a director (serving as a member of a social and ethics committee) is required to monitor not only relevant legislation, but also the 'prevailing codes of best practice',[308] it is pertinent to examine the King IV Report on Corporate Governance as it considers the role of a social and ethics committee more substantially and provides further guidance on acceptable principles and practices for good corporate governance.

4.3. THE KING IV REPORT ON CORPORATE GOVERNANCE

The dismantling of Apartheid and the establishment of democracy in South Africa, brought with it the potential to attract foreign investment and to rebuild South Africa's domestic businesses.[309] This required the development of a sound corporate governance climate, and culminated in the creation of what is now commonly referred to as the King Reports.[310]

The King Reports have been instrumental in the global development of corporate governance principles, from addressing traditional corporate governance issues

[307] Katzew (2011) 704; and Kloppers (2013) 187

[308] Regulation 43(5)(a)(iii) of the Companies Regulations.

[309] Jebe et al (2018) 134.

[310] Jebe et al (2018) 134. The first report was released in 1994, and revised reports followed in 2002, 2009 and most recently in 2016 (i.e. the King IV Report on Corporate Governance).

(such as corporate risk governance), to conceptualising and pioneering new principles needed to progress toward the aspirations of the new Constitutional regime, such as recognising that a company is a 'citizen' and member of society, and therefore required to honour its duties and obligations to society and to the environment.[311] These reports have been recognised for contributing to the ground-breaking advancement of corporate governance, and has been described as 'one of the best corporate governance frameworks' worldwide.[312]

Importantly, it recognises that a company, as a responsible citizen, should extend its focus beyond economic impact to consider environmental and social issues, too, especially the issue of sustainable development (which has been described as being the 'primary ethical and economical imperative' of the 21st century), climate change, and ecological overshoot, amongst other issues.[313]

As discussed above, when determining what the best interests of the company are, the King IV Report on Corporate Governance rejects the notion that this is equivalent to a focus on the interests of shareholders alone and construes the company's interests to embrace wider societal concerns.[314] Because directors are in fact the practical decision-makers in a company, it is important not to allow directors to shield

[311] Jebe et al (2018) 135-7.

[312] Judin M, Roberts L & Naidoo R 'Corporate Governance - Innovative Thinking in South Africa's Latest Code' (2017) *Business Law Today* 1.

[313] Jebe et al (2018) 136; and King IV Report on Corporate Governance 3.

[314] Bilchitz (2008) 781-2; Botha (2015) 3; Esser & Dekker (2008) 157; Gwanyanya (2015) 3110; Luiz & Taljaard (2009) 424; and Sampson (2001) 23.

behind separate legal personality of the company and to ensure that, where necessary, directors are held personally liable for violations of environmental rights.[315]

The King IV Report on Corporate Governance recognises the complex but necessary nature of this duty of care and states that:

> 'No governing body today can say it is not aware of the changed world in which it is directing an organisation. Consequently, a business judgement call that does not take into account the impacts of an organisation's business model on the triple context [which refers to the combined context of the economy, society and the environment] could lead to a decrease in the organisation's value.'[316]

In order to determine whether the King Reports could potentially be used to measure a director's duty of care, it is important to first examine the type of guidance provided in the latest King IV Report on Corporate Governance relating to a director's duties, and thereafter to determine how this may be applied judicially.

4.3.1. APPLICABLE PRINCIPLES WITH REGARDS TO ENSURING GOOD ENVIRONMENTAL PRACTICE

The hallmark for sound corporate governance practice is understood as the existence of suitable checks and balances against the unfettered exercise of

[315] Bilchitz (2008) 782.

[316] King IV Report on Corporate Governance 4.

power.[317] The King Reports were created to provide corporations with guidance on the types of checks and balances that should be considered by corporations so that corporations are able to demonstrate corporate responsibility.

The King IV Report on Corporate Governance was released by the Institute of Directors of Southern Africa on 1 November 2016. It is a combination of not only the latest international thinking, but includes truly innovative measures, too.[318]

It consists of 16, concise principles that can be applied to any organisation in the private or public sector.[319] Each of the 16 principles are accompanied by recommended practices which may be implemented on a proportional basis, and this enables organisations to select the practices in proportion to the size of turnover and workforce, resources, extent and complexity of activities – and therefore creates a more adaptable, flexible checklist, as opposed to an obligatory, rigid checklist.[320]

While all the principles are equally important, the following principles are specifically highlighted as being of relevance to this thesis:

1. The governing body should lead ethically and effectively (principle 1).

[317] Bray E 'Legal Perspectives on Global Environmental Governance: South Africa's Partnership Role (2)' (2005) 68:3 *THRHR* 359.

[318] Judin, Roberts & Naidoo (2017) 1.

[319] Judin, Roberts & Naidoo (2017) 1. It has been described as being concise because the previous King Report consisted of an extensive list of 75 principles in total.

[320] Judin, Roberts & Naidoo (2017) 2; and King IV Report on Corporate Governance 37.

