

Corporate social responsibility and related legal checks in the pursuit of environmental protection in South Africa

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Supervisor/Promoter: Prof AA Du Plessis

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**Corporate social responsibility and related legal checks in the pursuit of
environmental protection in South Africa**

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Job 12:7-10

"But ask the animals, and they will teach you, or the birds in the sky, and they will tell you; or speak to the earth, and it will teach you, or let the fish in the sea inform you. Which of all these does not know that the hand of the LORD has done this? In His hand is the life of every creature and the breath of all mankind."

List of abbreviations

AHRLJ	African Human Rights Law Journal
AM	ArcelorMittal South Africa Limited
BCSD	Business Charter for Sustainable Development
CER	Centre for Environmental Rights
CERES	Coalition for the Environmentally Responsible Economies
Colo J Int'l Env'tl L & Pol'y	Colorado Journal of International Environmental Law and Policy
Contemp Econ Pol'y	Contemporary Economic Policy
CPA	Criminal Procedure Act 51 of 1977
CRISA	Code for Responsible Investing in South Africa
CSR	Corporate Social Responsibility
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DEAWA	Department of Environmental Affairs and Water Affairs
Denv J Int'l L & Pol'y	Denver Journal of International Law and Policy
DMR	Department of Mineral Resources
dti	Department of Trade and Industry
ECA	Environment Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EMI	Environmental Management Inspectorate
EMPr	Environmental Management Programme

EMS	Environmental Management Systems
Envtl L	Environmental Law
EPA	Environmental Protection Agency
EU	European Union
German LJ	German Law Journal
GCNSA	Global Compact Network South Africa
I&APs	Interested and Affected Parties
ICC	International Chamber of Commerce
ICSA	Institute of Chartered Secretaries and Administrators
IEMA	Institute of Environmental Management and Assessment
Int'l J Civ Soc'y L	International Journal of Civil Society Law
Int'l J NPL	International Journal of Not-for-Profit Law
IoDSA	Institute of Directors in Southern Africa
IPC	International Personnel Certification Association
IRC	Integrated Reporting Committee
ISO	International Organisation for Standardisation
JCI	Journal of Court Innovation
JEPP	Journal of European Public Policy
JERL	Journal of Energy and Natural Resources Law
JIBE	Journal of International Business Ethics
J Int'l Bus & L	Journal of International Business and Law
JSE	Johannesburg Stock Exchange
Juta's Bus L	Juta's Business Law

MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NBI	National Business Initiative
NEMA	National Environmental Management Act 107 of 1998
NEM:AQA	National Environmental Management: Air Quality Act 39 of 2004
NEM:BA	National Environmental Management: Biodiversity Act 10 of 2004
NEM:ICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEM:PA	National Environmental Management: Protected Areas Act. 57 of 2003
NEM:WA	National Environmental Management: Waste Act 59 of 2008
NEPAD	New Partnership for Africa's Development
NWA	National Water Act 36 of 1998
NYL Sch J Hum Rts	New York Law School Journal of Human Rights
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion of Access to Information Act 2 of 2000
PER/PELJ	Potchefstroom Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
RoDs	Record of Decision
SABS	South African Bureau of Standards

SAICA	South African Institute of Chartered Accountants
SAJELP	South African Journal of Environmental Law and Policy
SALJ	South African Law Journal
SANAS	South African National Accreditation System
SCA	Supreme Court of Appeal
SEC	Social and Ethics Committee
SEMAAs	Specific Environmental Management Acts
TNCs	Transnational Corporations
UN	United Nations
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNIDO	United Nations Industrial Development Organisation
USA	United States of America
VEJA	Vaal Environmental Justice Alliance
WCED	World Commission on Environment and Development
WHCA	World Heritage Convention Act 49 of 1999

Abstract

In a developing country like South Africa, business has an important role to play in the economy. Companies also play a role in the environmental protection of South Africa's considerable natural resources and physical beauty. This research interrogates the voluntary and legal mechanisms for achieving the purpose of Corporate Social Responsibility (CSR) in the context of environmental protection in South Africa.

Section 24 of the *Constitution of the Republic of South Africa*, 1996 affirms that everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected through reasonable legislative measures. South African companies have access to a considerable number of voluntary mechanisms which can guide industry in the pursuit of achieving sustainable development. South Africa's primary pieces of legislation governing the conduct of companies and the protection of the environment are the *Companies Act 71 of 2008* and the *National Environmental Management Act 107 of 1998*.

Given the import of companies in South African society and their use of natural resources, it is necessary to investigate the nexus between these CSR and legislative checks and environmental protection in terms of South African law. In particular, an analysis is required of the mechanisms available in the voluntary codes and the legislation against the interpretation of these mechanisms by the courts. Through a critical evaluation of the main voluntary CSR mechanisms available and the applicable legal framework, against their interpretation by the courts, this study illustrates the role that companies can play in environmental protection in South Africa.

Keywords: corporate social responsibility, the social and ethics committee, shareholder activism, environmental protection and sustainability, the *Companies Act 71 of 2008*, the *National Environmental Management Act 107 of 1998*.

Opsomming

In die konteks van 'n ontwikkelende land soos Suid-Afrika, speel besighede 'n belangrike ekonomiese rol. Maatskappye speel terselfertyd 'n belangrike rol in die beskerming van Suid-Afrika se natuurlike hulpbronne en natuurskoon. Hierdie navorsing ondersoek die vrywillige en regsmechanismes wat gemik is op Korporatiewe Sosiale Verantwoordelikheid ('CSR') spesifiek in die konteks van omgewingsbeskerming in Suid-Afrika.

Aritkel 24 van die *Grondwet van die Republiek van Suid-Afrika*, 1996 bevestig dat elkeen die reg het op 'n omgewing wat nie skadelik is vir gesondheid of welstand nie en op die beskerming van die omgewing by wyse van redelike wetgewende maatreëls. Suid-Afrikaanse maatskappye het egter ook toegang to verskeie vrywillige meganismes wat die industrie kan lei in die stree na meer volhoubare ontwikkeling. Die hoofwetgewing wat die gedrag van maatskappye en omgewingsbeskerming reguleer is die Maatskappyyewet 71 van 2008 en die *Nasionale Omgewingbestuurswet* 107 van 1998.

Gegewe die belangrikheid van maatskappye in die Suid-Afrikaanse gemeenskap en hul gebruik van natuurlike hulpbronne, is dit nodig om ondersoek in te stel na die verband tussen korporatiewe kontrole meganismes en omgewingsbeskerming in terme van Suid-Afrikaanse reg. Meer spesifiek is 'n analise nodig van die meganismes beskikbaar in verskillende vrywillige korporatiewe kodes en die wetgewing wat die interpretasie van hierdie kodes deur die hof, onderlê. Hierdie studie illustreer die rol wat maatskappye kan speel in omgewingsbeskerming in Suid-Afrika by wyse van 'n kritiese evaluering van die belangrikste CSR meganismes beskikbaar, die toepaslike regsraamwerk en interpretasie deur die regbank.

Sleutelwoorde: korporatiewe sosiale verantwoordelikheid, die sosiale en etiese komitee, aandeelhouer aktivisme, omgewingsbewaring en volhoubaarheid, Nasionale Omgewingsbestuurswet, Maatskappyyewet

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1 Introduction

Corporate Social Responsibility (CSR) is defined by the United Nations Industrial Development Organisation (UNIDO) as:

...a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders.¹

This definition refers to a "management concept" and hence by implication speaks of mechanisms which may be self-determined by the management of a company. This definition suggests that quasi-legal or voluntary mechanisms aimed at the integration of business and social and environmental concerns may be adopted and implemented by business through choice. The definition also presupposes that corporate responsibility is fundamental to business at an operational level and further that there is a range of stakeholders who are part of the integration referred to above. The internationally accepted tool used in trying to manage the risks associated with these broader social issues and the conduct of a business's activities is CSR.²

Glazewski takes the definition further and states that CSR is:

...an approach whereby a company commits to address its social and environmental impacts, and integrates this commitment into its business practice.³

Glazewski's definition denotes a call for business to move beyond the mere conceptualisation of corporate responsibility and to make a firm commitment to corporate responsibility - a commitment that must be integrated into business practice.

In 2009 the Institute of Directors in Southern Africa (IoDSA) introduced the *King Code of Governance Principles* and the *King Report on Governance* (King III) to complement the *Companies Act 71* of 2008.⁴ CSR is defined in King III as follows:⁵

Corporate responsibility is the responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and

¹ Wiese *Corporate Governance in South Africa* 182.

² Kloppers and du Plessis 2008 *JERL* 93.

³ Glazewski *Environmental Law in South Africa* 26-49.

⁴ IoDSA 2009 <http://www.iodsa.co.za/?kingIII>.

⁵ The Institute of Directors in Southern Africa (IoDSA) formally introduced the King Code of Governance Principles and the King Report on Governance (King III).

ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the legitimate interests and expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the company and practiced in its relationships.⁶

The King III definition includes legal compliance in reference to the overall aim of CSR.⁷ However, no reference is made in the above definitions to the interaction between legal and quasi-legal or voluntary mechanisms in order to assist business to fulfil CSR objectives and to become more proactive in strategic decision-making. For example, no reference is made to how CSR affects operational and strategic spheres of business. This suggests that there is uncertainty about how these definitions directly determine the nexus between corporate checks and environmental protection in terms of South African law at a strategic and operational level.

There are two new pieces of legislation pursuant to the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) which speak directly to business practice in the context of CSR as well as to environmental concerns. These are the *National Environmental Management Act 107 of 1998* (the NEMA) and the *Companies Act 71 of 2008* (the *Companies Act*). For example, section 7(a) of the *Companies Act* states that the purpose of the *Companies Act* is to promote compliance with the Bill of Rights as provided for in the *Constitution*, in the application of company law. This would include the section 24 right to an environment which is not harmful to human health or well-being and the right to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures. The environmental right is confirmed in the preamble of the NEMA, which also affirms that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions.⁸

⁶ King III Glossary 51.

⁷ The IoDSA is currently drafting King IV. IoDSA 2016 <http://www.iodsa.co.za/news/279768/King-IV-open-for-public-comment.htm>.

⁸ The preamble of the *National Environmental Management Act 107 of 1998* (NEMA) also states that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves the present and future generations. This would apply to business.

Section 24 of the *Constitution* (as well as the NEMA) makes reference to sustainable development which balances the use of natural resources whilst promoting justifiable economic and social development. Business in South Africa is bound by the *Constitution*.⁹ Trading activities have, however, raised issues of tension between the competing rights to environment, trade and property¹⁰ against the overall backdrop of sustainable development and environmental governance.¹¹

Despite the existing legislative and constitutional advances, South African legislation does not place an express obligation on business to fulfil CSR obligations.¹² No overt provision is made for CSR in either the *Companies Act* or the NEMA, and South Africa has no "CSR Act", so to speak.¹³ However, CSR language is used in South African legislation in order to achieve certain social and environmental objectives.¹⁴ King III explains that CSR is a body of principles and practices which call upon business to "comply or explain".¹⁵ A proposed amendment in King IV is to adapt this to "comply *and* explain".¹⁶ King III specifically relates CSR to corporate citizenship, which King describes as:

Responsible corporate citizenship implies an ethical relationship of responsibility between the company and the society in which it operates. As responsible corporate citizens of the societies in which they do business, companies have, apart from rights, also legal and moral obligations in respect of their economic, social and natural environments. As a responsible corporate citizen, the company should protect, enhance and invest in the wellbeing of the economy, society and the natural environment.¹⁷

The nexus between CSR, business practices and the existing South African legal framework has been touched upon by the courts as well. In *Company Secretary of*

⁹Gwanyana 2015 *PER/PELJ* 3102.

¹⁰ Kloppers 2013 *PER/PELJ* 166.

¹¹ The Brundtland Report defines sustainable development as: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs." WCED *Our Common Future* 43.

¹² Kloppers and du Plessis 2008 *JERL* 93.

¹³ Kloppers 2013 *PER/PELJ* 166.

¹⁴ Kloppers and du Plessis 2008 *JERL* 93.

¹⁵ King III 5.

¹⁶ IoDSA 2016 <http://www.iodsa.co.za/news/279768/King-IV-open-for-public-comment.htm>.

¹⁷ King III Glossary 50.

*ArcelorMittal South Africa vs Vaal Environmental Justice Alliance*¹⁸ (the VEJAcase) the Supreme Court of Appeal (SCA), for example, interpreted a request for access to information regarding environmental concerns thus:

It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, *inter alia* the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment.¹⁹

The VEJA decision is inline with the CSR notion that business can and should focus on a "triple bottom line" consisting of competing interests, being economic, social and environmental aspects, for the benefit of stakeholders and society at large.²⁰

Business is a powerful entity in society, with access to considerable resources and skills.²¹ In *DH Brothers Industries (Pty) Ltd v Gribnitz*²² (the *DH Brothers* case) Judge Gorven, for example, emphasised the importance of business in the delivery of goods and services. He stated that such goods and services are the "lifeblood" of any economy. The *DH Brothers* case was one of the first matters to ventilate some of the dynamic new provisions of the *Companies Act*.²³ The court alluded to the fact that business is an essential component of society. However, the pursuit of profit and business' importance within society as a whole needs to be balanced against business' responsibility towards the environment. This exists, *inter alia*, because business utilises scarce natural resources for profit in a product life cycle process which some call expending "biological capital".²⁴ Business activities thus have a direct impact on the natural environment as well as on human health. The industrialised world is repeatedly cited for unsustainable consumption and production

¹⁸ *Company Secretary of ArcelorMittal South Africa vs Vaal Environmental Justice Alliance* 2014 ZASCA 184 (26 November 2014) (the VEJA case).

¹⁹ Para 71 of the VEJA case.

²⁰ Wiese *Corporate Governance in South Africa* 182.

²¹ Van den Ende *Corporate Social Responsibility in South Africa* iii.

²² *DH Brothers Industries (Pty) Ltd v Gribnitz* 2014 1 SA 103 (KZP) (the *DH Brothers* case).

²³ The *DH Brothers* case involves an exploration of new business rescue provisions. However, further dynamic provisions include the provision of audit committees in terms of s 94 of the *Companies Act* 71 of 2008 and the farreaching consequences of declaring a director delinquent in terms of s 162(5) - see *Kukama v Lobelo* (GSJ) unreported case number 38587/2011 of 12 April 2012 (Tshabalala J).

²⁴ Hair 1985 *Envtl L* 746.

patterns which affect third world countries and present a viable risk to future generations.²⁵

Within Sub-Saharan Africa the CSR context for business is complex because most countries face chronic poverty, corruption, inadequate service delivery, war and civil strife, labour unrest, tribal tensions and cultural differences as well as disease.²⁶ Some of these factors are manifest in South Africa.²⁷ The tension between economic and environmental interests was discussed by the South African courts in *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga*²⁸ (the *Fuel Retailers* case), for example. This was the first environmental case to be heard in the country's Constitutional Court. In the minority judgment of the *Fuel Retailers* case Judge Sachs noted the irony of the fact that the first environmental matter to be heard in a constitutional setting was brought by a corporate polluter. He held that the purpose of environmental law was to protect the environment and not the profits of corporate petrol stations.²⁹

Against the background of the above, the purpose of this study is the legal and quasi-legal mechanisms used in South Africa to promote CSR with specific reference to environmental protection. These include the United Nations (UN) Global Compact (the Global Compact), the Organisation for Economic Co-operation and Development's (OECD) Principles of Corporate Governance (the Principles), the International Corporate Governance Network Global Compact Principles (the Global Compact Principles), King III, environmental management systems (EMS) and the Johannesburg Stock Exchange's (JSE) Listing Requirements. The assessment will be performed with the purpose of investigating a) the variety of legally prescribed and quasi-legal (voluntary-type) CSR mechanisms available that assist towards b) improved proactive environmental protection as envisaged by South African environmental law.

²⁵ Jacobsen 1995 *Colo J Int'l Env'tl L & Pol'y* 256.

²⁶ Irobi 2005 <http://www.beyondintractability.org/casestudy/irobi-ethnic>.

²⁷ Delwin 2010 *Int'l J Civ Soc'y* L65.

²⁸ *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga* 2007 6 SA 4 (CC) (the *Fuel Retailers* case).

²⁹ Paras 113, 114 of the *Fuel Retailers* case. Judge Sachs found that the essence of sustainable development is the balanced integration of socio-economic development and environmental priorities and norms. However, economic development becomes a relevant factor only when it potentially threatens the environment.

The research method adopted for this study is a desktop study of relevant materials including but not limited to legislation, case law, policy, journals, textbooks, electronic sources, scholarly publications, articles and reports.

