# The accountability of lending institutions for environmental damage under the lender liability principle

**E C Nhapi**

**26754665**

**LLBS**

Dissertation submitted in fulfilment of the requirements for the degree *Magister Legum* Environmental Law and Governance at the Potchefstroom Campus of the North-West University

Supervisor: Prof Sarel du Toit

December 2015

**ACKNOWLEDGEMENTS**

**EBENEZZAR**(Thus far the Lord has taken me)

I would like to thank the Lord Almighty for the opportunity and the wisdom, my friends and family for the support, my supervisor, Prof Sarel Du Toit for the encouragement and the patience, and my better half Tiri for the inspiration, may the Lord bless you all

…until next time..

**ABSTRACT**

The environment as we know it today may not be the same for the next generations if this generation does not take positive steps to ensure its protection. This is simply to say that the fate of future generations lies on the ability of this generation to put in place measures that protect the environment. The most common measure installed is the "polluter pays" principle (PPP), which entails that whosoever is responsible for polluting must bear the burden of remediating the pollution. After decades of applying this principle, it is clear that this principle alone will not achieve environmental protection. There is therefore a need to extend the scope and applicability of the principle to include those who are not ordinarily covered by it. One such principle that extends the PPP is the lender liability principle. This principle extends the scope of polluters to include those who are not ordinarily regarded as polluters under the PPP, such as lenders.

The work of lenders is generally regarded as "clean" in that they do not produce toxic fumes or cut down trees, but the effects of lending can barely be regarded as being clean. The projects which they finance are the vehicles by which ultimate environmental damage is achieved. There is therefore a need to institute measures to avert the environmental damage caused. The principle of lender liability advocates and gives the lender a mandate to consider the environmental implications of their actions as a real risk. It creates a causal link between lending and environmental damage, creating a framework that holds lending institutions accountable for environmental damage.

Keywords: Lender Liability, Lending, Environment, Environmental Management, Sustainable development

**OPSOMMING**

Die omgewing soos ons dit tans ken, sal nie dieselfde vir volgende geslagte lyk as daar nie vandag reeds stappe gedoen word om die bewaring daarvan te verseker nie. Die lot van toekomstige generasies rus op die vermoë van hierdie generasie om maatreëls gerig op omgewingsbewaring, in plek te stel. Die beginsel dat die besoedelaar betaal (*polluter pays principle* (*PPP*)), behels dat wie ookal verantwoordelik vir die besoedeling is, die las moet dra om die besoedeling op te ruim. Nadat die beginsel reeds dekades lank toegepas is, is dit egter duidelik dat die beginsel alleen nie sal lei tot omgewingsbewaring nie. Daar is dus 'n behoefte om die omvang en toepaslikheid van die beginsel uit te brei om ook diegene in te sluit wat nie gewoonlik daardeur gedek sou word nie. Een beginsel wat die *PPP* uitbrei, is die beginsel van aanspreeklikheid van die lener (*lender liability principle*). Volgens hierdie beginsel sluit besoedelaars ook diegene in wat nie gewoonlik as besoedelaars beskou word ingevolge die *polluter pays principle* nie.

Die besigheid van leners word gewoonlik as "skoon" gesien omdat hulle nie self giftige rook vrystel of bome afkap nie, maar die uitwerking van die lening kan dikwels kwalik as skoon beskou word. Die projekte wat deur hulle gefinansier word, lei tot omgewingskade. Daar is dus 'n behoefte om maatreëls in werking te stel om die omgewingskade te vermy. Die beginsel van *lender liability* bepleit dus dat die lener die omgewingsgevolge wat uit hul optrede vloei, as 'n daadwerklike risiko moet beskou. Daar word 'n kousale verband geskep tussen lenings en omgewingskade, en 'n raamwerk word daargestel wat finansiële instansies aanspreeklik hou vir omgewingskade.

Sleutelwoorde: aanspreeklikheid van (uit)lener; lenings; omgewing; omgewingsbestuur; volhoubare ontwikkeling

**TABLE OF CONTENTS**

## LIST OF ABBREVIATIONS

| | |
|---|---|
| BNDES | Brazilian Development Bank |
| CEPMLP | Centre for Energy, Petroleum and Mineral Law Policy |
| CERCLA | Comprehensive Environmental Response, Compensation and Liability Act of 1980 |
| EIA | Environmental Impact Assessment |
| EP's | Equator Principles |
| EPA | Environmental Protection Agency |
| FICA | Financial Intelligence Centre Act 38 of 2001 |
| HARV ENVTL LAW REV | Harvard Environmental law review |
| ICJ | International Court of Justice |
| IFC | International Finance Corporation |
| ISO | International Organization for Standardization |
| LAL REV | Loyola of Los Angeles Law Review |
| MPRDA | Mineral and Petroleum Resources Development Act 28 of 2002 |
| NCA | National Credit Act 34 of 2005 |
| NEMA | National Environmental Management Act 107 of 1998 |
| NEMWA | National Environmental Management; Waste Act 59 of 2008 |
| NWA | National Water Act 36 of 1998 |
| OECD | Organisation for economic co-operation and development |
| PPP | Polluter pays principle |
| SAJELP | South African Journal of Environmental Law and Policy |
| SAJHR | South African Journal of Human Rights |
| SD | Sustainable Development |
| SD L. Rev | South Dakota Law Review |