2. The governing body should ensure that the organisation is and is seen to be a responsible corporate citizen (principle 3).

3. The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for its to discharge its governance role and responsibilities objectively and effectively (principle 7).

4. The governing body should ensure that is arrangements for delegation within its own structures promote independent judgement, and assist with balance of power and the effective discharge of its duties (principle 8).

5. The governing body should govern compliance with applicable laws and adopted, non-binding rules, codes and standards in a way that supports the organisation being ethical and a good corporate citizen (principle 13).

We will examine each of these principles in more detail below.

4.3.1.1. PRINCIPLE 1: THE GOVERNING BODY SHOULD LEAD ETHICALLY AND EFFECTIVELY

Principle 1 requires members of the governing body[321] to, *inter alia*:[322]

1. act in good faith and in the best interests of the organisation;[323]

2. act ethically beyond mere legal compliance, with due care, skill and diligence, and take reasonably diligent steps to become informed about matters for decision;[324]

3. assume responsibility for anticipating, preventing or otherwise ameliorating the negative outcomes of the organisation's activities and outputs on the triple context in which it operates;[325] and

4. be willing to answer for the execution of their responsibilities.[326]

[321] The governing body is defined as 'the structure that has primary accountability for the governance and performance of the organisation' and, depending on the context, it includes, amongst others, the board of directors of a company (King IV Report on Corporate Governance 12).

[322] King IV Report on Corporate Governance 43.

[323] Recommended practice 1(a)(i) of King IV Report on Corporate Governance.

[324] Recommended practices 1(a)(iii) and (b)(ii) of King IV Report on Corporate Governance.

[325] Recommended practice 1(c)(iii) of King IV Report on Corporate Governance.

[326] Recommended practice 1(d) of King IV Report on Corporate Governance.

These recommended practices reflect the statutory obligations of directors under the Companies Act, such as the fiduciary duties and the duty of care which a director is required to exercise in the execution of his or her duties. However, it goes further by requiring directors to act 'ethically beyond mere legal compliance', to prevent negative outcomes of the organisation's activities upon the environment, and for directors to be answerable for any decisions they take.

The need to prevent negative outcomes is emphasised throughout the King IV Report on Corporate Governance, and the term 'corporate governance' itself is defined as the exercise of ethical and effective leadership by the governing body which involves, *inter alia*:

> '[T]he anticipation and prevention, or otherwise amelioration, of the negative consequences of the organisation's activities and outputs on the economy, society and the environment.'[327]

In order to demonstrate adherence to this principle, an organisation should take into consideration the outcomes of the organisation's products or services on critical aspects of the environment, and ensure that these are considered by the governing body at each meeting.[328] Furthermore, where products are found to have a negative impact or being contrary to that which society expects, then the actions of the organisation would be regarded as being inconsistent with good corporate citizenship and reflect poorly upon the organisation's reputation, and thereby

[327] King IV Report on Corporate Governance 11 & 20.

[328] King IV Report on Corporate Governance 6.

threatening the organisation's operational legitimacy – ultimately decreasing or destroying the value of the organisation.[329] It is therefore in the interest of all stakeholders, internally and externally, for an organisation to ensure that all decisions taken by its board of directors properly consider the impact/s of such decisions upon the environment.

When directors fail in 'anticipating, preventing or otherwise ameliorating the negative outcomes' of the organisation's activities or fails to act ethically, such directors shall have failed to meet the standards of principle 1 in leading the organisation ethically and effectively. By way of example, if a director of petrol station is advised that, while not required in law, the storage tanks should be serviced due to significant wear and tear identified, but elects not to do so and this results in significant contamination of the soil and groundwater, which ultimately results in statutory fines and reputational damage, such a director would not have demonstrated the ethical and effective leadership standards prescribed by the King IV Report on Corporate Governance, even if the servicing of the tanks was not a requirement in law.

4.3.1.2. PRINCIPLE 3: THE GOVERNING BODY SHOULD ENSURE THAT THE ORGANISATION IS AND IS SEEN TO BE A RESPONSIBLE CORPORATE CITIZEN

Principle 3 requires the governing body to assume responsibility for corporate citizenship, which includes compliance with, *inter alia*, the Constitution, the law and

[329] King IV Report on Corporate Governance 6.

leading standards.[330] Furthermore, the governing body should continually monitor the consequences of the organisation's activities and outputs as a responsible corporate citizen, and this includes monitoring its responsibilities in respect of the environment, and any pollution and waste disposal, as well as protection of biodiversity.[331]

The King IV Report on Corporate Governance describes the notion of corporate citizenship as an entity that exists as an integral part of the broader society in which it operates – together with rights, responsibilities and obligations.[332] As such, an organisation is required to take responsibility for the environmental outcomes of their activities and outputs, as those outcomes affect society as a whole.[333] In addition, corporate citizenship recognises the need for an organisation to consider society in the broad sense, and that this wider spectrum of stakeholders ultimately 'licenses' the organisation's ability to operate and to continue operating.[334]

This principle clearly demonstrates the need for directors to ensure not only statutory compliance with applicable environmental laws, but to also continually monitor their activities, whether prescribed in law or not, to ensure that the environment is always protected. This therefore extends a director's duties beyond those prescribed by law, and requires a higher standard of decision-making by directors.