The study comprises of four parts. The first part explores the quasi-judicial or voluntary CSR mechanisms most widely used by South African business. The second part will unpack the legal framework applicable to CSR in South Africa, in particular existing company and environmental law. The third part analyses cases pertinent to the discussion of CSR in a South African setting in order to highlight the role of the judiciary in the promotion of CSR. Lastly, the fourth part offers a conclusion with recommendations.

2 Quasi-legal voluntary CSR mechanisms in South Africa

2.1 Introduction

Voluntary mechanisms for CSR are mechanisms which business can choose to adopt and implement in their business operations,³⁰ whereas judicial mechanisms in the form of the law are never a matter of free choice. Compliance is required or else business faces the risk of sanction.³¹

This chapter explores the most commonly used quasi-legal or voluntary CSR norms employed by South African business, namely the UN Global Compact (the Global Compact), the OECD's Principles of Corporate Governance (the Principles), the International Corporate Governance Network Global Compact Principles (the Global Compact Principles), King III, environmental management systems (EMS) and the JSE's Listing Requirements.³²

The business case for voluntary CSR mechanisms is that business is incentivised by the assumption that being environmentally compliant has a direct impact on a business' finances through the management of risk.³³ However, according to Lazarus, Short and Currie, environmental considerations in business decision-making are determined primarily by considerations of potential liability or negative publicity that may result from environmentally detrimental activities, so environmental considerations are generally not so much a part of a business' production strategy as of its risk strategy.³⁴

A weakness inherent in CSR is the sheer number of voluntary norms available to business. A plethora of CSR tools exist, which can overwhelm companies' available financial resources and skills.³⁵ Some companies are of the view that the cost of paying administrative fines is slight in comparison with the cost of complying with

³⁰ Lehmann "Voluntary Compliance Measures" 269.

³¹ Lehmann "Voluntary Compliance Measures" 269.

³² Wiese *Corporate Governance in South Africa* 182-191.

³³ Glazewski *Environmental Law in South Africa* 26-49.

³⁴ Lazarus, Short and Currie "Legislative Framework" 9.

³⁵ Lehmann "Voluntary Compliance Measures" 271-272. According to Lehmann, a 1998 study described the use of voluntary approaches as "pervasive" with approximately 300 negotiated agreements in Europe, 300 000 pollution control agreements in Japan, and over 40 voluntary programmes in the United States.

environmental legislation.³⁶ This is a fundamental shortcoming in the legal mechanisms available to the state. The risk of legal liability and direct prosecution can thus be perceived as relatively insignificant to business and a risk easily overcome through the payment of administrative fines.³⁷

It is imperative to view legal and quasi-legal norms as complementary due to the weaknesses inherent in both categories, where such weakness may effectively be combatted through collaboration between voluntary and legislated mechanisms.³⁸ Voluntary or quasi-legal CSR mechanisms may be effective to supplement environmental management as demanded by law, but they cannot and should not replace state regulation.³⁹ It is in this context that this chapter seeks to explore some of the main voluntary CSR mechanisms at the disposal of South African companies, and discusses the theoretical advantages and disadvantages of such mechanisms for CSR.

2.2 The United Nations Global Compact

2.2.1 What is the United Nations Global Compact?

The Global Compact is a self-monitoring framework of ten principles which companies can prescribe to. It calls upon companies to align business strategy and operations with universal principles on human rights, labour, environment and anti-corruption, and to take action to advance societal goals.⁴⁰

In 2005, 191 member states of the United Nations General Assembly (UNGA) officially endorsed the Global Compact,⁴¹ which urges business to recognise and adhere to the principles of the *Rio Declaration on Sustainable Development*, 1992 (the *Rio Declaration*).⁴² South Africa currently has 79 participants in the Global

³⁶ Lehmann "Voluntary Compliance Measures" 269.

³⁷ Lehmann "Voluntary Compliance Measures" 269.

³⁸ Lehmann "Voluntary Compliance Measures" 269.

³⁹ Lehmann "Voluntary Compliance Measures" 269.

⁴⁰ UN Global Compact 2016 <https://www.unglobalcompact.org/what-is-gc>.

⁴¹ Akhtarkhavari 2010 *Denv J Int'l L & Pol'y* 277.

⁴² Taylor 2001 *NYL Sch J Hum Rts* 975.

Compact across the following sectors: financial services, mining, travel and leisure, construction and materials, and beverages.⁴³

The South African group of companies that subscribes to the Global Compact was organised in 2007.⁴⁴ This initiative is called the Global Compact Network South Africa (GCNSA) and is hosted and facilitated by the National Business Initiative (NBI). The NBI is a voluntary association of multi-stakeholders.⁴⁵ The Global Compact is also referred to in law. For example, the Global Compact is specifically referred to in regulation 43(5)(a)(i)(aa) of the *Companies Act* in relation to the responsibilities of a social and ethics committee.⁴⁶ Hence, there is seemingly a direct link between the *Companies Act* and this voluntary CSR mechanism which endorses sustainable development. A criticism of the Global Compact is that it was developed by states and not by industry, and that the principles it enunciates may therefore not cater for specific and unique company needs and capabilities.⁴⁷ Furthermore, the principles themselves are open to interpretation and consist of "abstract norms" which require actors to engage with them to create meaning from them.⁴⁸

2.2.2 The Global Compact's main features

Principle 7 of the Global Compact states that businesses should support a precautionary approach to environmental challenges.⁴⁹ Principle 7 is directly affected by Principle 15 of the *Rio Declaration*, which says that:

⁴³ The UN Global Compact 2016 <https://www.unglobalcompact.org/engage-locally/africa/south%20africa>.

⁴⁴ UN Global Compact 2016 <https://www.unglobalcompact.org/engage-locally/africa/south%20africa>.

⁴⁵ NBI 2015 <http://www.nbi.org.za/focus-areas/social-sustainability/un-global-compact-network-sa/>.

⁴⁶ The social and ethics committee which is dealt with in s 72 of the *Companies Act* and the regulations is discussed in ch 3, legal CSR mechanisms. Reg 43(5)(a)(i)(aa) states that a social and ethics committee has the function of monitoring 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 social and economic development, including the company's standing in terms of the goals and purposes of the 10 principles set out in the United Nations Global Compact Principles.

⁴⁷ Akhtarkhavari *Global Governance of the Environment* 165.

⁴⁸ Akhtarkhavari *Global Governance of the Environment* 165.

⁴⁹ UN Global Compact 2016 <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7>.

...where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The companies that prescribe to the principles are not monitored by any external body or organisation.⁵⁰The UN gives broad, generic advice as to how companies could incorporate the principles into their business strategy and operations.⁵¹ These include, firstly communicating potential risks to multiple stakeholders, secondly developing codes of conduct or practice and guidelines for company operations and products that confirm their commitment to caring for health and the environment,thirdly creating a managerial committee to oversee sustainability practices and policies, and fourthly supporting scientific research and industry-wide collaborative efforts on the safeguarding of the environment.⁵²Thus theGlobal Compact makes recommendations only and it is nota directive.⁵³ It therefore offers broad guidance to companies, who are expected to respond voluntarily.⁵⁴

2.2.3 The benefits of the Global Compact for South African business

According to Rasche and Waddock,the principles provide a platform for working on issues affecting business as a whole and can apply to all contexts, and from this vantage point industry-specific initiatives can be formulated and implemented, thus the implementation of these principles are flexible.⁵⁵

⁵⁰ Talbot *Critical Company Law*87.

⁵¹ The ideals of the Global Compact have been advanced through the *Norms on the Responsibilities of the UN Transnational Corporations and Other Business Enterprises with Regard to Human Rights* and the *UN Guiding Principles on Business and Human Rights*. Simons "Selectivity in law making: regulating extraterritorial environmental harm and human rights violations by transnational extractive corporations" 478

⁵² UN Global Compact 2016 <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-7>.

⁵³ UN Global Compact Italy 2016 <http://www.globalcompactnetwork.org/en/faq-eng/297-is-the-global-compact-legally-binding.html>.

⁵⁴While th Global Compact does not impose legal obligations on corporations, it provides a human right based approach for corporate responsibility which seek to link CSR with rights responsibilities more explicitly. Kotzé and Fuo 2016 *JENRL* 297.

⁵⁵ Rasche and Waddock 2014 http://www.cbs.dk/files/cbs.dk/31.01.2014_andreas_rasche_global_sustainability_governance.pdf 6.

Studies have revealed that its adoption and the implementation of its principles has had noticeable beneficial impacts on companies, governments and civil society actors which genuinely subscribe to them.⁵⁶

The Global Compact has brought about accelerated policy change in companies in relation to sustainability initiatives and has catalysed a proliferation of partnership projects and development-orientated activities that companies engage in with various stakeholders including UN agencies, the state and other partners.⁵⁷ Most of the companies which do adopt the voluntary mechanisms of CSR employ over 10 000 employees each. In other words, these are large companies. This phenomenon may lead one to ask about the implementation of the Global Compact by small and medium sized companies.⁵⁸ The principles enunciated in the Global Compact are accessible and adaptable to any workplace, and can be of use to small and medium sized enterprises due to their simplicity, although research indicates that the Global Compact is being implemented chiefly by large companies.⁵⁹

2.3 The Organisation for Economic Co-operation and Development's Principles of Corporate Governance

2.3.1 What are the OECD Principles?

The OECD came into being after World War II and has as its mission the promotion of policies that will improve the economic and social well-being of people around the world. It is thus policy focussed and policy driven.⁶⁰

The first set of the OECD Principles was published in 1999, and they were updated in 2015.⁶¹ South Africa is a non-member state of the OECD, and the country's collaboration with the organisation covers a wide array of policy issues, including macroeconomic policy and structural reform, debt management, fiscal policy,

⁵⁶ Akhtarkhavari 2010 *Denv J Int'l L & Pol'y* 279.

⁵⁷ Akhtarkhavari 2010 *Denv J Int'l L & Pol'y* 279.

⁵⁸ Akhtarkhavari *Global Governance of the Environment* 178.

⁵⁹ Akhtarkhavari *Global Governance of the Environment* 300. According to Akhtarkhavari, a significant proportion of corporations which were interviewed that have adopted environmental policies or practices have more than 10,000 employees, which often means that they are large transnational corporations.

⁶⁰ OECD 2016 <http://www.oecd.org/about/>.

⁶¹ Karuvaki and Sudatta 2013 *Kathmandu Sch L Rev* 132.

domestic resource mobilisation, competition policy, agricultural policy, public governance, rural and urban development, anti-corruption, science, technology and innovation, chemicals testing and tourism.⁶²

The OECD principles span six non-binding concepts which are simple enough for any enterprise to adopt and implement, even though they are primarily geared towards publicly traded companies.⁶³ These six principles are as follows: ensuring the basis for an effective corporate governance framework (principle 1), the rights and equitable treatment of shareholders and key ownership functions (principle 2), institutional investors, stock markets, and other intermediaries (principle 3), the role of stakeholders in corporate governance (principle 4), disclosure and transparency (principle 5) and the responsibilities of the board (principle 6).⁶⁴

2.3.2 *The main features of the OECD Principles*

The OECD principles are elaborations of the premise that good corporate governance can improve the economic efficiency of a company. They pertain to the management of a company inclusive of its various stakeholders such as the shareholders, the board and others representing the state and or facets of civil society.⁶⁵ The aim of the OECD principles is to:

...help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability.⁶⁶

The OECD principles should not be read or applied in isolation from other relevant OECD tools. In the context of sustainability, companies should also evaluate their policies against the standards implicit in the OECD's Green Growth Strategy, 2011⁶⁷ and the OECD Guidelines for Multinational Enterprises, 2011.⁶⁸ According to Schuler and Gefion, these OECD tools generate considerable reputational effects on

⁶² OECD 2016 <http://www.oecd.org/southafrica/south-africa-and-oecd.htm>.

⁶³ OECD *Principles of Corporate Governance* 9.

⁶⁴ OECD 2015

http://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en/.

⁶⁵ Karuvaki and Sudatta 2013 *Kathmandu Sch L Rev* 132.

⁶⁶ OECD *Principles of Corporate Governance* 3.

⁶⁷ OECD 2011 <http://www.oecd.org/env/towards-green-growth-9789264111318-en.htm> 10.

⁶⁸ OECD 2016 <http://mneguidelines.oecd.org/text/>.

different actors outside the OECD and regulate subject matter of high public interest, to the extent that there would be a "call for regulation in domestic or international public law" in the absence of the OECD mechanisms.⁶⁹ According to the OECD Principles of Corporate Governance, the purpose of CSR is to:

...help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.⁷⁰

The OECD therefore places prominence on transparency and accountability in CSR mechanisms. The OECD's Green Growth Strategy emphasises that there cannot be a continuance of "business as usual" since this would be "unwise" and "unsustainable" and would involve "risks that could impose human costs and constraints on economic growth and development".⁷¹ The OECD's Green Growth Strategy refers to the following risks: "increased water scarcity, resource bottlenecks, air and water pollution, climate change and biodiversity loss which is irreversible".⁷² These risks in the context of the Green Strategy, if they were to eventuate, would have severe social impacts in addition to curtailing economic growth.⁷³

In an African regional context, the OECD supports the New Partnership for Africa's Development (NEPAD), an African Union strategic framework for pan-African socio-economic development.⁷⁴ This is through the NEPAD-OECD Africa Investment Initiative, which aims to strengthen the capacity of African countries to design and implement reforms that improve their business climate, and to raise the profile of Africa as an investment destination, while facilitating regional cooperation and highlighting the African perspective in international dialogue on investment policies.⁷⁵ It thus has as its focus the regional development and implementation of effective policy.

⁶⁹ Schuler 2008 *German LJ1755*.

⁷⁰ OECD *Principles of Corporate Governance* Preface 7.

⁷¹ OECD 2011 <http://www.oecd.org/env/towards-green-growth-9789264111318-en.htm> 3.

⁷² OECD 2011 <http://www.oecd.org/env/towards-green-growth-9789264111318-en.htm> 3.

⁷³ See OECD 2011 <http://www.oecd.org/env/towards-green-growth-9789264111318-en.htm> 17, which states that the world faces two related challenges, expanding production to cater for the ever-increasing world population, and simultaneously reacting to environmental pressures which would seem to prevent such expansion.

⁷⁴ NEPAD 2015 <http://www.nepad.org/about>.

⁷⁵ OECD 2015 <http://www.oecd.org/investment/investmentfordevelopment/africa.htm>.

2.3.3 *The benefits of the OECD Principles for South African business*

The OECD Principles are framed broadly and thematically, and there is a family resemblance with some of the themes found in the *Companies Act*. For example, the *Companies Act* deals with the need for the enhanced accountability and transparency of companies in Chapter 2 part C and in Chapter 3. Other governance mechanisms are codified in Chapter 2 part F, which details shareholder activism provisions. Legislated remedies such as section 163 of the *Companies Act*, which particularises relief from oppressive or prejudicial conduct or from the abuse of the separate juristic personality of company, can also find application in principles 1 and 2 of the OECD Principles. The rationale of the OECD Principles is to operate as an elementary reference point. It is up to a company to relate its governance policy to this generic point of reference.⁷⁶

2.4 *The King Report on Governance*

2.4.1 *What is the King Report on Corporate Governance?*

The *King Report on Corporate Governance*⁷⁷ gave rise to the formulation of three consecutive related codes pertaining to good governance, namely King I (1996), King II (2002) and King III (2010).⁷⁸ In July 2016 a draft King IV report was released for comment. This has not yet been finalised. For the purposes of this research further references to the King Code will be to King III. The King Codes are a non-legislated compliance framework fundamentally affecting CSR standards and norms in a South African setting. Cassim explains that whilst the King Code may be a voluntary mechanism, it also has considerable persuasive force⁷⁹ and may over the course of time come to have legal implications:

The more established certain governance practices become, the more likely a court would regard conduct that conforms with these practices as meeting the required

⁷⁶ OECD *Principles of Corporate Governance* Preamble

⁷⁷ The King Committee was formed in 1993 under the auspices of the Institute of Directors in Southern Africa (IoDSA), which initiative was supported by the South African Chamber of Business, the South African Institute of Chartered Accountants (SAICA), the Johannesburg Stock Exchange (JSE), the Institute of Chartered Secretaries and Administrators (ICSA). See Armstrong 1995 *Juta's Bus. L.*

⁷⁸ Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 5.