# Chapter 1 Introduction

The environment has been ardently described as everything that we are not. In fact it is simply everything that surrounds us.[1] It is a common heritage shared by all human beings, which is why there are countless reasons we should protect it.[2] Protecting the environment however, is not an easy job because it literally takes the combined effort of every human being on earth. This hurdle, coupled with the fact that almost everything we do negatively impacts on the environment, makes it even harder. For example, in South Africa although the economy is significantly benefiting from mining, the consequences on the environment have been immense. These include: acid mine drainage from coal mining areas which has had a devastating impact on water resources, with acidification of rivers and streams, elevated metal levels and consequent fish die-offs.[3]

It is therefore necessary to balance the competing interests of developing the economy so that the lives of people are ameliorated, on the one hand, and to protect the environment for the sake of future generations, on the other.[4] This is done by regulating those environmental impacts that cause significant harm. Basically, this means that that individuals or persons that cause environmental damage or pollution should be held accountable in one way or another.

## *1.1 The environmental impacts of lending*

The banking sector is relatively clean, and the environmental burden of their energy, water and paper, is not comparable to many sectors in the economy because the product of the bank itself does not pollute. Instead it is the users of the product who impact on the environment.[5] This makes it very hard to calculate the environmental

---

1 Calderon 2015 https://prezi.com/-2xu3gxvqtu5/the-environment-is-everything-that-surrounds-us-and-that-we/.

2 These include that we also inherited it from other generations therefore we should live it for others as well (this notion is called inter-generational equity); Jasmin 2013 http://ecoadmirer.com/6-reasons-you-should-care-about-our-environment/.

3 Colvin *et al* 2011 http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf.

4 This concept is coined sustainable development.

5 Bourma *Sustainable Banking* 29-30.

impact of the external activities of the banking sectors. However, a general assumption can be made that, all pollution that is caused by companies that are financed by banks, is the responsibility of the lenders. It would then be easy to calculate the environmental impact, in this sense, as it would equate to almost the aggregate pollution of the whole economy in many countries.[6] On the other hand, there is the factual reality that banks do not pollute, and it is their clients that do so, and these clients should take responsibility for the pollution they create. While both standpoints are absurd, the truth lies somewhere in the middle.[7]

This research is based on the reasoning that through the banking products and the services they provide, financial institutions are uniquely placed to influence the direction and pace of a country's economic development, and by default, long-term sustainability.[8]

The objective of this research is to unveil circumstances under which a lending institution can be held accountable for the environmental damage done by its debtor, under the principle of lender liability in South Africa.

### *1.2 Problem statement*

The principle of state sovereignty at international law guarantees that a state cannot intervene in the governance of another. In the environmental context this is very problematic because the environment knows no state boundaries. This principle in international environmental law therefore makes the enforcement of environmental laws at international level rather weak, when compared to the statutory regime at national level.[9]

---

6 Bourma *Sustainable Banking* 30-31.

7 Bourma *Sustainable Banking* 31.

8 UNEP *Banking on Value: Anew approach to credit risk in Africa* 6 http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf.

9 Furthermore, there is no independent international environmental law body that is primarily tasked with adjudicating environmental matters, so environmental issues are intertwined within other issues. For example, there is the World Trade Organisation (WTO), an institution regulating international trade which presided over the "Shrimp-turtle" case, a case which was mainly

As previously stated, the primary business of banks, that is, lending, does not *per se* pollute the environment, coupled with the fact that the statutory regime in South Africa does not explicitly name banks as polluters, leads to the conclusion that lenders are not statutorily mandated to be environmentally conscious in their lending activities. Instead, they consider and monitor their environmental impact on a voluntary basis because of pressures from international initiatives such as the Equator Principles.[10]

The current statutory regime ignores the fact that lenders provide borrowers the vehicle by which they can degrade the environment. Such lending should be regulated in order to solve the problem from its roots. It is therefore argued that the fate of the lenders should be tied with that of their debtors. If the lenders are ignorant or decide to ignore the effects of their lending, as they are doing under the current regime, and escaping the wrath of the law by arguing sustainable development, then a stricter and more direct intervention should be given in the form of the application of the principle of lender liability, either by purposive judicial interpretation or law reform.

Currently under South African law, it is unclear whether a lender can be held accountable for financing an environmentally hazardous project under *National Environmental Management Act* (NEMA)[11] on the basis of negligence or the duty of care.[12] Sadly, the current principles of environmental law, as they exist in our law, may not be able to hold lenders accountable for their lending decisions.

In order to establish a nexus between lenders and the environmental impact of their business, reference to the principle of lender liability is necessary, a principle developed by the judiciary in the United States of America between 1960 and 1980.[13] It exists

---

environmental but underlined with trade issues. There is also the United Nations Environmental Program (UNEP), but it is merely a programme and does not wield much powers.