[330] Recommended practice 12 of King IV Report on Corporate Governance.

[331] Recommended practice 14(d) of King IV Report on Corporate Governance.

[332] King IV Report on Corporate Governance 11.

[333] King IV Report on Corporate Governance 24.

[334] King IV Report on Corporate Governance 25.

This approach is aligned with or can be strengthened by the need to promote sustainable development. Notably, sustainable development consists of eight sub-principles under NEMA, including the precautionary principle, which is described as –

> 'a risk-averse and cautious approach…which takes into account the limits of current knowledge about the consequences of decisions and actions…'[335]

Where directors are unsure whether certain precautionary measures should be taken to safeguard against environmental damage or degradation (due to limits of current knowledge, unavailability of scientific knowledge, or arguably, due to the lack of existing legislation to regulate or restrict a particular situation), the precautionary principle should be followed and measures taken despite the lack of knowledge or lack of statutory provisions. Therefore, the precautionary principle would support principle 3 of the King IV Code on Corporate Governance in recommending that directors take a more cautious approach in decision-making, and to undertake precautionary measures even if not required in law, so as to achieve sustainable development.[336]

[335] Section 2(4)(a)(vii) of NEMA.

[336] While the very broad nature of the precautionary has attracted criticism, some have argued that this broadness is also its strength because it can assist in furthering sustainable development and protection of the environment from serious and irreversible harm. South African decision-makers are therefore recommended to apply this principle in appropriate situations, and this could arguably include directors, as decision-makers within companies. See Glazewski J & Pitt L 'Towards the

4.3.1.3. PRINCIPLE 7: THE GOVERNING BODY SHOULD COMPRISE THE APPROPRIATE BALANCE OF KNOWLEDGE, SKILLS, EXPERIENCE, DIVERSITY AND INDEPENDENCE FOR ITS TO DISCHARGE ITS GOVERNANCE ROLE AND RESPONSIBILITIES OBJECTIVELY AND EFFECTIVELY

Principle 7 prescribes the need for governing bodies to be composed by directors with the appropriate balance of knowledge, skills and experience to effectively discharge its governance role and responsibilities.[337] This includes considering directors with an appropriate mix of knowledge, skills and experience (in business, commercial and industry) that is needed to govern the organisation.[338]

While the benefit of varied wisdom, expertise and background is commonly acknowledged, it is, at best, idealistic, and it remains largely unclear how the fundamentally legal issues that drive the monitoring process required, can be handled by directors lacking legal skills.[339] In reality, environmental legislation is incredibly complex, often combining highly detailed technical norms with rather open

Application of the Precautionary Principle in South African Law' (2015) 26(1) *Stellenbosch Law Review* 218.

[337] Recommended practice 6 of King IV Report on Corporate Governance.

[338] Recommended practice 7 of King IV Report on Corporate Governance.

[339] Nietsch M 'Corporate Illegal Conduct and Directors' Liability: An Approach to Personal Accountability for Violations of Corporate Legal Compliance' (2018) 18(1) *Journal of Corporate Law Studies* 169.

and discretionary terms, such as requiring monitoring to be 'adequate' or 'effective'.[340] In addition, corporate legal compliance is often interdisciplinary in nature, requiring knowledge of a wide variety of topics and this makes it challenging to appoint directors with the necessary or appropriate expertise.[341]

Furthermore, the principle recommends that members of the governing body with 'no or limited governance experience should be provided with mentorship and encouraged to undergo training',[342] and that a –

> 'programme of professional development and regular briefings on legal and corporate governance developments, and risks and changes in the external environmental of the organisation, should be provided for members of the governing body.'[343]

In practice, directors are generally expected to take personal responsibility for their development to ensure that they are adequately informed of, and respond to, a constantly changing business environment, and are ultimately able to fulfil their

[340] Nietsch (2018) 169. For example, NEMA indicates that the objective of integrated environmental is to ensure that the effects of activities on the environment receive 'adequate' consideration before actions are taken, without specifying what would be regarded as being 'adequate' (s 23(2)(c)), or that an incident is required to be reported through the most 'effective' means reasonably available, without any directions on what would be regarded as being 'effective' under the circumstances (s 30(3)).

[341] Nietsch (2018) 169.

[342] Recommended practice 23 of King IV Report on Corporate Governance.