⁷⁹ Cassim "Corporate Governance" 475.

standard of care. Corporate governance practices, codes and guidelines therefore lift the bar of what are regarded as appropriate standards of conduct. Consequently, any failure to meet a recognised standard of governance, albeit not legislated, may render a board or individual director liable at law.⁸⁰

The JSE requires all listed companies to comply with King III.⁸¹ King III was published to complement the *Companies Act*.⁸² Unlike the previous King Codes, King III applies to *all* entities incorporated in and resident in South Africa.⁸³

2.4.2 The main features of the King Report on Governance

As already stated, King III adopts a "comply or explain" approach.⁸⁴ It also recognises the synergy between voluntary CSR mechanisms and legal compliance. It emphasises that it is impossible to "unhinge" voluntary governance mechanisms from the law.⁸⁵ It emphasises the sustainability, corporate citizenship and leadership of a company.⁸⁶ Wiese reiterates that for a business to comply fully with King III it must ensure that the entity complies with the *Companies Act*, but that compliance with the *Companies Act* does not ensure that a business will also be complying with King III.⁸⁷

Sustainability is listed as a key aspect of King III.⁸⁸ Sustainability is discussed as both an opportunity and a risk to business.⁸⁹

Sustainability is the primary moral and economic imperative of the 21st century. It is one of the most important sources of both opportunities and risks for businesses. Nature, society and business are interconnected in complex ways that should be understood by decision-makers. Most importantly, current incremental changes towards sustainability are not sufficient - we need a fundamental shift in the way companies and directors act and organise themselves.⁹⁰

⁸⁰ King III 7.

⁸¹ Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 6.

⁸² Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 101.

⁸³ Cassim "Corporate Governance" 474.

⁸⁴ King III 5.

⁸⁵ King III 6.

⁸⁶ Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 102.

⁸⁷ Wiese *Corporate Governance in South Africa* 26.

⁸⁸ King III 9.

⁸⁹ King III 11.

⁹⁰ King III 11.

King III also states that companies operate in a "triple context" of social, economic and environmental worlds which are interconnected in complex ways, which interaction should be taken into account by decision-makers.⁹¹

Sustainability is strongly linked to good corporate citizenship which, according to King III, flows directly from the *Constitution*, which is the social contract entered into by all South Africans, and which applies to public and private bodies alike.⁹² King III also seeks an integration of social, economic and environmental issues which it views as being interdependent.⁹³ King III seeks for business to focus on integrated reporting.⁹⁴ Integrated reporting requires that sustainability reporting by a company should be integrated to a company's financial reporting.⁹⁵

2.4.3 *The benefits of the King Report on Governance for South African business*

King III takes a holistic approach to governance, which includes adherence to non-binding rules, codes and standards as well as compliance with all applicable legislation.⁹⁶ Hence, the Codes are palatable to business and are relevant to business strategy. The Codes are thematically presented, being divided into governance themes such as the responsibility of boards and directors, ethical leadership, audit committees and audits, the governance of risk and information technology, and the need to adopt a stakeholder-inclusive approach.⁹⁷

Some of the practices recommended in the King II report were incorporated into the *Companies Act*, and some have become regulatory prescriptions to companies listed on the JSE, for example.⁹⁸ The language used in King III has also found application in legislation, and the same language has also found application in legal precedent, with

⁹¹ King III 9.

⁹² King III 10.

⁹³ King III 2.

⁹⁴ King III 11.

⁹⁵ De Beer "Financial Reporting" 194.

⁹⁶ Cassim "Governance and the Board of Directors" 493.

⁹⁷ For example, King III 3 – 5.

⁹⁸ Hendricks and Wyngaard 2010 *Int'l J NPL* 104.

the courts looking to the Codes for guidance on various tests such as the duty of care.⁹⁹

The King Code III places emphasis on risk and liability management, which is also an essential component of integrated environmental management, and an opportunity for business is to include this issue its strategic management.¹⁰⁰ Cassim advises that this should be done through the establishment of a risk committee appointed to assist the board in carrying out its risk responsibilities.¹⁰¹

2.5 Environmental systems auditing

2.5.1 What is environmental systems auditing?

The then Department of Environmental Affairs and Tourism (DEA) has defined environmental auditing as:

...a process whereby an organisation's environmental performance is tested against its environmental policies and objectives. These policies and objectives need to be clearly defined and documented.¹⁰²

The International Chamber of Commerce (ICC) defines environmental auditing as:

...a management tool comprising a systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing with the aim of contributing to safeguarding the environment by: facilitating management control of environmental practices; and assessing compliance with company policies, which would include meeting regulatory requirements...¹⁰³

2.5.2 The main features of environmental systems auditing

Environmental auditing is constantly evolving.¹⁰⁴ According to UNEP, the term "environmental audit" is fairly new, but much of what is now being done as part of an "environmental audit" was previously done in the form of environmental reviews,

⁹⁹ Cassim "Corporate Governance" 475.

¹⁰⁰ DEA 2005
https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 21-24.

¹⁰¹ Cassim "Corporate Governance" 492.

¹⁰² DEA 2005
https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 21-24.

¹⁰³ Compton *et al Environmental Management in Practice* 256.

¹⁰⁴ Thomas *Environmental Management Processes and Practices* 253.

screening, investigations, quality controls and survey assessments.¹⁰⁵ An environmental audit is one of a variety of tools available to business to assess, evaluate and manage environmental and sustainability issues. Environmental auditing should not be confused with an Environmental Impact Assessment (EIA), which is a tool used to predict, evaluate and analyse environmental impacts before a listed activity commences (e.g. an infrastructure project).¹⁰⁶

An immediate problem with the term "environmental auditing" is that it is open to many different interpretations.¹⁰⁷ Krages makes a distinction between environmental compliance auditing and environmental systems auditing. Compliance auditing looks at the conformance of a company's activities with the applicable legal requirements. Its specific purpose is thus to monitor and measure compliance with the applicable legislative standards and rules.¹⁰⁸ Systems auditing or performance auditing on the other hand is broader, and it assesses the degree to which a company conforms to its own environmental policies and procedures - in other words, its own environmental management system.¹⁰⁹ There is a risk with a systems audit that unless a company utilises a tool which makes reference to legal adherence, the audit may exclude the oversight of a company's legal compliance.¹¹⁰

2.5.3 *The benefits of environmental systems auditing for South African business*

Environmental auditing has become a robust management tool used by companies as part of the development and implementation of an integrated environmental management systems (EMS). Individual companies are increasingly adopting an EMS of their own accord or as part of an industry-wide code of practice.¹¹¹ The DEA has reiterated that there are no specific legal requirements for environmental audits to be carried out in South Africa.¹¹² However, in order to achieve compliance

¹⁰⁵ Compton *et al Environmental Management in Practice* 255.

¹⁰⁶ DEAT 2005
https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf4.

¹⁰⁷ Compton *et al Environmental Management in Practice* 255.

¹⁰⁸ Krages *Total Environmental Compliance* 73.

¹⁰⁹ Krages *Total Environmental Compliance* 74.

¹¹⁰ Krages *Total Environmental Compliance* 73.

¹¹¹ Lehmann "Voluntary Compliance Measures" 276.

¹¹² DEA 2004
https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf4.

with certain environmental legal requirements, environmental auditing as a tool is the most logical means of formally checking compliance.¹¹³

Environmental systems auditing, being broader, helps a company to oversee an integrated EMS, or as Sampson notes in relation to the benefits of this type of auditing:

Initially EMS grew out of a need for organisations to find a systematic way to implement the commitments made in their environmental policies, however, this tool is now recognised as important in the prevention and management of environmental risks. Furthermore, EMS enables compliance with environmental legal standards as well as with its own environmental objectives and targets. Ultimately, however, corporate environmental management must be aimed at operating in a way that is consistent with the concept of sustainable development. Increasingly, EMS is being recognised as one of the tools that can assist in achieving this goal.¹¹⁴

A benefit of environmental compliance auditing for companies is that it helps business to "determine, disseminate and comply with a large volume of complex environmental laws".¹¹⁵

2.6 Relevant international standards

2.6.1 What are international standards?

Some of the most powerful and sophisticated actors on the world stage are juristic persons, and not governments.¹¹⁶ According to Clapp¹¹⁷ there are three methods that are utilised by business to exert pressure on government regarding its domestic environmental policies and its stance on global environmental negotiations. Firstly there is lobbying a domestic government before such a state sends off delegations to international environmental negotiations to position such negotiators (appearing for the state) to support a company's agenda.¹¹⁸ These lobby agendas have included environmental issues such as global warming, ozone depletion and the toxic waste trade.¹¹⁹ A second method is the use of structural power.¹²⁰ This refers to business'

¹¹³ DEA 2004
https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf.

¹¹⁴ Sampson and Van der Linde *Guide to Environmental Auditing* para 5.1.

¹¹⁵ Sampson and Van der Linde *Guide to Environmental Auditing* para 2.1.

¹¹⁶ Gwanyanya 2015 *PER/PELJ* 3104.

¹¹⁷ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-4.

¹¹⁸ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-4.

¹¹⁹ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

ability to influence the formation and functioning of governance through the dominant position of the business in the global economy.¹²¹ In an increasingly competitive economy, many states have pursued domestic and international policy outcomes which would be acceptable to business in order to attract and keep investment in their country.¹²² This is also referred to as "regulatory chill."¹²³ States are increasingly reluctant to regulate environmental protection at the threat or potential threat of investment relocation.¹²⁴ Thirdly, business affects global environmental governance through the development and implementation of industry codes and standards. This is viewed as a privatised form of global environmental governance.¹²⁵

The codes referred to by Clapp above include the International Organisation for Standardisation's (ISO) ISO 14001 environmental management, the ICC's Business Charter for Sustainable Development (BCSD) and the Coalition for the Environmentally Responsible Economies (CERES) Principles.¹²⁶ The next section interrogates two international standards relevant to CSR regarding business' role in sustainability. One is ISO 26000, which is the ISO's guide on social responsibility, and the other is ISO 14001, being the ISO's standard for environmental management.

2.6.2 *The ISO 14001 Environmental Management Systems*

2.6.2.1 What is ISO 14001?

The ISO is an independent, non-governmental membership organisation and the world's largest developer of voluntary International Standards.¹²⁷ Worldwide, there are two programmes for an EMS. The first is the ISO 14000 system, namely the 14001:2004-based EMS standard,¹²⁸ and the second is the European Union's (EU)

¹²⁰ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

¹²¹ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

¹²² Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

¹²³ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

¹²⁴ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 2-9.

¹²⁵ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 9.

¹²⁶ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 9.

¹²⁷ ISO 2015 <http://www.iso.org/iso/home/standards.htm>.

¹²⁸ The first revision of the international consensus standard was published in 1996, the second revision in 2004, while a third revision is expected between 2008 and 2012.

Eco-Management and Audit Scheme.¹²⁹ The former is a globally adopted standard, while the latter is limited to the European Union. Clapp nevertheless identifies several weaknesses in ISO14001.¹³⁰ Firstly, the standards provide little incentive for firms to adopt cleaner production practices. The Plan, Do, Check, Act of the Deming Cycle, which is the cornerstone of the standard, is vague and subject to considerable abuse.¹³¹ The standard speaks of "continual improvement" and the "prevention of pollution" in broad terms.¹³² Clapp suggests that the standard should call for the compulsory reporting of emissions and the publication of the level of emissions in public registers, which could be a powerful incentive for business to prioritise environmental management.¹³³ Secondly, regulatory frameworks at the national and international levels may be weakened because companies set their own environmental goals in their environmental policy statement, and are judged only against their own goals, there is little incentive for firms to go beyond the minimum requirement of meeting existing environmental laws in the jurisdiction in which they are operating.¹³⁴

Clapp argues that the fees to conduct audits for certification may also be prohibitive for small and medium size businesses as well as businesses based in developing countries.¹³⁵ In line with this argument, business may also seek to shift operations to jurisdictions where environmental laws are marginal or poorly monitored and enforced.¹³⁶ Nel and Wessels argue that businesses are not forced to publicly report their state of legal compliance as part of an EMS audit, while a generally accepted perspective is that certification auditors need only to verify that an organisation conforms to the procedural requirements of the standards and not the actual state of legal compliance *per se*.¹³⁷

¹²⁹ IEMA 2015 <http://ems.iema.net/emas>.

¹³⁰ Clapp 2011 http://www.fni.no/ybiced/01_02_clapp.pdf 27.

¹³¹ Clapp 2011 http://www.fni.no/ybiced/01_02_clapp.pdf 29.

¹³² Clapp 2011 http://www.fni.no/ybiced/01_02_clapp.pdf 29.

¹³³ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 29.

¹³⁴ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 29.

¹³⁵ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 29.

¹³⁶ Clapp 2011 http://www.fni.no/ybiced/01_02_clapp.pdf 29.

¹³⁷ Nel and Wessels 2005 *PER/PELJ* 12.

Nel and Wessels raise further weaknesses in that ISO 14001 does not explicitly require demonstrated legal compliance as a prerequisite for certification.¹³⁸ The standard also does not require auditors to have skills in the legal field.¹³⁹

The most pressing concern about ISO 14001 is that it may provide business with a vehicle to "green wash" its activities. Nel and Wessels report that the South African EMS community was shocked in 2007 due to findings reported in the media of gross and continued legal non-compliance by some organisations certified to ISO 14001, as reported by the Environmental Management Inspectorate (EMI) established in terms of sections 31(A-Q) of the NEMA.¹⁴⁰ The Business Report reported on 5 October 2007 that:

The state's environmental management inspectorate has named three companies as serious transgressors of environmental laws and permits, all three of which are ISO 14001 certified ... The department of environmental affairs and tourism [sic], which houses the Green Scorpions, said it was "taken aback" at the levels of non-compliance ... The department has raised its concerns about ISO 14001 with the SA National Accreditation System (Sanas). Sanas certifies the country's 32 accreditation agencies.¹⁴¹

The pressure from the marketplace to obtain certification, particularly if there are international contracts at stake, may be a complex shortfall of the ISO 14001 standard,¹⁴² since companies can employ methods to discredit the overall value of an audit in terms of its quality and objectivity in order to secure lucrative contracts. There is very little quantitative research into how companies can potentially dilute or manipulate the value or integrity of audits and the possible corruption in the ISO series of standards, but it is recorded that:

...non-compliance is often easy to hide to auditors, who routinely audit companies and slowly adopt a non-engagement approach with their auditees, pointing to nonconformities but never digging very deep, hoping that the fix implemented by the auditee, will also get rid of the "tumour".¹⁴³

¹³⁸ Nel and Wessels 2005 *PER/PELJ* 12.

¹³⁹ Nel and Wessels 2005 *PER/PELJ* 12.

¹⁴⁰ Nel and Wessels 2005 *PER/PELJ* 15.

¹⁴¹ Nel and Wessels 2005 *PER/PELJ* 15.

¹⁴² Friedman *Practical Guide to Environmental Management* 268.

¹⁴³ Benmiloud 2011 <http://iso-9001-caliso.blogspot.co.za/2011/02/corruption-and-iso-9001.html>.

Further, due to contracts and rules of privilege, both legal compliance and systems audits are confidential.¹⁴⁴ These include the non-conformances perpetrated by a company. Third parties are prevented from having oversight of the audit process which diminish transparency.¹⁴⁵

The standard itself admits to certain shortcomings if it is used for an audit, and states that to be effective audits need to be conducted within a structured management system that is integrated within the organisation.¹⁴⁶ Hence, without ongoing oversight of the auditor, auditee and the environmental system implemented by a company, an audit runs the risk of becoming a mere formality, with little to no conservation purpose.

2.6.2.2 The main features of the ISO 14001

The introductory preamble of ISO 14001 states that in order for the standard to be effective, an audit needs to "be conducted within a structured management system that is integrated within the organisation".¹⁴⁷ It says further that the main aim and objective of the standard is to "support environmental protection and prevent pollution in balance with socio-economic needs".¹⁴⁸ The methodology used is known as the Deming Cycle, being Plan, Do, Check, and Act with the motive of continuous improvement of a system.¹⁴⁹

Clause 4.3.2 of ISO 14001 places an onus on a business to establish, implement and maintain a procedure to identify and access the applicable legal requirements and to ensure that such legal requirements are taken into consideration when establishing, implementing and maintaining its environmental management system.

The environmental management standard currently used by South African companies is ISO14001, through a process which has become known as an

¹⁴⁴McDonald 1993 http://www.aic.gov.au/media_library/publications/proceedings/26/mcdonald.pdf.

¹⁴⁵ McDonald 1993 http://www.aic.gov.au/media_library/publications/proceedings/26/mcdonald.pdf. McDonald argues that the publication of non-conformances may open a company up to charges of green crime. Due to the rights of accused to keep silent and to legal representation, the confidentiality of the process is imperative.

¹⁴⁶ ISO 14001:2004 Introduction.