[343] Recommended practice 24 of King IV Report on Corporate Governance.

responsibilities to shareholders and other key stakeholders.[344] As the role of directors is multifaceted and complex, considerable attention should be given to their orientation and continuous development.[345] This includes receiving timeous briefings on changes in their legal and operating environments as recommended by principle 7.[346] A well-developed board that receives continuous development will be better equipped to function more effectively in the constantly changing business environment in comparison to those who receive limited training.[347] This is especially important in the context of promoting sustainable business practices, and therefore pertinent for directors to receive ongoing training and development on responsible corporate behaviour such as environmental governance matters.[348]

However, while the inclusion of professional development initiatives are welcomed, it is submitted that the language used can be interpreted as being weak (such as the use of terms like 'encouraged' and 'should') and it is uncertain whether all companies would regard these provisions as being significant (in comparison to the other provisions) and prioritise such training and development of directors. It should also be noted that principle 7 appears to focus heavily on the objective of achieving or encouraging more diversity on boards (in terms of race and gender representation).

[344] Jebe et al (2018) 138; and Mans-Kemp N et al 'Investigating Director Development in South Africa' (2018) 18(1) *Acta Commercii* 1 & 7.

[345] Mans-Kemp (2018) 2.

[346] Mans-Kemp (2018) 3.

[347] Mans-Kemp (2018) 8.

[348] Mans-Kemp (2018) 8.

While diversity concerns are apposite, the issue regarding the required skills and experience expected of directors does appear to be a subsidiary consideration.

It would be interesting to observe, in circumstances where training programmes are in fact implemented, how this would influence the manner in which a court would determine whether a particular director has carried out his or her duties with the 'degree of care, skill and diligence' expected in terms of section 76(3)(c) of the Companies Act.[349] A court would ordinarily make a value judgement by comparing how other directors with similar general knowledge, skill and experience would have conducted themselves i.e. comparing directors with the same skills on an equal footing.[350] It is arguable that, where it is shown that appropriate and regular briefings on legal and corporate governance developments had been provided to a particular director as recommended by King IV Report on Corporate Governance, such a director's actions or omissions would be measured against other directors having the benefit of similar knowledge, skill and experience i.e. a higher standard. In such circumstances, unless such a director is able to show that proper due diligence was undertaken, such as evidence of proper documentation of the detailed analysis of the reasons for a decision as well as, perhaps legal advice they had obtained in determining whether a decision was in the best interest of a company, it would be difficult for that director to rely on the business judgement rule to escape personal liability.[351]

[349] For a more detailed discussion regarding a director's reasonable duty of care, refer to paragraph 3.2.1.2 of this thesis.

[350] Bidie (2019) 31-2.

[351] Bidie (2019) 35.

4.3.1.4. PRINCIPLE 8: THE GOVERNING BODY SHOULD ENSURE THAT ITS ARRANGEMENTS FOR DELEGATION WITHIN ITS OWN STRUCTURES PROMOTE INDEPENDENT JUDGEMENT, AND ASSIST WITH BALANCE OF POWER AND THE EFFECTIVE DISCHARGE OF ITS DUTIES

Principle 8 is of relevance because it deals with the determination and delegation of particular roles and responsibilities by the governing body to particular members of the governing body, or to committees such as the social and ethics committee.[352]

Such delegation should be recorded by means of formal terms of reference that includes, *inter alia*, the overall role and associated responsibilities and functions of such committee.[353] In addition, the governing body is required to ensure that each committee, as a whole, has the necessary knowledge, skills, experience and capacity to execute its duties effectively.[354]

Specifically, the King IV Report on Corporate Governance recommends that a social and ethics committee should be obliged to consider and report on a wide variety of issues such as organisational ethics, responsible corporate citizenship, sustainable development, stakeholder relationships, and any other responsibilities delegated to it

[352] Recommended practice 39, read with practices 68-70 of King IV Report on Corporate Governance.

[353] Recommended practices 42 and 43(b) of King IV Report on Corporate Governance.

[354] Recommended practice 45 of King IV Report on Corporate Governance.

by the governing body.[355] In addition, where the establishment of a social and ethics committee is not a statutory requirement for a particular company, it is recommended that these issues should still be addressed by another committee within the company.[356]

It is clear that the recommendations highlighted under principle 8 provide considerably more substance to the duties and responsibilities of a social and ethics committee in comparison to the somewhat scant guidance provided by regulation 43 of the Companies Regulations. Whereas the Companies Regulations merely lists the functions of the committee, the King IV Report on Corporate Governance recommends the establishment of formal terms of references to record the roles and responsibilities of such a committee, and that members of the committee should be suitably experienced to fulfil such a role. It also seeks to encourage companies to establish social and ethics committees that consider a wider spectrum of issues, including sustainable development (which is a key environmental principle mandated by the Constitution) as well as any other responsibilities which the governing body deems appropriate for the organisation, and therefore this presents an ideal opportunity for companies to use the social and ethics committee as a means to ensure better monitoring of environmental impacts, and therefore achieve better environmental practices.

Through clear terms of references, and defined roles and responsibilities, committee members are provided with unambiguous guidance on exactly what is expected of

[355] Recommended practices 68-9.

[356] Recommended practice 68 of King IV Report on Corporate Governance.

them in the performance of their duties, which improves the ability of members to achieve compliance compared to relying on the abstract provisions provided by the Companies Regulations.

4.3.1.5. PRINCIPLE 13: THE GOVERNING BODY SHOULD GOVERN COMPLIANCE WITH APPLICABLE LAWS AND ADOPTED, NON-BINDING RULES, CODES AND STANDARDS IN A WAY THAT SUPPORTS THE ORGANISATION BEING ETHICAL AND A GOOD CORPORATE CITIZEN

This principle requires directors to assume responsibility for the governance of compliance with applicable laws, as well as any adopted rules, codes or standards.[357] Directors are also required to exercise ongoing oversight of compliance, including continual monitoring of the regulatory environment, and appropriate responses to changes and developments.[358]

The above provisions are similar to the functions described under regulation 43(5)(a)(iii) of the Companies Regulations, and therefore reinforces a director's responsibility to continually monitor the changing legislative landscape to ensure that the company's response to such changes are appropriate and responsible.

[357] Recommended practice 18 of King IV Report on Corporate Governance.

[358] Recommended practice 21 of King IV Report on Corporate Governance.

4.3.2. VOLUNTARY OR MANDATORY APPLICATION?

The King IV Report on Corporate Governance reflects aspirational governance standards for all companies and, despite being a voluntary code, it is mandatory where so required by specific bodies such as the Johannesburg Stock Exchange.[359]

As demonstrated through the principles discussed above, the King IV Report on Corporate Governance recommends leading practices on how governance duties should be discharged by directors, and therefore it has the ability to influence corporate practices.[360] Where recommended practices are shown to be widely adopted by companies, this would enable the courts to turn to the King IV Report on Corporate Governance to determine whether the required standard of care has been achieved in a particular case and, in this way, these voluntary provisions may find their way into jurisprudence to become part of our common law.[361] Therefore, while these provisions are not legislated, they are still able to invoke liability.[362]

Since various judgements have in fact made reference to the King Reports, it is arguable that it now forms part of South Africa's common law, or at least an indication that the process has begun – and can therefore be used to modify and interpret

[359] Bilchitz (2008) 773; Jebe et al (2018) 137; Judin, Roberts & Naidoo (2017) 1; and Van der Linde (2008) 441. As of 1 April 2017, most of the provisions of the King Reports have been incorporated into the listing requirements of the Johannesburg Stock Exchange.

[360] King IV Report on Corporate Governance 35.

[361] King IV Report on Corporate Governance 35.

[362] King IV Report on Corporate Governance 35.

provisions of the Companies Act by judicial precedent.[363] Therefore, while the King Reports themselves are not binding as law, the failure to comply with them may provide an indication that directors are not acting in the best interest of the company.[364] It is hoped that our courts will continue to be guided by the King Reports when considering the actions taken by companies, to ensure that decisions are aligned with current societal principles and values.[365]

In addition, where a director seeks to rely on the busines judgement rule as a defence against any personal liability in terms of the Companies Act, it would be necessary for that director to demonstrate that robust and sound governance structures and processes – such as those recommended by the King IV Report on Corporate Governance – were diligently implemented and followed.[366] Without demonstrating good governance, it would be difficult for a director to show that decisions were taken in good faith, with care and on an informed basis which such director believed to be in the best interest of the company.[367]

[363] Jebe et al (2018) 138; and Judin, Roberts & Naidoo (2017) 2. This includes the *Stilfontein Gold Mining* case, where the court referred to the principles of good governance as set out in the King Reports, and the social responsibility of a company. This therefore highlighted the issue of whom directors owe their fiduciary duties to when managing their company, and shifted the traditional view that a director manages a company in the interest of the shareholders only, to recognition of a much wider variety of interests, including environmental interests.

[364] Cassim F 'Company Law (Including Close Corporations)' (2006) *Annual Survey of South African Law* 512; and Luiz & Taljaard (2009) 425.

[365] Jebe et al (2018) 159.

[366] King IV Report on Corporate Governance 35.

[367] King IV Report on Corporate Governance 35.

Notably, as a framework which operates on self-regulation, it may not be seen as being particularly effective in invoking liability as it does not, by way of example, provide any remedies for violations of environmental infringements where they are reported.[368] However, the provisions remain commendably progressive and, at the very least, provides much needed guidance to directors on best practices and may ultimately result in the wider adoption of these principles.

4.4. CONCLUSION

Modern directors are now required to not only consider shareholder interests, but to consider a much wider spectrum of interests, including environmental interests.

While the Companies Act does not refer to corporate governance or CSR directly, it does prescribe the need to establish a social and ethics committee in some instances, and these committees are required to consider environmental issues, among other issues. However, the Companies Act and Companies Regulations provide limited guidance on what is expected from directors in the performance of their duties in this regard, and therefore the King IV Report on Corporate Governance is a useful guide in providing more substance to these duties.