¹⁴⁷ ISO 2004 http://www.iso.org/iso/catalogue_detail?csnumber=31807 (ISO 14001:2004) Preamble.

¹⁴⁸ ISO 14001:2004 Preamble.

¹⁴⁹ *Loves Applicability of the ISO 14001* 5.

"environmental systems audit".¹⁵⁰ Voluntary environmental measures have increased given that business has long been sceptical of command-and-control type environmental regulations.¹⁵¹

In September 2015 a revised version of ISO 14001 was published. The following themes have been included in the revisions: an increased prominence of environmental management within the organisation's strategic planning processes, greater focus on leadership, the addition of proactive initiatives to protect the environment from harm and degradation (such as sustainable resource use and climate change mitigation), life-cycle thinking when considering environmental issues, and the need for a relevant communications strategy.¹⁵²

2.6.2.3 The benefits of ISO 14001 for South African business

ISO 14001 is a generic standard and can be implemented across industries. Firms that wish to comply with ISO 14001 have to adopt an EMS and conform to the ISO clauses, but the environmental goals and targets contained in a company's EMS are set entirely at the discretion of the implementing company.¹⁵³

Proper implementation of the ISO systems, in particular ISO14001, can see an increase in environmental protection and conservation through a process called the "California Effect".¹⁵⁴ Vogel coined the phrase "California Effect" to characterise the spread of consumer and environmental protections outside the jurisdiction where such laws originated.¹⁵⁵ This implies that companies in developing countries which are placed under pressure by international partners or business relations to conform to ISO 14001 and meet these requirements may improve their environmental management to retain certification, and hence improve their sustainability policy and focus.

¹⁵⁰ SABS 2016 <https://www.sabs.co.za/sectors-and-services/services/ems/index.asp>.

¹⁵¹ Clapp 2003 <http://www.trentu.ca/org/tipec/3clapp4.pdf> 8.

¹⁵² ISO 2015 <https://www.iso.org/obp/ui/#iso:std:iso:14001:ed-3:v1:en> (ISO 14001:2015).

¹⁵³ Lehmann "Voluntary Compliance Measures" 281.

¹⁵⁴ Perkins and Neumayer 2012 *JEPP*1.

¹⁵⁵ Klepetar 2012 <http://wpsa.research.pdx.edu/meet/2012/klepetar.pdf> 4.

Lehmann states that the main purpose of the ISO is:

...to facilitate international trade by developing a set of common standards with which goods and services must comply if a firm wishes to become ISO certified.¹⁵⁶

The DEA points out that a number of international companies have subsidiaries in South Africa, who periodically conduct environmental audits.¹⁵⁷ The United States of America (USA) as well as the EU have a strong "Command and Control" legal structure. The USA Environmental Protection Agency (EPA) and other State authorities have a strong monitoring and compliance function. This is in contrast to the South African governance system, where negotiation between authorities and companies to gain consensus on legal compliance is preferred.¹⁵⁸ A benefit of adopting and implementing ISO14001 in a company is that international companies require ISO certification as a contractual requirement, and so certification creates competitive advantage.¹⁵⁹ Lehmann states that the principal reasons why companies adopt EMS tools have to do with consumer and shareholder pressure and the fear of incurring liability for environmentally harmful practices.¹⁶⁰

Other benefits of employing an EMS such as ISO14001 are, for example, that the ISO14001 system may assist a company to identify environmental problems, the process can help a company to anticipate and adapt to legislative change, it creates a source of documentary evidence, it can be a basis for insurance to control risk, it can assist to train staff to become environmentally sensitive and lastly, and it can act as a medium to create a bridge for external communication to stakeholders including the broader public.¹⁶¹

The *Environmental Impact Assessment Regulations*, 4 December 2014¹⁶² (the *EIA Regulations*) make provision for the auditing and amendment of environmental

¹⁵⁶ Lehmann "Voluntary Compliance Measures" 281.

¹⁵⁷ DEA 2004
https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf6.

¹⁵⁸ DEA 2004
https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf6.

¹⁵⁹ DEA 2004
https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf6.

¹⁶⁰ Lehmann "Voluntary Compliance Measures" 277.

¹⁶¹ Compton *et al Environmental Management in Practice* 256.

¹⁶² GN R982 in GG 38282 of 4 December 2014 (the *EIA Regulations*).

authorisation, environmental management programme and closure plan.¹⁶³ The term audit is not defined in the *EIA Regulations* and the regulations are applicable only to the mining sector. Regulation 34 provides that a holder of an environmental authorisation must, for the period during which the environmental authorisation and the environmental management programme (EMPr), and where applicable the closure plan remain valid, ensure that the compliance with the conditions of the environmental authorisation and the EMPr, and where applicable the closure plan, are audited. Further, a company must submit an environmental audit report to the relevant competent authority. Regulation 34 provides further that such audits must be performed by an independent person and at the intervals provided for in the EMPr with the specific focus of such an audit being on the compliance of the holder of such an authorisation.¹⁶⁴

An important development regarding the audit process is found in Regulation 34(6), which provides for a public participation process and the disclosure of the audit to interested and affected parties (I&APs). The provisions of Regulations 34 and 35 therefore significantly increase the legislative oversight regarding the provisions of auditing for the mining sector and have serious implications for the holder of environmental authorisations and the acceptability of closure plans.¹⁶⁵

2.6.3 *The ISO 26000 Guide on Social Responsibility*

The ISO 26000 aims to be an accessible tool to provide guidance to all types of organisations globally on CSR standards and norms.¹⁶⁶

2.6.3.1 What is the ISO 26000 Guide on Social Responsibility?

The ISO 26000 check is the standard speaking directly to CSR. It provides guidance on how business can operate in a socially responsible way in order to improve performance. This means acting in an ethical and transparent way that contributes to the health and welfare of society whilst protecting the environment.¹⁶⁷ The ISO

¹⁶³ Regulations 34 and 35 of the *EIA Regulations*.

¹⁶⁴ Regulation 34(3) of the *EIA Regulations*.

¹⁶⁵ Regulation 35 of the *EIA Regulations*.

¹⁶⁶ Mahesh 2011 *J Int'l Bus & L* 112.

¹⁶⁷ ISO 2010 <http://www.iso.org/iso/home/standards/iso26000.htm> (ISO 26000:2010).

26000 is not without its critics. Mahesh indicates that a barrier to its effective implementation is the mind-set by companies that CSR is equivalent to philanthropy and the concern that the adoption of CSR norms will be costly.¹⁶⁸

Moratis and Cochius also state that the requirements of the ISO 26000 may discourage a company from utilising the standard because the issues detailed may seem overly ambitious for most companies.¹⁶⁹ The content of the ISO 26000 addresses broad global problems such as poverty, climate change and human rights violations, which call for wide-ranging commitments by a company. The broad nature of these commitments may make the standard unsuitable for use by small and medium sized companies.

2.6.3.2 The main features of the ISO 26000 Guide on Social Responsibility

Direct reference to sustainable development is made in ISO 26000's introduction and is given as a key objective. ISO 26000 packages the benefits of CSR as positively influencing competitive advantage, reputation, the ability to attract and retain workers and customers, the maintenance of morale, commitment and productivity, the view of investors and other stakeholders such as competitors, the media, government and the broader community.¹⁷⁰ The basic principles of ISO 26000 are as follows: respect for adherence to international norms, compliance with the law and recognition of stakeholder interests, accountability, transparency, ethical conduct and respect for fundamental basic rights.¹⁷¹

2.6.3.3 The benefits of the ISO 26000 for South African business

The ISO26000, which was launched in 2010, is a voluntary guidance tool and certification is not its intent, unlike the ISO14001 series.¹⁷² An immediate benefit of the ISO26000 is that it standardises CSR themes, making CSR principles more palatable to businesses, particularly in emerging markets. Clause 6.5 of the standard refers to the core subject of the environment and includes the themes of preventing

¹⁶⁸ Mahesh 2011 *J Int'l Bus & L* 113.

¹⁶⁹ Moratis and Cochius *ISO 26000* 139.

¹⁷⁰ ISO 26000:2010 Preamble vi.

¹⁷¹ Mahesh 2011 *J Int'l Bus & L* 112.

¹⁷² ISO 26000:2010 Preamble vii.

pollution, sustainable resource use, climate change mitigation and adaptation, the protection of the environment, biodiversity, and the restoration of natural habitats.¹⁷³

The principles incorporated include the precautionary approach, the polluter pays, environmental responsibility and (importantly) environmental risk management.¹⁷⁴ A powerful check could be to utilise the ISO 26000 in conjunction with the ISO 31000, which describes the components of a risk management implementation framework, and the ISO14001 audit framework.¹⁷⁵ This may, however, require a considerable level of available interdisciplinary skills; for example, experts who have knowledge of both standards as well as of risk management and the CSR codes.

Specific strategies are explored within the standard, which can be adopted by companies.¹⁷⁶ These include innovations to continuously improve environmental performance in the lifecycle of a service or product, assessing environmental impacts before starting a new activity,¹⁷⁷ employing techniques to focus on cleaner production, sustainable green procurement, and increased public awareness.

Mahesh indicates that some of the benefits of using the ISO 26000 are that the standard creates a harmonisation tool for current standards, it is a practical tool for small and medium enterprises, it can be a marketing tool for companies, and it can be a platform for stakeholder groups, thus increasing public participation in the lifecycle of the company.¹⁷⁸

2.7 The Johannesburg Stock Exchange Listing

2.7.1 What is the Johannesburg Stock Exchange Listing?

A stock exchange is defined as an organised and regulated financial market where securities¹⁷⁹ are bought and sold at prices governed by the forces of demand and

¹⁷³ ISO 26000:2010 clause 6.5.

¹⁷⁴ ISO 26000:2010 41.

¹⁷⁵ Institute of Risk Management 2002 https://www.theirm.org/media/886059/ARMS_2002_IRM.pdf.

¹⁷⁶ ISO 26000:2010 clause 6.5.2.2.

¹⁷⁷ This theme will be developed in ch 3 regarding assessments falling under s 24G of the NEMA.

¹⁷⁸ Mahesh 2011 *J Int'l Bus & L* 112.

¹⁷⁹ These are bonds, notes or shares.

supply.¹⁸⁰Public companies offer and dispose of shares to the public.¹⁸¹ The definition of a public company is found within the *Companies Act*:

...a profit company that is not a state owned company, a private company, or a personal liability company...¹⁸²

The JSE listing requirements make specific reference to corporate governance requirements such as compliance with King III. In other words, companies listed on the JSE need to adhere to these requirements to retain their listing.¹⁸³ King III entrenches a company's responsibility to comply with legislation. The compliance with King III and legislative compliance must be detailed in a company's annual report and financial statements, and should there be non-compliance this must be explained.¹⁸⁴

The requirement of reporting catalysed the formation of a voluntary organisation called the Integrated Reporting Committee (IRC). The JSE is one of its founding members.¹⁸⁵ The aim of the IRC is to assist companies in preparing integrated reports and to act as an information hub.¹⁸⁶

The CER reports that most JSE-listed and assessed companies are not accurately disclosing to their shareholders the extent of their non-compliance with environmental legislation.¹⁸⁷ Some assessed companies are even actively misrepresenting their levels of compliance with environmental laws.¹⁸⁸ It reports further that the manner in which listed South African companies are rated as good targets for "socially responsible investment" is wholly inadequate.¹⁸⁹ Investors, in particular South Africa's large institutional investors, are failing to recognise worrying red flags in company reports and are not making relevant and necessary enquiry into the environmental compliance of the companies that they invest in. Fifthly, South

¹⁸⁰ Business Dictionary 2016 <http://www.businessdictionary.com/definition/stock-exchange.html>.

¹⁸¹ Hendrikse and Hefer-Hendrikse *Corporate Governance Handbook* 49.

¹⁸² Section 1 of the *Companies Act* 71 of 2008.

¹⁸³ Wiese *Corporate Governance in South Africa* 27.

¹⁸⁴ Wiese *Corporate Governance in South Africa* 27.

¹⁸⁵ Roberts "Integrated Reporting" 222.

¹⁸⁶ IRC 2015 <http://www.integratedreportingsa.org/About.aspx>.

¹⁸⁷ CER 2015 <http://cer.org.za/full-disclosure>.

¹⁸⁸ CER 2015 <http://cer.org.za/full-disclosure>.

¹⁸⁹ CER 2015 <http://cer.org.za/full-disclosure>.

Africa's environmental compliance monitoring and enforcement system is insufficiently effective.¹⁹⁰

2.7.2 *The main features of the Johannesburg Stock Exchange Listing*

The JSE is the largest stock exchange on the African Continent.¹⁹¹ It provides the platform for trading in the shares of public companies. Trading takes place in a regulated manner, and listed companies have to comply with JSE listing requirements.¹⁹²

2.7.3 *The benefits of the Johannesburg Stock Exchange Listing for South African business*

Glazewski emphasises that whilst the King Code has no legislative force, it may fulfil the role of a quasi-legal mechanism in relation to JSE listing.¹⁹³ This is because the JSE in its listing requirements makes compliance with the King Code mandatory.¹⁹⁴ The pressure on companies to comply with the King Code in conjunction with the JSE reporting mechanisms can assist companies to forge a business model that takes cognisance of impacts, risks and opportunities in relation to the environmental, social and economic contexts within which a company operates.¹⁹⁵ This integrated reporting mechanism as part of the JSE requirements also works hand-in-glove with the Code for Responsible Investing in South Africa (CRISA), which requires institutional investors such as pension and unit trust funds to interrogate the quality of a company's integrated reporting.¹⁹⁶ This can enhance investor activism and stakeholder participation in the scrutiny of a company's sustainability track record.¹⁹⁷

¹⁹⁰ The CER has identified a vast number of compliance shortcomings including capacity constraints and the availability of *ex-post facto* authorisation for unlawful activities which have already commenced through s 24G of the NEMA and the general mistrust between private and public sectors. See CER 2015 <http://cer.org.za/full-disclosure>.

¹⁹¹ JSE 2016 <https://www.jse.co.za/about/history-company-overview>.

¹⁹² Section 1 of the *Companies Act 71 of 2008*.

¹⁹³ Glazewski *Environmental Law in South Africa* 26-50.

¹⁹⁴ Glazewski *Environmental Law in South Africa* 26-50.

¹⁹⁵ JSE 2016 <https://www.jse.co.za/about/sustainability>.

¹⁹⁶ Roberts "Integrated Reporting" 222.

¹⁹⁷ Roberts "Integrated Reporting" 229.

2.8 Conclusion

There are limitations to traditional command-and-control mechanisms for environmental compliance.¹⁹⁸ This chapter has discussed the most widely used voluntary mechanisms available to South African companies for CSR and for the facilitation of the role companies can play in sustainability. It has shown that a number of voluntary CSR mechanisms exist, each with its inherent strengths and weaknesses. It is emphasised, however, that the voluntary CSR mechanisms mentioned in this chapter cannot be implemented in isolation from the legal mechanisms discussed in chapter 3.¹⁹⁹

¹⁹⁸ Lehmann "Voluntary Compliance Measures" 294.

¹⁹⁹ Lehmann "Voluntary Compliance Measures" 294-295.

3 The SA legal framework on companies'"environmentally-relevant" conduct

3.1 Introduction

Businesses are not only economic institutions, but are also global corporate citizens.²⁰⁰ As such they should focus on sustainability, since they are expected to be accountable for the impacts of their activities on the broader society in which they operate. If they act responsibly in this respect, they are said to be granted a "social licence to operate".²⁰¹ This licence is said by Wilburn and Wilburn to mean the following:

...a company can only gain a Social License to Operate through the broad acceptance of its activities by society or the local community. Without this approval, a business may not be able to carry on its activities without incurring serious delays and costs.²⁰²

Should a business contravene this licence to operate, then it may be subjected to regulatory sanction in conjunction with the costly burden of trying to regain legitimacy in the eyes of its stakeholders.²⁰³ It is likely that business activities have caused many of the environmental challenges which exist today.²⁰⁴ The proper regulation of business and the impact of its activities on the environment is a concern for the state, since the state is tasked with enforcing environmental compliance in terms of the NEMA and a range of specific sectoral environmental law.²⁰⁵ This chapter will explore the scope of the application of South African law (with a particular focus on the NEMA and the *Companies Act*) with a view to understanding the provisions of these two pieces of legislation in relation to environmental protection and the responsibility on business.

²⁰⁰ Wiese *Corporate Governance in South Africa* 183.

²⁰¹ Wiese *Corporate Governance in South Africa* 183.

²⁰² Wilburn and Wilburn 2011 *JIBE* 4.

²⁰³ Jarvie-Eggart "Mining Association of Canada's Towards Sustainable Mining Program" 81.

²⁰⁴ Du Plessis "Understanding the Legal Context" 24.

²⁰⁵ Du Plessis "Understanding the Legal Context" 24.

3.2 The scope of application of South African environmental law

Business has environmental duties imposed on it by legislation from a range of different sources, which include international law, the common law, the *Constitution*, and custom, as will be shown in greater depth below.

3.3 The Constitution

3.3.1 The scope of the Constitution

The *Constitution* is the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.²⁰⁶ Chapter 2 of the *Constitution* contains the Bill of Rights, which is described as "a cornerstone of democracy in South Africa".²⁰⁷ Of concern to companies, *inter alia*, is the tension between section 22 (the right to trade) and section 24 (the environmental right) of the Bill of Rights.

Section 22 says that every citizen has the right to choose his or her trade, occupation or profession freely. However, this is curtailed and refined further in the statement that "the practice of a trade, occupation or profession may be regulated by law". Hence this right to trade is not limitless. Further, section 36 says that the rights in the Bill of Rights, such as in sections 24 and 22, may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.²⁰⁸

Section 24 states that everyone has the right to an environment that is not harmful to his or her health or well-being; and to have the environment protected for the benefit of the present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation;

²⁰⁶ Section 2 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

²⁰⁷ Section 7(1) of the *Constitution*.

²⁰⁸ These factors include: a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. the existence of less restrictive means to achieve the purpose.

and secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.

The section 24 right firstly binds the state,²⁰⁹ but it is widely accepted that it imposes both negative and positive obligations on the state.²¹⁰ Section 8(1) of the *Constitution* provides that section 24 applies to all law and binds the legislature, the executive, the judiciary and all organs of state. However, section 8 goes further and binds not only the state in relation to the provisions of the Bill of Rights - section 8(2) implies that section 24 also binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.²¹¹ Thus, in determining whether the environmental right contained in section 24 applies to natural or juristic persons such as a company, a court will interrogate the nature of the right and the nature of the duty imposed by the right.²¹² Thus, it can be argued that the horizontal application falls within the discretion of a court.²¹³

The common law recognition of environmental rights may also support the notion that the environmental right is suitable for horizontal application.²¹⁴ Feris and Tladi argue that the common law principle of nuisance against environmental legislation such as the NEMA implicitly recognises the right to a healthy environment.²¹⁵ This will be

²⁰⁹ Brand and Heyns *Socio-economic Rights in South Africa* 257.

²¹⁰ The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa. De Wet and du Plessis 2010 *AHRLJ* 345-376.

²¹¹ Section 8(3) of the *Constitution* states that when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). And section 8(4) states that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

²¹² Legislation enacted to give effect to s24 may impose positive duties. For example, section 28(1) of the NEMA states that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment. This would include juristic persons.

²¹³ Feris and Tladi "Environmental Rights" 258.

²¹⁴ Feris and Tladi "Environmental Rights" 258.

²¹⁵ Feris and Tladi "Environmental Rights" 258.

discussed further in chapter 4, where a case law analysis will examine the relief sought in terms of nuisance regarding environmental concerns.

Glazewski states that section 24 of the Constitution is "eminently suited to horizontal application" and reiterates that section 24(a) resembles the common law principle of neighbour law, being *sic utere tuo ut alienum non laedas*, which means that one should use one's own property in such a way that you do not injure other people's property.²¹⁶

The above rights may compete in relation to a company's pursuit to gain profit and the company's obligation (as a juristic person) to promote the health of the environment, and this tension is looked at holistically by the courts.²¹⁷ Sections 22 and 24 are on a par with each other and need to be balanced against each other.²¹⁸

3.4 The National Environmental Management Act

3.4.1 The scope of the National Environmental Management Act

Section 24 of the *Constitution* is enabled via the NEMA, specific Environmental Management Acts (SEMAs),²¹⁹ and related legislation that affects the environment.²²⁰ The NEMA is South Africa's principal framework law, and provides the most important environmental management principles.²²¹ The NEMA has undergone several important amendments, in conjunction with other pieces of legislation such as the *Mineral and Petroleum Resources Development Act 28 of 2002* (the MPRDA), in order to try to streamline the processes for environmental authorisations which are relevant to industry.²²² The NEMA as amended is sometimes referred to as South

²¹⁶ Glazewski *Environmental Law in South Africa* 5-13.

²¹⁷ The *Fuel Retailers* case.

²¹⁸ Ako *Environmental Justice in Developing Countries* 53.

²¹⁹ In the definitions of the NEMA, the following SEMAs are listed: the *Environment Conservation Act 73 of 1989* (ECA); the *National Water Act 36 of 1998* (NWA); the *National Environmental Management: Protected Areas Act 57 of 2003* (NEM: PA); the *National Environmental Management: Biodiversity Act 10 of 2004* (NEM:BA); the *National Environmental Management: Air Quality Act 39 of 2004* (NEM:AQA); the *National Environmental Management: Integrated Coastal Management Act 24 of 2008* (NEM:ICMA); the *National Environmental Management: Waste Act 59 of 2008* (NEM:WA); and the *World Heritage Convention Act 49 of 1999* (WHCA).

²²⁰ PMG date unknown <https://pmg.org.za/files/docs/120828analysis>.

²²¹ Du Plessis 2008 *PER/PELJ*16.

²²² DEAWA and DMR 2014
<https://www.environment.gov.za/mediarelease/oneenvironmentalsystem>.

Africa's "one environmental system."The NEMA seeks to streamline administrative and legislative requirements regarding environmental authorisations.²²³

3.4.1.1 The NEMA and sustainable development

The preamble to the NEMA affirms the section 24 constitutional right. Moreover, it affirms the notion of sustainable development and calls upon government to respect, protect, promote and fulfil the social, economic and environmental rights of everyone within the Republic, and to strive to meet the basic needs of previously disadvantaged communities. The wording of section 24 of the *Constitution*, read against the NEMA, suggests that sustainable development is an explicit constitutional objective to the extent that it is inherent in the environmental right.²²⁴ Sustainable development has been defined as:

...the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.²²⁵

This tension among the relevant economic, environmental and social factors was discussed in the *Fuel Retailers* case,²²⁶ which dealt with competing economic concerns and an application for a filling station.²²⁷ The court described sustainable development as follows:

...development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.²²⁸

The Constitutional Court further reiterated that "environmental considerations will now increasingly be a feature of economic and development policy".²²⁹ In other words, companies are affected by the obligation on the state to consider many

²²³ Fischer 2015 <http://www.elasa.co.za/uploads/1/1/8/2/11823994/d.fischer.pdf>.

²²⁴ Feris and Kotzé 2014 *PER/PELJ*2116.

²²⁵ Feris and Kotzé 2014 *PER/PELJ*2116.

²²⁶ The *Fuel Retailers* case.

²²⁷ *Fuel Retailers* case paras 44, 45.

²²⁸ *Fuel Retailers* case para 21E-H.

²²⁹ *Fuel Retailers* case para 52.

factors in their decision-making and not merely their economic goals and the pursuit of profit.²³⁰

3.4.1.2 The section 2 principles

Section 2(1) of the NEMA states that the principles set out in section 2 apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. Section 2(3) reiterates the concept of sustainable development in that development must be socially, environmentally and economically sustainable. Section 2(4) discusses the factors to be considered in sustainable development, which factors include amongst othersthe precautionary principle,²³¹ the public trust doctrine,²³² the preventative principle,²³³ and the polluter pays principle.²³⁴

3.4.1.3 The duty of care

Although the NEMA section 2 principles apply throughout the Republic to the actions of all organs of state that may significantly affect the environment, they also apply indirectly to companies and their activities.²³⁵ This was affirmed by the SCA in *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs*,²³⁶ where the court applied the section 2 principles indirectly against the mining company which was the appellant. In the case, the mining company was required to take anti-pollution measures when it ceased to be a person who owns, controls, occupies or uses land on which gold mining operations were undertaken

²³⁰ *Fuel Retailers* case para 24A, F-G.

²³¹ The principle in s 2(4)(a) entails that a risk-averse approach must be taken.

²³² Section 4(4)(o) states that the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest, and the environment must be protected as the people's common heritage.

²³³ The principle in s 2(4)(a) entails that pollution and environmental degradation must be prevented, and where they cannot be prevented, they must be remedied and minimised.

²³⁴ Section 4(4)(p) states that the costs of remedying pollution, environmental degradation and the 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.

²³⁵ Glazewski *Environmental Law in South Africa* 7-15.

²³⁶ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2013 ZASCA 206 (4 December 2013).

that caused pollution.²³⁷ As Glazewski reiterates, the cost of industrial pollution, waste and environmental degradation are often borne by society as a whole rather than by a corporate polluter.²³⁸ The importance of the legislated "polluter pays principle" is that a company can be held responsible for the pollution which it generates, rather than shifting the cost of the same onto society.²³⁹

Section 28(1) of the NEMA "concretises" the polluter pays principle.²⁴⁰ It says that:

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

It is apparent that section 28 applies to "every person," which includes a juristic person such as a company. It has also been argued that it is evident that the legislature, by including the words "has caused," intended section 28 to be retrospectively applicable. Hence companies can be held liable for historic environmental degradation and pollution.²⁴¹ Section 28 was discussed in *Chief Pule Shadrack VII Bareki v Gencor Limited*,²⁴² where the court reiterated that there is a presumption in South African common law against the retrospective application of legislation. This led to an amendment of section 28 in 2009 through the *National Environmental Laws Amendment Act 14 of 2009*.

Section 281(A) now states that the duty of care also applies to a significant pollution or degradation that occurred before the commencement of the NEMA; arises or is likely to arise at a different time from the actual activity that caused the contamination; or arises through an act or activity of a person that results in a change to pre-existing contamination. This significantly broadens the scope of liability of a company and escalates its risk regarding the cost of historical environmental degradation or pollution which is "significant".

²³⁷ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2013 ZASCA 206 (4 December 2013) para 20.

²³⁸ Glazewski *Environmental Law in South Africa* 1-26.

²³⁹ Glazewski *Environmental Law in South Africa* 1-26.

²⁴⁰ Feris 2006 *PER/PELJ* 63.

²⁴¹ Feris 2006 *PER/PELJ* 63.

²⁴² *Chief Pule Shadrack VII Bareki v Gencor Limited* 2006 8 BCLR 920 (T).

Companies which purchase assets or shares may therefore inherit environmental liability. Section 40 of the *National Environmental Management: Waste Act* 59 of 2008 (the NEM:WA) may also affect companies wishing to buy or sell assets or shares, in that the NEM:WA states that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC and complying with any conditions that are specified by the Minister or MEC. The provisions are aimed at restricting the shifting of the costs of corporate pollution and environmental degradation onto an unsuspecting new buyer.

3.4.1.4 The applicability to companies of environmental implementation plans and environmental management plans

In conjunction with the section 2 principles, chapter 3 of the NEMA provides procedures for co-operative governance, which are among the main mechanisms available to government to implement the section 2 principles discussed above.²⁴³ Section 11 details that every national department listed in Schedule 1 as exercising functions which may affect the environment and every provincial department responsible for environmental affairs must prepare an environmental implementation plan within five years of the coming into operation of the Act, and at intervals of not more than five years thereafter.²⁴⁴

Every national department listed in Schedule 2 as exercising functions involving the management of the environment must prepare an environmental management plan within five years of the coming into operation of the NEMA, and at intervals of not more than five years thereafter.²⁴⁵ This applies to all departments exercising functions applicable to the management of the environment.

Like the section 2 principles of NEMA, chapter 3 does not apply directly to the private sector. However, companies will be indirectly affected by chapter 3 in that section 16(1) of the NEMA states that every organ of state needs to exercise every function it may have, or that has been assigned or delegated to it, by or under any law, and

²⁴³ Glazewski *Environmental Law in South Africa* 7-15.

²⁴⁴ Section 11(1) of NEMA.

²⁴⁵ Section 11(2) of NEMA.

that may significantly affect the protection of the environment, substantially in accordance with the environmental implementation plan or the environmental management plan prepared, submitted and adopted by that organ of state in accordance with chapter 3.

A good example of the synergy between chapter 3 of the NEMA and company CSR sustainability responsibilities is to be found in the Department of Trade and Industry's (the dti's) "Schedule 1 Environmental Implementation Plan".²⁴⁶The dti's Environmental Implementation Plan affirms the sustainable development principles discussed above, specifically in section 2.2.3 of the plan. It also recalls South Africa's National Framework on Sustainable Development. Section 2.2.2 states that:

South Africa aspires to be a sustainable, economically prosperous and self-reliant nation state that safeguards its democracy by meeting the fundamental human needs of its people, by managing its limited ecological resources responsibly for current and future generations, and by advancing efficient and effective integrated planning and governance through national, regional and global collaboration.

Section 2.2.4 of the dti's environmental implementation plan makes specific reference to the King Code and states that this voluntary mechanism deals with the duty of care, skills and diligence, as well as fiduciary duties which make for good governance of organisational structures and processes. The dti's environmental implementation plan also details the establishment of structures and processes along with appropriate checks and balances to strengthen compliance with legislation. Section 2.2.4 integrates the NEMA and the King Code to the *Companies Act* by stating that the King Code, which applies directly to the dti's environmental implementation plan, incorporates principles trending in international governance and further incorporates the need for sustainability reporting by organisational structures.

3.4.1.5 Listed activities and section 24G of the NEMA

Section 24(2)(a) of the NEMA provides for the identification of listed activities which cannot be undertaken without environmental authorisation, which gives effect to a risk averse approach. What section 24 of the NEMA provides is that a) the Minister is

²⁴⁶ GN R379 in GG34247 of 28 April 2011.

empowered to identify "listed activities"; b) prior to a company's commencing any listed activity it must seek authorisation for that listed activity by a competent authority; and c) it is an offence to commence a listed activity without an authorisation.²⁴⁷

The main tool available to persons and government to ensure that listed activities are sustainable is an EIA.²⁴⁸ An EIA has been described as an:

...integrative and holistic process, addressing social, economic, and environmental or ecological issues concurrently.²⁴⁹

and

...the evaluation of the effects likely to arise from a major project (or other action) significantly affecting the natural or man-made environment...²⁵⁰

What is apparent from the above definitions is that an EIA should be a tool to anticipate impacts, and that it is not a tool which interrogates exclusively the impacts to the environment. It should address social and economic interests as well as environmental impacts.²⁵¹

Murombo argues that participation by the public is crucial to the success of the EIA process and consequently also to the achievement of sustainable development.²⁵² The purpose and process of public participation is clarified in Regulations 39 to 44 of GN R 982 in GG 38282 of 4 December 2014. In terms of Regulation 26(h) of GN R 982 in GG 38282 of 4 December 2014, all environmental authorisations issued after December 2014 must include a requirement that copies of prescribed documents must be made available by the authorisation holder on a company's website, at the site of operation, and on request the environmental authorisation itself must also be made available.²⁵³

²⁴⁷ Paschke and Glazewski 2006 *PER/PELJ* 5.

²⁴⁸ Murombo 2008 *PER/PELJ* 2.

²⁴⁹ Murombo 2008 *PER/PELJ* 2.

²⁵⁰ Wood *Environmental Impact Assessment* 1.

²⁵¹ Field 2006 *SALJ* 409.

²⁵² Murombo 2008 *PER/PELJ* 4.

²⁵³ These documents are the environmental management programme; any independent assessments of financial provision for rehabilitation and environmental liability; closure plans;

The *NEMA Amendment Act 8 of 2004*²⁵⁴ extensively amended section 24 of the NEMA by replacing it with a number of new sections, including a controversial amendment, being section 24G headed the "rectification of unlawful commencement or continuation of listed activity".²⁵⁵ The anomaly of section 24G is described by Kohn as follows:

Section 24G encapsulates a legislative invitation to offenders to attempt an unscrambling of the egg: it invites those developers already in breach of our prophylactic legislative *schema* governing environmental authorisations to ask for forgiveness, instead of permission, through an application for *ex post facto* authorisation for an illegally commenced listed activity. The damage may already be done, but section 24G purports to legitimise it.²⁵⁶

This *ex post facto* approval, according to Kohn, was intended to afford authorities the power to give this authorisation in the appropriate circumstances, but the section has given rise to considerable criticism in that it is being used by business to "rubber stamp" illegal activities, and more specifically, contraventions of the EIA procedure.²⁵⁷

The CER alerted the Department of Environmental Affairs (DEA) to the existence of several shortcomings in section 24G, which loopholes and shortcomings may conceivably present fertile ground for companies to engage in irresponsible development.²⁵⁸ These shortcomings include, amongst others, that section 24G does not provide sufficient detail for fault, particularly in relation to repeat offenders; the administrative fine is far too low to disincentivise the unlawful commencement of activities; the calculation and administration of the section 24G fine lacks transparency and accessibility; the CER reports "cynical abuse" of section 24G whereby companies budget for fines and proceed to intentionally contravene section

audit reports and all compliance monitoring reports. This expands the access to information to interested and affected parties affected by a company's operations.