As demonstrated in this chapter, the King IV Report on Corporate Governance is a progressive document which provides extensive guidance on the type of

[368] Bilchitz (2008) 773.

considerations a director is required to take into consideration when discharging his or her duties and in taking decisions on behalf of a company. While the King IV Report on Corporate Governance is voluntary in nature, a director's actions or omissions can be measured against the principles prescribed by them and, if it is found to be inadequate or lacking, this may serve to persuade a court that a director has failed in his or her duties as a director, and result in personal liability.

While these provisions do not provide direct or easy methods to hold director's personally liable for environmental transgressions, we need to embrace open-ended principles of directors' duties, as well as innovative and creative application of existing tools such as the King IV Report on Corporate Governance, in order to achieve better compliance with environmental values.[369] While some authors disagree with the voluntary approaches such as those envisaged by the King IV Report on Corporate Governance, and describe such approaches as being inadequate and incoherent;[370] it is submitted, with cautious optimism, that the King IV Report on Corporate Governance exists as a useful, complementary tool to existing legislation, with the potential of reinforcing and bolstering the strength of existing legislation through the use of unambiguous, progressive principles. The willingness of our courts make use of these voluntary provisions also demonstrates an encouraging movement towards such provisions becoming part of our common law.

[369] Katzew (2011) 687-8, and 700.

[370] Bilchitz (2008) 789.

5. CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. INTRODUCTION

While pious principles are embodied in our Constitution and elaborated in chapter 2 of NEMA, in practice, it remains unjustifiably difficult for citizens and communities to exercise these rights,[371] and the impact of improper environmental management practices are often borne disproportionately by the poor.

As described in this thesis, directors occupy a special position of responsibility, not only in relation to the company, but are required (in terms of good corporate governance) to embrace wider societal concerns, such as ensuring better management and protection of the environment and to promote sustainable development. Directors are, essentially, the decision-makers in companies, and should therefore be held personally responsible for any actions or omissions that result in the violation of environmental rights, and not be allowed to be shielded unconditionally behind the separate legal personality of the company.

In this chapter, the conclusions regarding the research question (namely, whether provisions found in existing statutes may be interpreted to hold directors personally liable for environmental transgressions) shall be presented on the basis of the findings in the previous chapters. Thereafter, the author shall submit

[371] Fig D 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' (2005) 81 *Royal Institute of International Affairs* 616.

recommendations as to how these existing provisions may be strengthened to ensure that they are more easily utilised and that directors are given better guidance on the standard of care required from them when discharging their duties.

5.2. CONCLUSIONS

5.2.1. SHORTCOMINGS IDENTIFIED IN EXISTING LEGISLATION

While it is possible to hold directors personally liability for environmental transgressions in terms of the existing statutes as demonstrated in this thesis[372] (and the courts have expressed their willingness to lift the corporate veil, where appropriate, to ensure that citizens are protected especially from the effects of environmental pollution and degradation),[373] the following shortcomings were identified:

1. The law does not specifically require directors to have special business acumen or any minimum qualifications.[374] As environmental legislation is incredibly

[372] Directors may be held personally liable in terms of criminal and civil actions in respect of the Companies Act, NEMA, the Water Act, the NEM: Waste Act and the NEM: Air Quality Act, as demonstrated in the previous chapters.

[373] Such as demonstrated in the *Stilfontein Gold Mining* case. For comparative research of jurisdictions throughout the world that share this approach of lifting the corporate veil, see Anderson H 'Directors' Liability for Corporate Faults and Defaults – An International Comparison' (2009) 18(1) *Pacific Rim Law & Policy Journal* 50.

[374] Davis et al (2011) 118. While s 69(6)(b) of the Companies Act does permit a company to impose minimum qualifications to be met by directors in the company's MOI, this is not mandatory.

complex, when directors lacking the necessary skills or expertise are tasked with taking decisions on behalf of a company relating to the environment and compliance with environmental laws, and they fail to consult with the necessary professionals prior to taking decisions (such as consulting environmental lawyers for advice on best practices), this can prove to be challenging and may result in ignorance of the law, poor environmental practices and, inevitably, serious environmental damage.

2. While existing legislation makes it possible to hold directors personally liable for environmental offences,[375] criminal cases have been exhaustively demonstrated as being bedevilled by a number of weaknesses including, *inter alia*, low success rates due to it being a resource-intensive process (requiring intensive investigation and case development), the high burden of proof required, the reactive nature of criminal law, lack of expertise among the prosecutors and the judiciary, poor detection and investigation skills and general weakness of the South African criminal justice system.[376] In addition, the plea and sentence process (which was utilised in the *Blue Platinum Ventures* case) often leads to leniency of penalties and remediation orders, creating the impression that environmental crimes as 'less heinous than other crimes' and could negatively affect the efficacy of the criminal justice system as a tool to enforce environmental laws.[377]

[375] As per s 34(7) of NEMA.

[376] See discussion at paragraph 3.3.1 above.

[377] Murombo & Munyuki (2019) 31.