²⁵⁴ *National Environmental Management Amendment Act 8 of 2004.*

²⁵⁵ Paschke and Glazewski 2006 *PER/PELJ* 4.

²⁵⁶ Kohn 2012 *SAJELP* 2.

²⁵⁷ Kohn 2012 *SAJELP* 2.

²⁵⁸ CER 2011 <http://cer.org.za/wp-content/uploads/2011/08/CER-Submission-on-S24G-May-2011.pdf>.

24F of the NEMA; and the perception that applicants applying under section 24G are always granted authorisation.²⁵⁹

According to September there have been a number of "perverse effects" in relation to section 24G, which has the potential to:

...considerably undermine the very purpose of environmental assessment, the principles of Integrated Environmental Management and sustainable development, and ultimately, the fundamental right to environmental protection.²⁶⁰

In practice, compliance with the NEMA has historically been left to companies in terms of self-regulation.²⁶¹ In other words, due to capacity constraints government cannot police every company's activities all the time.²⁶² Hence government must rely either on whistleblowers or companies to self-monitor their activities, and government surveillance is dependent upon the information reaching the department.²⁶³ Seemingly many activities are currently taking place in South Africa without oversight.²⁶⁴ This is a further weakness when it comes to companies contravening the NEMA provisions.²⁶⁵

3.4.1.6 Director liability in terms of the NEMA

Section 24N(8) of the NEMA states that notwithstanding the *Companies Act* or the *Close Corporations Act* 69 of 1984, the directors of a company or members of a close corporation are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including damage, degradation or pollution. The section broadens the scope of director liability beyond the provisions provided for in the *Companies Act*.²⁶⁶

²⁵⁹ CER 2011 <http://cer.org.za/wp-content/uploads/2011/08/CER-Submission-on-S24G-May-2011.pdf>.

²⁶⁰ September *Critical Analysis of the Application of Section 24G Provisions* Abstract ii.

²⁶¹ Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 50.

²⁶² Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 50.

²⁶³ Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 50.

²⁶⁴ Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 51.

²⁶⁵ Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement" 50.

²⁶⁶ PMG 2013 <https://pmg.org.za/committee-meeting/16615/>.

Section 34(7) of the NEMA applies to criminal matters and 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 subsections (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.

3.5 The Companies Act

3.5.1 The scope of the Companies Act

The Preamble of the *Companies Act* states that the legislation's intent is to oversee the incorporation and management of companies within the Republic, further to define the relationships between companies and their respective shareholders or members and directors, and to provide appropriate legal redress for investors and third parties with respect to companies.

Kloppers remarks that despite the *Companies Act* introducing ground-breaking concepts such as business rescue and new solvency and liquidity tests, it does not expressly provide for CSR. Kloppers states that:

...as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures businesses will not be legally obliged to act in a socially responsible manner.²⁶⁷

Part F of the *Companies Act* details the governance requirements of companies. This paragraph explores the available mechanisms inherent in the *Companies Act* and its regulations which create a complementary mechanism to the fulfilment of CSR objectives as read against the NEMA and the King Code III.

As discussed in the previous chapters, CSR is the integration of social, economic and environmental concerns within a company's operations and management. It is

²⁶⁷ Kloppers 2013 *PER/PELJ* 166.

therefore more than mere philanthropy.²⁶⁸The King Report suggests that company-related legislation should encourage the adoption of a strategy to enhance stakeholder inclusion and dialogue, which could have great bearing on CSR strategies which enhance environmental protection.²⁶⁹ The import of the King Report's recommendation should be comprehensively considered by the legislature, since the point raised also affects company cohesion at shareholder level.²⁷⁰ According to Lekhesa²⁷¹, there are different reasons for shareholders to revolt against management, but the primary catalyst of shareholder activism is the lack of compliance with corporate governance, which includes issues of policy. Hence, a company without clear governance policies is predisposed and amenable to shareholder activism, which can affect the ability of a company to remain in existence.²⁷²

The good governance of a company is ultimately about leadership, which is characterised by integrity, accountability, transparency and fairness,²⁷³ as stated by the court in *South African Broadcasting Corporation v Mpofu*.²⁷⁴ Good governance and sound CSR practices are fundamental to the essential well-being of a company and to the sustainable growth of South Africa's economy.²⁷⁵

Companies which do not manage CSR and corporate governance effectively may experience a negative response from their stakeholders, which might affect their share prices, reputations and sustainability.²⁷⁶ King III was prompted not only by changes in international trends which speak to sound CSR but also by the reforms brought about by the *Companies Act*.²⁷⁷ King III and the *Companies Act* should therefore be read together and implemented on the basis that the two are complementary.

²⁶⁸ Vertigans, Idowu and Schmidtpeter *Corporate Social Responsibility in Sub-Saharan Africa* 117.

²⁶⁹ Rahim *Legal Regulation of Corporate Social Responsibility* 42.

²⁷⁰ Lekhesa *Shareholder Activism* 177.

²⁷¹ Lekhesa *Shareholder Activism* 177.

²⁷² Lekhesa *Shareholder Activism* 177.

²⁷³ Cassim "Corporate Governance" 473.

²⁷⁴ *South African Broadcasting Corporation v Mpofu* 2009 4 All SA 169 (GSJ).

²⁷⁵ Cassim "Corporate Governance" 473.

²⁷⁶ Cassim "Corporate Governance" 473.

²⁷⁷ IoDSA 2009 <http://www.iodsa.co.za/?kingIII>.

3.5.1.1 Shareholder activism and the social and ethics committee

The contribution of the *Companies Act* is not overtly evident within the piece of legislation itself. From a CSR perspective the fundamental development is section 72, which deals with board committees, and the section's subsequent amendments and regulations.²⁷⁸ Section 72(4) states that the Minister, by regulation, may prescribe a category of companies that must each have a social and ethics committee (SEC), if that is desirable in the public interest, having regard to annual turnover, workforce size, or the nature and extent of the activities of such companies; the functions to be performed by a SEC required by this subsection; and rules governing the composition and conduct of a SEC.²⁷⁹

Since the provision of a SEC in the *Companies Act*, a number of companies have applied for exemption from this provision through section 72(5), but the grounds for exemption are limited.²⁸⁰ An exemption granted in terms of section 72(5) is valid for five years, or such shorter period as the Companies Tribunal may determine at the time of granting the exemption, unless set aside by the Companies Tribunal in terms of section 72(7). Section 72(7) states that the Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Companies Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies. Thus, section 72(7) grants shareholders *locus standi* to bring such an application to set aside an exemption, which may prove a powerful mechanism to shareholders to ensure that a corporate governance system includes a SEC. A shortcoming of the exemption provisions in the *Companies Act* is that the section allows companies to approach the Tribunal on an *ex parte* basis. Thus, the

²⁷⁸ Kloppers 2013 *PER/PELJ* 167.

²⁷⁹ Replaced by s 47(a) of the *Companies Amendment Act* 3 of 2011 (wef 1 May 2011).

²⁸⁰ Section 72(5) of the *Companies Act* 71 of 2008 states that an applicant company may apply to the Tribunal for exemption. The Tribunal may grant such an exemption if it is satisfied that the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee in terms of this section and the regulations; or it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company.

opportunity for stakeholders and interested and affected parties to voice objection to an exemption is severely curtailed.²⁸¹

Section 72(4) read against Chapter 3 of the *Companies Regulations*, 2011 indicates that the SEC provisions apply to certain categories of companies only. Regulation 43(1)²⁸² states that the provisions apply only to state owned companies, listed public companies and any other company that has in any two of the previous five years scored above 500 points in terms of Regulation 26(2).²⁸³ Regulation 43(4) describes the composition of the SEC, which must comprise of not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

Regulation 43(5) describes the function of aSEC, which is to monitor and report on a company's activities,²⁸⁴ having regard to relevant legislation and prevailing industry codes of best practice, with regard to matters relating to social and economic development, including the company's standing in terms of the goals and purposes of amongst others the ten principles set out in the United Nations Global Compact Principles.²⁸⁵ The SEC is also mandated to report to the board of directors and annually to the shareholders of a company on matters forming part of its functions as listed in the *Companies Act* and the Regulations.²⁸⁶

²⁸¹ *In the Companies Tribunal of South Africa, Pretoria Ex parte application: Precinct Funding (RF) Ltd* Case number CTR018/05/2013(2012/079215/06) and *In the Companies Tribunal of South Africa, Pretoria Ex parte application: Old Mutual South Africa Limited* Case number 001/05/2012-8/1/4/2.

²⁸² Regulation 43(2) of GN R351 in GG 34239 of 26 April 2011 (*Companies Regulations*) states that it is not necessary to appoint such a committee if that company is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or it has been exempted by the Companies Tribunal in accordance with ss 72(5) and (6).

²⁸³ Regulation 26 of the *Companies Regulations* assists in the interpretation of regulations affecting transparency and accountability. Reg 26(2) states that in terms of reg 43 every company must calculate its "public interest score" at the end of each financial year.

²⁸⁴ Kloppers 2013 *PER/PELJ* 171.

²⁸⁵ Regulation 43(5)(a)(i)(aa) of the *Companies Regulations*.

²⁸⁶ Cassim "Governance and the Board of Directors" 461.

Regulation 43(5)(a)(ii) describes a company's role as that of a good global citizen.²⁸⁷ Regulation 43(5)(a)(iii) affirms the principle that a company should monitor the impact of its activities on the environment, health and public safety, including the impact of the company's products or services. Kloppers emphasises that this regulation indicates that this requires the members of the committee to have a working knowledge of legislation relating to the environment, health and public safety.²⁸⁸

Although the SEC is empowered to request information from directors relating to their functions, a shortcoming of the provisions is that there is no overt duty on the SEC to report to other stakeholders.²⁸⁹ The disparity between the legislation and practice has also been debated widely. In 2016 a Business Day report indicated that a 2012 survey by the Ethics Institute of South Africa found that only 11% of companies indicated a strong awareness of the role and function of the SEC throughout the company.²⁹⁰ Anecdotal evidence suggests that business leaders are still on the starting blocks with regard to the potential of SEC mandates.²⁹¹

3.5.1.2 Director liability in the Companies Act

Section 1 of the *Companies Act* defines a director as a member of the board of a company, as contemplated in section 66, or an alternate director of a company, and includes any person occupying the position of a director or alternate director, by whatever name designated. The definition includes executive and non-executive directors. Section 66 states that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the *Companies Act* or the company's Memorandum of Incorporation

²⁸⁷ This includes the promotion of equality, the prevention of unfair discrimination, and the reduction of corruption; the contribution to the development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and the keeping of a record of sponsorship, donations and charitable giving.

²⁸⁸ Kloppers 2013 *PER/PELJ* 178.

²⁸⁹ Cassim "Duties and Liability of Directors" 523.

²⁹⁰ Shabodien and Du Toit 2016 <http://www.bdlive.co.za/opinion/2016/04/28/accountability-to-shareholders-a-legislative-obligation>.

²⁹¹ Shabodien and Du Toit 2016 <http://www.bdlive.co.za/opinion/2016/04/28/accountability-to-shareholders-a-legislative-obligation>.

provides otherwise. In other words, section 66 provides that directors must exercise their functions in accordance with the *Companies Act*.

Sections 76 and 77 of the *Companies Act* discuss the liability of committee members. It is stated in section 76(3) that a member of the social and ethics committee (a director) is required to exercise the powers and perform the functions of a member of the committee in good faith and for a proper purpose in the best interest of the company and with the degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as those carried out by the member of the committee. Kloppers states:

Despite the fact that the heading of section 76 is "Standards of directors' conduct", the section is equally applicable to prescribed officers or members of board committees such as the social and ethics committee or the audit committee.²⁹²

Cassim, however, believes that there is no legal duty directly owed to stakeholders when it comes to the functions of the social and ethics committee and the regulations thereto; that there exists a legal duty towards the company only. Cassim regards these provisions as unenforceable by stakeholders, unless such stakeholders could rely on the derivative action brought in terms of section 165.²⁹³ In other words, such a stakeholder would have to be shareholder, a director, a prescribed officer, a trade union, an employee's representative or a person who has the leave of the court.²⁹⁴ The failure to appoint a social and ethics committee, however, may attract the sanction of a compliance notice in terms of section 171.²⁹⁵

The SEC is a welcome inclusion in company-related legislation which could complement voluntary CSR mechanisms. However, given the limitations of its scope of applicability to external stakeholders such as communities in the listed functions, it is vitally important that shareholders actively participate in the process of feedback by the committee. Passive acceptance by shareholders could seriously undermine the functioning of the committee and hence the overall governance of the

²⁹² Kloppers 2013 *PER/PELJ* 185.

²⁹³ Section 165(1) of the *Companies Act* states that any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

²⁹⁴ Cassim "Duties and Liability of Directors" 523.

²⁹⁵ Cassim "Duties and Liability of Directors" 523.

company when it comes to sustainability, since shareholders can hold the SEC to account.²⁹⁶

3.5.1.3 Compliance notices and the imposition of fines

An inclusion in the *Companies Act* is the provision that a company may be fined for a failure to comply with the *Companies Act*, which would include the governance provisions of the *Companies Act*.²⁹⁷ Section 171 details the provisions relating to the issuing of compliance notices. Section 171(1) states that the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes has contravened the *Companies Act*; or assented to, was implicated in, or directly or indirectly benefited from, a contravention of the *Companies Act*, unless the alleged contravention could otherwise be addressed in terms of the Act by an application to a court or to the Companies Tribunal. Note that the wording of the *Companies Act* makes provision for "any person," thus broadening the scope of application to include directors and office bearers.

An interesting dynamic to section 171 in relation to CSR is the possibility of external stakeholders holding non-compliant companies to account through avenues incorporating this section of the *Companies Act* and possibly section 24G of the NEMA, depending on the circumstances. Seemingly, external stakeholders can report non-compliant companies to the Commission, or the Executive Director of the Panel, which may lead to a compliance notice. The consequences of a compliance notice issued in terms of section 171 are broad and far-reaching. According to section 171(2) a compliance notice may require the person to whom it is addressed to cease, correct or reverse any action in contravention of the *Companies Act*, take any action required by the *Companies Act*, restore assets or their value to a company or any other person, provide a community service in the case of a notice

²⁹⁶ Cassim "Corporate Governance" 497.

²⁹⁷ Kennedy-Good 2009 <http://www.polity.org.za/article/administrative-fines-envisaged-in-the-new-companies-act-of-2008-could-be-costly-2009-05-20>.

issued by the Commission, or take any other steps reasonably related to the contravention and designed to rectify its effect.

3.6 Conclusion

This chapter has discussed the legal provisions available to complement voluntary or quasi-legal CSR checks. The chapter discussed the NEMA against the backdrop of the *Constitution* and the Bill of Rights and the synergy of the rights and duties applicable to companies in terms of the NEMA as against the *Companies Act*. Section 8(2) was discussed in relation to section 24 of the Constitution the Bill of Rights binds a juristic person such as a company, if and to the extent that, it is applicable, considering the nature of the right and the nature of any duty imposed by the right. Section 28 of the NEMA places a positive duty on 'a person', which would include a juristic person which causes, has caused or may cause significant pollution or degradation of the environment. The duty includes taking reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment. Although neither piece of legislation makes specific mention of CSR, the CSR language used in the legislation has been discussed, as have the implications thereof. The chapter analysed the advances made in the legislation which could benefit environmental protection in relation to company operations as well as the weaknesses in the legislation.

The next chapter explores how the courts have interpreted quasi-legal and legal mechanisms applicable to companies in the pursuit of environmental protection.

4 Case law analysis

4.1 Introduction

The evolution of environmental jurisprudence has been dependent upon the ability of the courts to interpret different rights that may have an impact on the environment.²⁹⁸ The judiciary is significant in enforcing compliance with legislated rules and standards, and hence an independent judiciary is vitally important to the development of environmental jurisprudence.²⁹⁹ This chapter explores how the courts have dealt with quasi-judicial and judicial CSR mechanisms, particularly in relation to environmental protection. CSR mechanisms have been debated by South African courts, but not specifically in relation to the provisions of the *Companies Act* and the NEMA. The courts have also, as described below, grappled with the civil and criminal liability of companies.

As Feris³⁰⁰ remarks, issues pertaining to environmental governance have been the subject of numerous court cases involving fuel and mining companies.³⁰¹ The courts have also endorsed the King Code and the King Code has persuasive force in South African courts in terms of determining a duty of care.³⁰² Judge Hussain affirmed the King Code in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* and reiterated that:³⁰³

The King Committee, correctly in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows: "A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly

²⁹⁸ Kotzé and du Plessis 2011 *JCI* 158.

²⁹⁹ World Bank 2002

<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1279901011064/GuidanceNoteonRoleofJudiciary.pdf>.

³⁰⁰ Feris 2010 *PER/PELJ* 73-74.

³⁰¹ Feris refers to a plethora of cases including: *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W); *Capital Park Motors CC and Fuel Retailers Association of SA (Pty) Ltd v Shell SA Marketing (Pty) Ltd* (TPD) unreported case number 3016/05 of 18 March 2005; *Sasol Oil (Pty) Ltd v Metcalf* 2004 5 SA 161 (W); *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil* 2006 2 All SA 17 (SCA) and most recently the *Fuel Retailers* case. Feris then refers to the mining and energy sector challenges which includes the *VEJA* judgment and *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C).

³⁰² Glazewski *Environmental Law in South Africa* 26-50.

³⁰³ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006).

seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration".³⁰⁴

In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*³⁰⁵ Judge Claassen stated that the constitutional environmental right embodied in section 24 of the *Constitution* was on a par with the rights to freedom of trade, occupation, profession and property embodied in subsections 22 and 25 of the *Constitution*. Hence, business cannot for example argue that the rights to trade and profit are more important than the section 24 environmental right. These rights have to be balanced against one another in any situation in which all of them come into play. None of them enjoy priority.³⁰⁶ In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*³⁰⁷ it was also held that the definition of "environment" as contained in section 1 of the *Environment Conservation Act 73 of 1989 (ECA)* meant that the environment was a composite right, which included social, economic and cultural considerations.³⁰⁸

Besides civil remedies, companies and their directors may also be held criminally liable for contravening provisions of the NEMA through section 34 and Schedule 3 of the NEMA.³⁰⁹ Kidd reiterates that corporate criminal liability involves two inter-related ideas, namely the liability of the company as a juristic entity and the liability of individual persons such as directors and corporate officers who are responsible for the management of the company.³¹⁰ In South African law, criminal liability is governed by section 332(1)³¹¹ of the *Criminal Procedure Act 51 of 1977 (the CPA)*.

³⁰⁴ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006) para 16.9.

³⁰⁵ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W).

³⁰⁶ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) para 143B-C/D.

³⁰⁷ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W).

³⁰⁸ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) para 144H-145A.

³⁰⁹ Milton 1999 SAJELP 53-55.

³¹⁰ Kidd *Environmental Law* 219.

³¹¹ Section 332(1) of the *Criminal Procedure Act 51 of 1977 (the CPA)* states that for the purpose of imposing upon a corporate body criminal liability for any offence,— (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a

Against the above backdrop, this chapter will analyse how the courts have interpreted CSR principles and the manner in which the courts have curtailed corporate activities in order to advance environmental protection.

4.2 The courts' approach to CSR principles

Although there is a paucity of case law deliberately acknowledging the nexus between the NEMA and the Companies Act in relation to quasi-judicial mechanisms, there is case law where CSR principles have been discussed by the courts.

The practicalities of CSR and governance with reference to the environment, access to information and corporate entities for example were usefully addressed in *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance*³¹² (the VEJA judgment), both by the court *a quo* and the Supreme Court of Appeal (SCA). The VEJA decision concerned, fundamentally, a request for information directed to *ArcelorMittal South Africa Limited* (AM) by the *Vaal Environmental Justice Alliance* (VEJA) in terms of sections 50(1) and 53 of the *Promotion of Access to Information Act 2 of 2000* (PAIA), with specific reference to AM's Environmental Master Plan.³¹³ AM refused the request made by VEJA for access to information on the basis that the Environmental Master Plan was outdated and hence lacked relevance to sections 50(1) and (53) of PAIA. AM also accused VEJA of trying to usurp the role of the relevant regulating authorities in the function of the regulation of environmental affairs.³¹⁴

The power of corporate entities and their pursuit of profit in a world with finite resources was underpinned by the SCA as follows:

director or servant of that corporate body; and (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

³¹² The VEJA case.

³¹³ Kirby 2014 <http://www.polity.org.za/print-version/green-skeletons-corporate-social-responsibility-advances-2014-12-11>.

³¹⁴ VEJA case paras 12, 21.

First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance.³¹⁵

The SCA also referred to the tension inherent in attempting to balance commercial and environmental interests.³¹⁶ Importantly, VEJA argued that the Environmental Master Plan was referred to in AM's corporate annual reports, which would be presented to shareholders and investors.³¹⁷ Moreover, AM had failed to state to its shareholders that the Environmental Master Plan was "outdated". On the contrary, AM had reported that the Environmental Master Plan had driven AM's environmental strategy, directly intimating that the information presented to shareholders was actually misleading.³¹⁸ The import of the veracity of the environmental information presented to shareholders and government by a company was highlighted as follows:

In assessing the Master Plan's significance and relevance, the high court considered, in VEJA's favour, that it had been published and communicated to AM's shareholders and repeatedly mentioned in its annual reports, where it was referred to as a primary strategic tool. In addition, the reports had been submitted to state authorities. Carstensen AJ concluded that it would be naïve for the court to find that this plan need not be at least considered, assessed and critically analysed by entities such as VEJA.³¹⁹

The SCA further held that the undertakings made by AM in its annual report were public statements and hence the company would be held to such statements, including assertions of trying to "collaborate with third parties" including VEJA.³²⁰ The SCA also confirmed that the section 2 principles set out in the NEMA are indirectly applicable to company decisions and activities affecting the environment.³²¹ In paragraph 71 the SCA referred to *collaborative corporate governance* in relation to the environment. This is a principle described in 1.2 of King III, which provides that:

³¹⁵ VEJA case para 1.

³¹⁶ VEJA case para 3.

³¹⁷ VEJA case para 19.

³¹⁸ VEJA case paras 30, 32.

³¹⁹ VEJA case para 45.

³²⁰ VEJA case para 53.

³²¹ VEJA case para 66.

...the board should ensure that the company is and is seen to be a responsible corporate citizen.³²²

The principle of collaborative corporate governance is dealt with specifically in paragraphs 26 and 27 of Chapter 1 of the King III:

There is a need to establish mechanisms for decision-makers to engage in collaborative responses to sustainability challenges. There has been a shift away from an emphasis – common at the time of King II – on individual companies' sustainability-related efforts. Although initiatives by individual companies are important, it is increasingly recognised that there are limits to what single companies acting by themselves can achieve. This is particularly true given the systemic character of many socio-environmental challenges, such as climate change, water depletion, informal settlements, and corruption.³²³

The collaborative governance approach discussed in the *VEJA* judgment above and King III is also part and parcel of the CSR language adopted to discuss the role of a company as a global citizen. In this regard, collaborative governance requires that a company adopt a multi-stakeholder approach in order that they may be part of a solution to global problems.³²⁴ South African case law and the main CSR Code are in keeping with international CSR principles and South African companies should note this progressive tendency.

4.3 The court's curtailment of commercial activities

As discussed in chapters 2 and 3, CSR checks can assist companies to regulate their environmental systems and to ensure legal compliance. In terms of the common law, commercial activities have been curtailed through the application of the law of nuisance. In *Gien v Gien*³²⁵ and *Regal v African Superslate*³²⁶ the court stressed the principle that the commercial activities of land owners must be reasonable and are subject to the maxim *sic utere tuo aliennum non laedas*, which means use your own property in such a manner as not to injure that of another.³²⁷ In

³²² Kirby 2014 <http://www.polity.org.za/print-version/green-skeletons-corporate-social-responsibility-advances-2014-12-11>.

³²³ Kirby 2014 <http://www.polity.org.za/print-version/green-skeletons-corporate-social-responsibility-advances-2014-12-11>.

³²⁴ Horrigan *Corporate Social Responsibility* 54-55.

³²⁵ *Gien v Gien* 1979 2 SA 1113 (T).

³²⁶ *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (AD)106H-107A.

³²⁷ *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (AD)106E-F.

these instances commercial activities were curtailed by the application for and granting of an interdict.³²⁸

The courts have also granted interdicts within the ambit of environmental legislation. For example, in *Minister of Health and Welfare v Woodcarb (Pty) Ltd*³²⁹ a commercial entity was restrained from carrying on a wood burning process on the property Versameling No 15759, Lidgetton, in the district of Lions River, Natal due to the fact that the entity was acting contrary to section 9(1) of the *Atmospheric Pollution Prevention Act* 45 of 1965. The courts have also held that a company may be held delictually liable for its pollution. In the matter of *Lascon Properties (Pty) Limited v Wadeville Investment Company (Pty) Limited*³³⁰ the court had to determine an exception to the plaintiff's particulars of claim in terms of Regulation 5.9.2 of the Regulations promulgated under the *Mines and Works Act* 27 of 1956. The plaintiff contended that the defendant mining company had a duty to ensure that its water containing any injurious matter in suspension or solution should not be permitted to escape without having been previously rendered innocuous. The court held that the legislature intended to provide civil remedy for damage caused by a breach of regulation.³³¹

Another form of relief has been that the courts have also ordered companies to investigate and report upon the impacts on the environment of their activities. In *Hichange Investments (Pty) Ltd v Cape Products Company (Pty) Ltd t/a Pelts Products*³³² a tanner company was directed in terms of section 28(4) of the NEMA to investigate, evaluate and assess the impact of gases emitted from its tannery and the effluent treatment plant. It was also directed to report on these activities and to take such further steps in terms of section 28(4) (b), (c) or (d) of the NEMA as might be

³²⁸ The requirements for an interim interdict are set out in *Setlogelo v Setlogelo* 1914 AD 221 227. They are a *prima facie* right, a well granted apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted, the balance of convenience in favour of the granting of the interim relief and the absence of any other adequate ordinary remedy.

³²⁹ *Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

³³⁰ *Lascon Properties (Pty) Limited v Wadeville Investment Company (Pty) Limited* 1997 3 All SA 433 (W).

³³¹ *Lascon Properties (Pty) Limited v Wadeville Investment Company (Pty) Limited* 1997 3 All SA 433 (W) paras VII-VIII, XI.

³³² *Hichange Investments (Pty) Ltd v Cape Products Company (Pty) Ltd t/a Pelts Products* 2004 JDR 0040 (E).

necessary, and in the light of the findings of such investigation, evaluation and assessment to ensure compliance with the NEMA.³³³

In *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry*³³⁴ the court discussed the liability of a mine (Harmony Gold) in relation to a directive issued to it in terms of section 19(3) of *the National Water Act 36 of 1998* (the NWA) whereby the gold mining company was required to take anti-pollution measures in respect of pollution on its land. The court also discussed that if:

...the directive was issued while a person was in control to take the preventative measures, his unfulfilled obligations do not become discharged or nullified once he ceases to be in control. If he severs ties with the land, fully knowing that his validly imposed obligations remained unfulfilled, he can hardly complain if it is insisted that he should comply with those before he is discharged from them. In this regard, s 28(6) of NEMA, which is concerned with rehabilitative and remedial work on another's land, comes into play, to the extent he has to access another person's land.

The case has fundamental importance for companies which fail to follow preventative measures and who assume that their obligations cease upon termination of their lawful land ownership and/ or ceasing to be in control of the land.³³⁵ As a result of *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry*³³⁶ all polluting companies which have been issued with directives in terms of environmental statutes should be wary of attempting to evade their obligations by selling off the land or even the control of the polluting operations to another company.³³⁷ Humby³³⁸ argues that the decision of *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water*

³³³ This relief, known as a "supervisory interdict" has also been granted against government. In this regard see *Kenton on Sea Ratepayers Association v Ndlambe Local Municipality* 2016 ZAECGHC 45 (15 June 2016) paras 112-113.

³³⁴ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2013 ZASCA 2006 (4 December 2013).

³³⁵ This also relates to Chapter 3 in that, companies as juristic persons have the duty to respect the environment and this may require companies to take positive action to prevent non-compliance due to company activities.

³³⁶ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2013 ZASCA 2006 (4 December 2013).

³³⁷ Wainwright 2014 <http://www.polity.org.za/article/mining-and-the-environment-the-inescapable-case-of-harmony-gold-mining-company-ltd-v-regional-director-free-state-department-of-water-affairs-2014-06-05>.

³³⁸ Humby 2013 *JERL*462-463.

*Affairs and Forestry*³³⁹ conforms to the "polluter pays principle" encapsulated in section 2(4)(p) of the NEMA³⁴⁰ as well as the "principle of legality".³⁴¹

In the *State v Golfview Mining (Pty) Ltd*³⁴² a mining company faced three charges for contravening the NEMA and the NWA for mining in a wetland, diverting water resources, inadequate pollution control of its mining activities, and an unauthorised transformation of indigenous vegetation. The mining company entered into a plea and sentence agreement in terms of section 112(2) of the CPA whereby it was sentenced to pay a fine of R4 million.³⁴³ Since 2013 there has been a sharp increase in the number of companies and directors charged with environmental crime³⁴⁴, with inspectors increasingly inclined to prosecute offenders.³⁴⁵ Companies in South Africa thus face criminal sanction for environmental crime³⁴⁶ and non-governmental organisations and other stakeholders are becoming aware of this fact in terms of a company's reputation and risk.³⁴⁷ In *S v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya*³⁴⁸ a director, Mr Maponya, was sentenced to five years' imprisonment for damages caused to the environment, which sentence was suspended for five years on condition that the affected areas were rehabilitated

³³⁹ *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2013 ZASCA 2006 (4 December 2013).

³⁴⁰ Section 2(4)(p) of NEMA states that (p) the costs of remedying pollution, environmental degradation and the 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.

³⁴¹ Section 1(c) of the *Constitution*, which states that the Republic of South Africa is founded on the value (among others) of the supremacy of the *Constitution* and the rule of law.

³⁴² *State v Golfview Mining (Pty) Ltd* (plea and sentence agreement) 462/04/2009 // ESH 82/11.

³⁴³ A similar plea and sentence agreement was entered into in *State v Anker Coal & Mineral Holdings SA (Pty) Ltd* (plea and sentence agreement) 8/11 // SHEEPMOOR CAS 26/06/2009. What is noteworthy is that in both the Anker Coal and Golfview cases the managing director representing the companies was the same, namely Albrecht Frick.

³⁴⁴ Environmental crime thus stems from non-compliance with legislation. Companies who fail to comply with CSR cannot be criminally liable.

³⁴⁵ Planting 2013 <http://www.moneyweb.co.za/archive/environmental-crime-business-as-usual-for-sa-compa/>.

³⁴⁶ ENCA 2013 <https://www.enca.com/south-africa/battle-get-sa-companies-be-environmentally-compliant>.

³⁴⁷ Planting 2013 <http://www.moneyweb.co.za/archive/environmental-crime-business-as-usual-for-sa-compa/>.

³⁴⁸ In *State v Blue Platinum Ventures 16 (Pty) Ltd & Matome Samuel Maponya* (sentencing proceedings) (Naphuno Regional Magistrates' Court) Unreported case number RN126/13 of 9 January 2014.

within three months, with costs estimated at R6.8 million.³⁴⁹ Mr Maponya was not given the option of a fine.³⁵⁰

Recently the court in *Kensal Rise Investments (Pty) Limited v Marchant*³⁵¹ confirmed that the *Companies Act* contains only a partial and not a full codification of all directors' duties and responsibilities, thus broadening the scope of directors' responsibilities and recognising that some responsibilities may be codified elsewhere, as in the NEMA.

In *Rabinowitz v Van Graan*³⁵² the liability of directors was also broadened. The court stated that liability in terms of section 77 of the *Companies Act* does not exclude section 218(2) liability. Section 218(2) is widely couched and states that any person who contravenes any provision of the *Companies Act* is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited*³⁵³ Judge Hussain made specific reference to the principles detailed in King II, the precursor of King III.³⁵⁴ The case concerned a mining company where all the directors resigned *en masse* due to non-compliance with environmental legislation within the company. At paragraph 16.7 the judge affirmed the King Code by stating:

Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country's economy especially in attracting new investments. To this end the corporate community within South Africa has widely and almost uniformly accepted the findings and recommendations of the King Committee on Corporate Governance.³⁵⁵

In a case unrelated to environmental protection but which dealt with the responsibility of a board of directors in a public company, Judge Victor in *South African*

³⁴⁹ Truter 2014 <http://www.werksmans.com/legal-briefs-view/environmental-law-compliance-noose-tightening/>.