3. Section 34 of NEMA creates an easier mechanism to claim for damages for loss suffered,[378] including the costs for investigation of a criminal offence to be recovered by the state from those convicted of an offence under NEMA (which would include, amongst others, a director). However, such costs may not be recovered in advance of an anticipated action. This inevitably results in hesitation by environmental authorities to take measures themselves due to the risk of only being able to recover their costs after the event.[379]

4. Existing provisions which may be used to hold directors personally liable are fragmented, as has been demonstrated by the previous chapters. These provisions are often not immediately identifiable and are scattered throughout various pieces of legislation in an uncoordinated fashion. Without direct, unambiguous provisions that clearly indicate personal director liability, it is argued that the environmental authorities and those seeking to claim damages or costs personally from a director, may find it a difficult task and would require the assistance of someone with specialised and in-depth knowledge of the various pieces of applicable laws.

5. The Companies Regulations are drafted relatively abstractly and does not, by way of example, provide clear guidance regarding the extent of environmental monitoring required to be undertaken by members of a social and ethics committee. It is argued that directors (and our courts) are therefore unlikely to know exactly what is expected of directors when serving on such a committee, or

[378] See discussion at paragraph 3.3.2 above.

[379] See discussion at paragraph 3.3.2 above.

the extent to which the company's activities should be monitored in respect of the environment.[380]

6. Despite s 76(3)(c) of the Companies Act requiring directors to carry out their duties with a reasonable duty of care, a director is still able to make use of the business judgement rule as a form of defence and a means to escape personal liability. The rule is sometimes referred to as a 'due diligence defence' because it is not clearly defined, enabling a director to simply show that certain processes were taken, without needing to explain whether such processes were sufficient or appropriate in the circumstances. This may reduce the standard of conduct expected of directors to a mere due diligence exercise rather than meaningful decisions to protect the environment.[381]

5.2.2. SHORTCOMINGS IDENTIFIED IN THE KING IV REPORT FOR CORPORATE GOVERNANCE

While this thesis has examined the King IV Report on Corporate Governance and found it to be an encouragingly progressive document (requiring directors to, *inter alia*, act ethically beyond mere legal compliance, take all reasonable measures even if such measures may not be prescribed in law, and receive continuous professional development), the following shortcomings were identified:

[380] See discussion at paragraph 4.2 above.

[381] See paragraph 3.2.3 above.

1. Although courts have demonstrated willingness to turn to the King IV Report on Corporate Governance (to determine whether the required standard of care has been achieved by directors), and these provisions could then find their way into jurisprudence to become part of our common law, the King IV Report on Corporate Governance remains a voluntary document. It is argued that this results in companies remaining reluctant to promote strong environmental standards, and standards will often not be voluntarily implemented by industry.[382] It is further argued that companies which publicly announce their adherence to the King IV Report on Corporate Governance tend to, unfortunately, overemphasise the extent of the company's voluntary contribution to environmental progress while, in reality, this is often 'greenwash' or a well-crafted public relations exercise aimed at distracting the gullible into believing that the company has serious sustainability agendas and masking its poor environmental practices - thereby 'seducing South Africans into forgetting, absolving, effacing old scars' of the company's previous poor practices without actually implementing any meaningful changes.[383]

2. It is argued that the requirement for directors to have the appropriate balance of knowledge, skills and experience to effectively discharge their governance role and responsibilities is, at best, idealistic. It remains largely unclear how the fundamentally legal issues that drive the monitoring process required to be undertaken by directors can be handled by directors lacking legal skills,

[382] Fig (2005) 616.

[383] Fig (2005) 617.

and continues to make it challenging to determine what should be regarded as being necessary or appropriate expertise required of directors.[384]

3. The King IV Report on Corporate Governance acknowledges the importance of a well-developed board, and this may be achieved through continuous development to ensure that directors are better equipped to function more effectively in the constantly changing business environment in comparison to those who receive limited training.[385] However, while the inclusion of professional development initiatives are welcomed, it is submitted that the language used can be interpreted as being weak (such as the use of terms like 'encouraged' and 'should') and it is uncertain whether all companies would regard these provisions as being significant (in comparison to the other provisions) and prioritise such training and development of directors.

5.2.3. RECOMMENDATIONS

Based on the shortcomings or weaknesses identified in this thesis, the following recommendations are proposed:

1. It is proposed that an integrated approach be adopted to incorporate a director's fiduciary duties and duty of care (as provided for in terms of the Companies Act) into existing environmental laws. This could be done by including provisions, within NEMA and other environmental laws, that

[384] See paragraph 4.3.1.3 above.

[385] See paragraph 4.3.1.3 above.

specifically refer to a director's general duties in terms of the Companies Act, and that liability in terms of the environmental laws does not preclude someone from making use of the Companies Act to hold directors accountable in terms of corporate law, too. It is submitted that this integrated approach would aid in encouraging those seeking to hold director's personally liable for environmental transgressions to consider and make use of the Companies Act, thereby expanding the range of tools available to hold director's accountable. Furthermore, it is argued that the risk of more personal liability would serve to further deter director's from abrogating their duties and responsibilities as directors of companies, and therefore encourage directors to act more reasonably and responsibly.