³⁵⁰ Buthelezi 2014 <http://www.iol.co.za/business/companies/director-gets-jail-for-land-damage-1644299>.

³⁵¹ *Kensal Rise Investments (Pty) Limited v Marchant* 2014 ZAKZDHC 47 (30 October 2014).

³⁵² *Rabinowitz v Van Graan* 2013 5 SA 315 (GSJ).

³⁵³ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006).

³⁵⁴ The court referred to principle 1.2 of King III at para 16.9 of the judgment.

³⁵⁵ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 ZAGPHC 47 (15 May 2006) para 16.7.

*Broadcasting Corporation Ltd v Mpofu*³⁵⁶ also referred to the CSR principles set out in the King Code. This was in relation to the relevant statutory framework, indicating the persuasive force of the Code in relation to directors' duties.³⁵⁷ In *South African Broadcasting Corporation Ltd v Mpofu*³⁵⁸ a full bench approved certain basic principles of corporate governance relying *inter alia* on the King Code. Judge Jajhbay in the judgment stated that good governance in a government or corporate setting is based on integrity.³⁵⁹ He observed that in South Africa the principle of Ubuntu applies to governance, which he described as follows:

Ubuntu-botho is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. Heated and impetuous decision making is the stuff of irrational outcomes. This must be avoided. This form of governance is underpinned by the philosophy of ubuntu-botho. The time is right to incorporate the views of umuntu ngumuntu ngabantu in the King code of good governance.³⁶⁰

The judgment of *South African Broadcasting Corporation Ltd v Mpofu* was affirmed in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited*,³⁶¹ where the court discussed the import of the King Code. This was also stressed in *Caxton and CPT Publishers and Printers Limited v Media 24 Proprietary Limited*,³⁶² where the Competition Appeal Court stated that companies need to comply with relevant legislation as well as King III. Hence, South Africa's main CSR Code is being referred to by South African courts in conjunction with legislated compliance requirements.³⁶³

³⁵⁶ *South African Broadcasting Corporation v Mpofu* 2009 4 All SA 169 (GSJ) paras 28-30.

³⁵⁷ In para 29 of the judgment, Judge Victor reiterates that companies and their boards are required to measure up to the principles set out in the Code. King recommends that public enterprises should try to apply the appropriate principles set out in the Code.

³⁵⁸ *South African Broadcasting Corporation v Mpofu* 2009 4 All SA 169 (GSJ).

³⁵⁹ *South African Broadcasting Corporation v Mpofu* 2009 4 All SA 169 (GSJ) para 64.

³⁶⁰ *South African Broadcasting Corporation v Mpofu* 2009 4 All SA 169 (GSJ) para 66.

³⁶¹ *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 6 SA 338 (WCC).

³⁶² *Caxton and CPT Publishers and Printers Limited v Media 24 Proprietary Limited* 2015 ZAWCHC 209 (25 November 2015) para 30.

³⁶³ Other judgments have also made reference to the King Code in conjunction with the *Companies Act*. These are not discussed in detail. They are: *Kalahari Resources (Pty) Ltd v ArcelorMittal SA* 2012 3 All SA 555 (GSJ); *Levenstein v S* 2013 4 All SA 528 (SCA); *Council for Medical Schemes v Selfmed Medical Scheme* 2011 ZASCA 207 (25 November 2011); *United Peoples Union of South Africa v Registrar of Labour Relations* 2011 ZALCJHB 275 (15 February 2011); *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2016 ZAGPJHC 8 (11 February 2016); *Randles v*

4.4 Conclusion

This chapter has discussed the CSR checks in case law where specific reference has been made to codes such as King III. It has also analysed the ramifications for companies and its officers should they fail to meet legislative obligations. The consequences for a company include civil remedies and criminal sanction which may cause a company reputational and monetary loss. Director liability has become significantly more onerous in terms of the court's interpretation of the provisions of both the NEMA and the *Companies Act*.

There is arguably a need for more case law concerning the nexus between corporate checks and environmental protection in South African law. It is apparent, however, that the courts are concerned with the governance of companies and have made specific reference to CSR codes which find considerable persuasive force in the determination of a matter. The above discussion indicates that South African courts have been progressive in linking legislative requirements affecting companies with the main CSR Code applicable to South African companies, namely King III. Companies therefore need to introspect on court findings where civil and criminal sanction may affect reputation and profits. The emphasis on good governance adopted by South African courts also suggests that South African courts acknowledge the benefits that derive from collaborative governance, a system which is internationally accepted and which places emphasis on collaboration with and input from a broad range of stakeholders.

What is also distilled from the above body of case law is that our courts are aware of the impact of pollution on current and future generations, the tension between commercial and environmental interests, and the duty of company officers not only towards the company but also to a broader range of stakeholders in the management of a company.

Chemical Specialist Ltd 2010 7 BLLR 730 (LC); *Democratic Alliance v South African Broadcasting Corporation Soc Ltd* 2016 3 SA 468 (WCC); and *Bytes Technology Group v Michael* 2014 ZAGPPHC 926 (25 November 2014).

5 Conclusion

The purpose of this study was to assess the implications of the NEMA and the *Companies Act* against the most widely adopted quasi-legal or voluntary codes used by South African business.³⁶⁴ It has been underpinned by an investigation into CSR language used in the legislation and by South African courts, in order to assess whether CSR principles are finding persuasive application within a legal setting despite the fact that no direct piece of CSR legislation exists.³⁶⁵

The main quasi-legal mechanisms widely employed by South African companies were discussed in chapter 2. It was found that the benefits to business from adopting and implementing these voluntary mechanisms, namely the UN Global Compact, the OECD Principles and the King Code on Governance, are that such mechanisms can improve production strategy and the management of risk.³⁶⁶ The chapter concluded that both the quasi-legal and the legal mechanisms should be used in combination. It was found that quasi-legal mechanisms cannot and should not replace legal mechanisms.³⁶⁷ The strengths and weaknesses of each quasi-legal mechanism were reflected upon. The UN Global Compact and OECD Principles have largely been adopted by and marketed to large companies, hence there is a need for small and medium enterprises to engage in these voluntary principles.³⁶⁸ King III is the most well-known CSR mechanism adopted by South African companies. It is a requirement that companies listed on the JSE adhere to King III.³⁶⁹ Compliance with King III also requires compliance with South African legislation, specifically the *Companies Act*. Sustainability is also a key feature of King III and is regarded as a business opportunity and a risk.³⁷⁰

A further CSR mechanism which was explored was environmental auditing, namely environmental compliance and environmental system auditing against

³⁶⁴ Chapter 1.

³⁶⁵ Chapter 1.

³⁶⁶ Para 2.1.

³⁶⁷ Para 2.1.

³⁶⁸ Para 2.2. and 2.3.

³⁶⁹ Para 2.4.1.

³⁷⁰ Para 2.4.1.

international standards.³⁷¹ Environmental auditing is a management tool whereby management makes a sustainability commitment through policy. This is both a strength and a weakness of the relevant auditing processes.³⁷² It is a shortcoming because the development of such company policy is often left to the discretion of management. It can also be a strength, because the tool is flexible and adaptable to various business settings and industries.³⁷³

The ISO 14001 (environmental management systems) and ISO26000 (CSR guidance tool) were discussed.³⁷⁴ The weaknesses of ISO 14001 were debated. These include that the ISO standards offer little incentive for firms to adopt cleaner production methods.³⁷⁵ Moreover, the cycle upon which the system is based, namely Plan, Do, Check and Act, which is known as the Deming Cycle, is subject to abuse and manipulation by companies.³⁷⁶ Moreover, the terms used by the standard in relation to pollution prevention and system improvement are vague. Further, the ISO 14001 does not require demonstrated legal compliance by a company for certification.³⁷⁷ Exacerbating this weakness is the fact that auditors do not have to possess legal expertise to conduct an ISO 14001 audit, and it is hence unlikely that auditors have the necessary skill to oversee legal compliance when conducting an audit.³⁷⁸ A fundamental weakness of system audits such as ISO14001 was found to be that the audit is only as strong as the auditor.³⁷⁹ The quality of an audit thus depends on the skills that such auditors hold, their experience, objectivity and integrity and the information provided to them by the company when conducting an audit.³⁸⁰ It was noted that audited non-conformances are contractually confidential in terms of a legal compliance and systems audit. This prevents third-party oversight of an audit process.³⁸¹

³⁷¹ Para 2.5.2.

³⁷² Para 2.5.1.

³⁷³ Para 2.5.2.

³⁷⁴ Para 2.6.2.1.

³⁷⁵ Para 2.6.2.1.

³⁷⁶ Para 2.6.2.1.

³⁷⁷ Para 2.6.2.1.

³⁷⁸ Para 2.6,2.4.

³⁷⁹ Parah 2.6.2.1.

³⁸⁰ Para 2.6.2.1.

³⁸¹ Para 2.6.2.3.

The JSE listing requirements were analysed as a quasi-legal mechanism with specific reference to the reporting requirements of listed companies.³⁸² Weaknesses were identified in the reporting of listed companies, both in terms of the information provided to shareholders as well as the quality and veracity of the information provided to the JSE by companies.³⁸³

The tension between the rights in section 22 (the right to trade) and section 24 (the environmental right) of the Bill of Rights was analysed in Chapter 3, against the section 36 limitation clause. Chapter 3 examined the legal checks applicable to companies, focussing on the two primary pieces of legislation, being the NEMA and the *Companies Act*. It was debated whether the section 2 principles of the NEMA apply indirectly to juristic persons.³⁸⁴ Environmental implementation plans and environmental management plans mentioned in NEMA were found to be indirectly applicable to companies.³⁸⁵

The main planning tool applicable to legislated listed activities affecting the environment and applicable to companies was discussed, namely the EIA. The EIA was defined as a planning tool which should be applied prior to any listed activity taking place.³⁸⁶ The controversy concerning section 24G of the NEMA was discussed in the light of this understanding that an EIA is essentially a planning tool. Section 24G provides for the "rectification of unlawful commencement or continuation of listed activity." In other words, it was thought that section 24G provides a mechanism for companies to retrospectively seek condonation where they have unlawfully commenced a listed activity without authorisation. It was concluded that the loopholes in this section present fertile ground upon which companies may engage in irresponsible development.³⁸⁷

Director liability within the NEMA framework and the *Companies Act* was discussed.³⁸⁸ This chapter found that an advancement in the *Companies Act* is the

³⁸² Para 2.7.1 and 2.7.2.

³⁸³ Para 2.7.1 and 2.7.2.

³⁸⁴ Para 3.4.1.2 and 3.4.1.3.

³⁸⁵ Para 3.4.1.4.

³⁸⁶ Para 3.4.1.4 and 3.4.1.5.

³⁸⁷ Para 3.4.1.5.

³⁸⁸ Para 3.5.1.2 and 3.4.1.6.

introduction of a SEC through the provisions of section 72 of the *Companies Act*.³⁸⁹ Although the SEC is a welcome advancement, its weaknesses were discussed, which include provisions whereby companies may seek exemption from the SEC requirements. Further weaknesses include the lack of a legislative mechanism for stakeholder participation in such an exemption process, and regulations which provide that the SEC requirements apply to defined categories of companies only.³⁹⁰ Hence, some categories of companies are totally excluded from this mechanism. Furthermore, it was found that there is no overt duty on the SEC to report to other stakeholders, and that directors are still unfamiliar with their SEC mandates. The feasibility and authenticity of the reporting by a SEC will depend largely on directors' ability, integrity and skill.³⁹¹

The mechanisms within the *Companies Act* to issue compliance notices and fines against non-compliant companies were investigated against the possibility of external stakeholders holding non-compliant companies to account through avenues provided by section 171 of the *Companies Act* and possibly section 24(G) of the NEMA.³⁹²

Chapter 4 deliberated how the courts can and have thus far contributed to the promotion of CSR checks in the South African context. The chapter stated that CSR mechanisms have been debated by South African courts, but not specifically in relation to both the *Companies Act* and the NEMA. Still, it was found that issues pertaining to environmental governance have been the subject of several court cases involving fuel and mining companies.³⁹³

Likewise, it was noted that the courts have made ample reference to the import of the provisions of the King Code in conjunction with legislation such as the *Companies Act*. It was found that the courts have confirmed that the environmental right also pertains to economic and social interests, which must be weighed against

³⁸⁹ Para 3.5.1.1.

³⁹⁰ Para 3.5.1.2 and 3.5.1.3.

³⁹¹ Para 3.5.1.3.

³⁹² Para 3.5.1.3.

³⁹³ Para 4.1.

environmental interests.³⁹⁴The courts have been progressive in determining requests for information and have stated that the information provided to shareholders by directors is important and binding on directors.³⁹⁵

It was shown that case law indicates that the courts have also been creative in terms of the relief ordered against non-compliant companies and directors, which includes ordering companies to investigate and monitor the effects of company activities on the environment, mandamus interdicts against government departments to contain and curtail corporate pollution, prohibitory or supervisory interdicts, and criminal sanction.³⁹⁶The courts have also confirmed the “polluter pays” principle even when the corporate polluter has already sold the operations and assets to new owners.³⁹⁷

Based on the findings in this study, the following general recommendations are made:

- The provisions in the *Companies Act* and its regulations to incorporate a SEC are commendable. However, to address the shortcomings discussed above, the *Companies Act* should also provide for such a committee for other types of corporations, such as medium sized enterprises. The associated costs of such a SEC at medium enterprise level could be set-off against a company’s better risk management.
- The exemption provisions applicable to SECs should include a mechanism for stakeholders to participate, and the procedural rules governing such applications should include the requirement for applications to be served on interested and affected parties through means such as email, advertisement or fax, to encourage stakeholder and shareholder inclusion and shareholder activism.

³⁹⁴ Para 4.2.

³⁹⁵ Para 4.2.

³⁹⁶ Para 4.3.

³⁹⁷ Para 4.3.

- There is currently no requirement for the SEC to report to stakeholders other than shareholders and directors. Such SEC reports should be made publicly available, particularly to civil society so that the reports can be interrogated.
- Voluntary mechanisms which facilitate environmental audits should include provisions overseeing the qualifications of auditors, and the information provided to auditors by companies. This would be to ensure that auditors are able to comprehensively address legislative non-conformances and to curb any corruption of the process by industry.³⁹⁸
- The provisions of section 24G of NEMA are silent on a company conducting similar listed activities elsewhere in the Republic. Hence, a possible amendment to curb the abuse of section 24G would be a legislative prohibition on a company conducting the same listed activity elsewhere in the Republic until the section 24G process has been ventilated and concluded. For example, should a developer be found to have unlawfully constructed a stormwater incision into a water channel, the same developer should be prohibited from conducting a similar stormwater activity until such time as the section 24G process has been finalised.
- Although the King Code makes reference to the *Companies Act* and sustainable development, it could develop references to the constitutional environmental right and the NEMA in order to link the main legislation concerning the environment to the *Companies Act*. In particular, it could address the problems of section 24G of the NEMA, which this research suggests is sometimes abused by corporate entities.

Against a discussion on the SEC envisaged by the *Companies Act*, the Chief Justice reiterated that company boards are accountable not only to their shareholders but also to internal and external stakeholders.³⁹⁹ Hence, our judiciary is very much

³⁹⁸ Whitelaw *ISO 14001* 100.

³⁹⁹ Shabodien and Du Toit 2016 <http://www.bdlive.co.za/opinion/2016/04/28/accountability-to-shareholders-a-legislative-obligation>.

aware of the responsibilities of directors and companies when it comes to ethical leadership, and has expressed a view that ethical stewardship is a duty owed not only to shareholders but to other stakeholders as well.

This study explicitly endorses the importance of a thriving economy in a country like South Africa. The study also explored the implications of the NEMA and the *Companies Act* against the most widely adopted quasi-legal or voluntary codes used by South African business against the need for sustainable business practice.⁴⁰⁰ These mechanisms recall the saying "umuntu ngumuntu ngabantu" which means "I am because you are, you are because we are."⁴⁰¹ Business and conservation of the environment are thus inextricably linked. Important developments can and should be made to directly link both the *Companies Act* and the NEMA to voluntary or quasi-judicial codes in case law. There is scope for future research on the issues raised. For example, future research could analyse the impact of the SEC provisions on shareholder activism in South African environmental law jurisprudence.

⁴⁰⁰ Para 3.1.

⁴⁰¹ Singh 2014 <http://durbanchamber.co.za/profiles/blogs/what-s-really-right-corporate-social-responsibility-as-a-legal>.

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