2. While the King IV Report on Corporate Governance is a voluntary guideline, it is mandatory for companies wishing to be listed on the Johannesburg Stock Exchange. This therefore ensures the achievement of a better standard of corporate governance, and therefore reduces the risk of director's behaving irresponsibly and risking personal liability. Apart from the Johannesburg Stock Exchange, it is submitted that more bodies should require compliance with the King IV Report on Corporate Governance as a requirement of doing business in South Africa, and therefore improving the adherence to such principles without having the King IV Report on Corporate Governance being promulgated as law. By way of example, companies submitting tenders to government entities could be required, as part of the tender requirements, to submit evidence of compliance with King IV Report on Corporate Governance. This would arguably improve environmental practices of

companies providing services to government, and proactively reduce the risk of such service providers causing environmental harm in the process. Private companies could similarly require their service providers to submit evidence of compliance with the King IV Report on Corporate Governance as a requirement for renewal of existing service contracts, for example. In addition, the King IV Report on Corporate Governance may also include an additional principle, rewarding and encouraging companies and entities to voluntarily elect to conduct business with other companies which observe the principles contained in the King IV Report on Corporate Governance. By doing so, it is argued that more companies would be encouraged to implement the practices proposed in the King IV Report on Corporate Governance.

3. As discussed in previous chapters, the need for directors to be properly trained, qualified and experienced cannot be understated, especially when navigating the complex nature of a director's duty of care within an ever-changing legal environment. While it is probably unrealistic to require directors to have environmental law experience, especially due to the complex nature of this area of law, it is proposed that, at the very least, the Companies Act should require directors to receive ongoing professional development and regular briefings on legal and corporate governance developments, and risks and changes in the external environmental of the organisation, as described in principle 7 of the King IV Report on Corporate Governance. By incorporating this principle, it would be mandatory for directors to receive ongoing professional development, ensuring that directors have a sound (or at least better) understanding of the operating landscape and applicable

legislation, and therefore be better equipped to execute of the monitoring obligations required of them. Furthermore, it would also improve the overall standard of directors, and therefore enable a court to measure a director's conduct against this higher standard. This would arguably reduce the ability of a director to rely on the business judgement rule and to compare their required standard of care with another director that has not received such professional development training i.e. a lower standard.

4. Although the establishment of a social and ethics committee by the Companies Act is said to contribute to better corporate governance, the Companies Act and Companies Regulations only provide abstract, vague guidance on the functions of this committee and the standard expected from directors serving as members of such committees. It is proposed that the Companies Regulations be amended to require the committee to consider the King IV Report on Corporate Governance when monitoring the company's activities relating to the environment. This would provide members with unambiguous guidance on exactly what is expected of them in the performance of their duties, and thereby improve their ability to achieve compliance. Similarly, it would make it easier for a court of law to determine when such obligations have in fact been met by directors.

5. As the King IV Report on Corporate Governance encourages companies and directors to act ethically beyond mere legal compliance, and therefore undertake precautionary measures even if not required in law in order to achieve sustainable development, it is submitted that the Companies

Regulations should require directors to be guided by the precautionary principle when exercising their duties on the social and ethics committee. This would encourage directors to act beyond mere legal compliance in the management and protection of the environment, to seek professional guidance on environmental issues that they are unclear about, and to advise the company to proceed cautiously when undertaking activities where limited knowledge is currently available.

5.3. CLOSING REMARKS

This thesis has sought to demonstrate that, despite the lack the coordination, the provisions nonetheless exist in the statutes examined to be interpreted to hold directors personally liable for environmental transgressions. This is demonstrated through the use of section 34(7) of NEMA to hold directors personally liable for offences under NEMA, the National Water Act, the NEM: Waste Act and the NEM: Air Quality Act; while simultaneously using the Companies Act to recognise that the environmental transgressions committed by directors under environmental laws should be viewed as a failure by such directors to exercise their fiduciary duties and therefore sufficient grounds for departing from the principle of separate legal personality – ultimately holding such directors personally liable.

In addition, it has been argued that the reference to social and ethics concerns as prescribed in the Companies Act, as well as the need to adhere to good corporate governance as described in the King IV Report on Corporate Governance, can help to support the need for directors to advance environmental issues, and for

companies to realise that it is no longer tenable to pursue profits at the expense of the environment.

This thesis proposes the embracing of open-ended principles of directors' duties, as well as innovative and creative application of existing tools such as the King IV Report on Corporate Governance, in order to achieve better compliance with environmental values. Furthermore, where the shortcomings been identified through the examination of existing legislation and the King IV Report Governance, recommendations have been proposed for consideration. It is optimistically hoped that such recommendations will contribute to the creation of ideal directors who exercise a higher degree of care, skill and diligence when considering environmental issues and advocate for better environmental compliance, and therefore proactively ensure the protection of environmental rights. The higher standard of care envisioned for directors may also, where appropriate, contribute to more directors being held personally liable for environmental transgressions.

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