10 Barclays Bank *Sustainability risk in lending* date unknown. https://www.home.barclays/citizenship/the-way-we-do-business/sustainability-risk-in-lending.html. The association of a bank with a client who has a bad environmental reputation is a risk in that it may smear the banks reputation resulting in loss.

11 (NEMA) 107 of 1998.

12 Sections 28 and 34 NEMA, Guilder *et al Environment - South Africa* 2012 https://www.ensafrica.com/news/Environment-South.Africa?Id=843&STitle=environmental%20ENSight.

13 Nicholson *et al* 1993 38 *S.D. L. REV*. 22.

where: with the granting or extending of a loan, the environmental liability of the debtor becomes that of the lender.[14] In the USA, the principle has now been statutorily codified under the *Comprehensive Environmental Response, Compensation and Liability Act* of 1980 (CERCLA) and therefore its application has been modified by statute to apply only under certain specific conditions.[15]

CERCLA imposes a strict liability on the creditor for the environmental damage caused by its debtor in specific instances.[16] Such a principle is alien to South Africa, as is apparent from its omission from the NEMA and other environment regulating Acts. Statutory liability, in South Africa, is only limited to the polluter pays principle (PPP), specifically concentrating on direct polluters, thereby ignoring the causal link to the damage by the lender as an "indirect polluter".[17] An incorporation of the lender liability principle would help to strengthen the already existing and applicable principles such as sustainable development and the PPP, in fulfilment of the ultimate environmental protection regime.

This research will make use of the original unmodified application of the lender liability principle, addressing the lenders' liability for environmental damage caused by their borrowers in a jurisdiction where no statutory regulation directly addresses the matter. It shall critically analyse the development and codification of the doctrine in the USA and its adoption and application in Brazil before purporting to apply it to South Africa.

The study intends to conclude that the lack of explicit regulatory liability does not mean that the lender is exempt from all liability. Liability will be imposed by the use of other theories or principles of law, for example, the duty of care under delict. The lender

---

14 Burcat *et al* 21 *ELR* 10464.

15 Hereinafter referred to as CERCLA 42 U.S.C. §§ 9601-9675.

16 Burcat *et al* 21 *ELR* 10464.

17 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf. An indirect polluter is one who indirectly contributes to the activity that caused the environmental degradation. There is no definition "indirect contribution" so theoretically speaking, a lender, by extending a loan, can be held liable as an indirect polluter.

liability application will be analysed from the instance of the granting or extending of a loan, the consideration of the loan application[18], and the conditions attached thereto.

The application of this principle is based on the fact that the financier has such control over the initial decisions and scope of the project that they can put measures in place to minimise the environmental harm, and if they exercise these powers then no harm would befall the environment. Although this might initially seem like an over-extension of the principle, the principle has never really been extended to financiers in African countries at all, ignoring the crucial role that lenders play in environmental issues. Consequently, the link in the development of principles such as sustainable development, the precautionary principle and PPP in trade related issues is lost.

[18] The environmental considerations being contemplated shall include but, not be limited to: compliance with direct and indirect national environmental obligations and other indirect legislation which potentially imposes obligations.

# Chapter 2 Lender Liability

## *2.1 Introduction*

It is perhaps more natural that the lender would sue the borrower for breach of contract, than to say that the borrower or a third party can sue the lender for actions or damages arising out of the decision to lend. Some scholars have argued that since banks do not pollute rivers there is no basis for holding them accountable for the activities of their borrowers.[19] The reasoning is that if someone borrows money from a bank, buys a car and kills a pedestrian, the bank which gave the loan is not held responsible. Ultimately, regardless of these causation concerns, it is factual that the lender's role in providing funds for the development of a project potentially enables the polluting activity to occur.[20]

It is therefore essential that the basis of the lender liability principle be clarified in order for it to be justified. The underpinning thought is that lending institutions are not so remote from the consequences of their decisions. This is even more so in environmental matters where it is everyone's obligation to safeguard the environment.[21] Lending institutions are also generally regarded to be financially capacitated and able to influence and change different spheres.

Environmental due diligence assesses the potential environmental liabilities that may affect the lender, and the collateral if it is provided.[22] This is important because if the lender incurs unexpected environmental liabilities, these might cause further financial obligations which may impair the continuance of his business and affect the lenders ability to repay the loan. The environmental liabilities may provide further risks to the

---

19 Harvis *Lender Liability, Environmental Risk and Debt* 2.

20 Harvis *Lender Liability, Environmental Risk and Debt* 2.

21 Internet Encyclopaedia of Philosophy Environmental Ethics date unknown http://www.iep.utm.edu/envi-eth/. This is underpinned by considerations of environmental ethics and the consideration that, we as human beings, will perish if we do not constrain our actions towards nature. Therefore we have an obligation to have regard to it both for our sake and that of our fellow human beings.

22 Ginter *Sound Environmental Policies* 12.

lender if they are found on the collateral land. The environmental due diligence process is therefore an extremely handy tool as it has the ability to discover or project these risks, coincidentally protecting the lender, borrower and the environment.

### *2.2 Who is a lender?*

A lender has been defined, amongst others, as a credit provider.[23] For purposes of this study the definition shall be limited to a financial institution, created and regulated by the governing legislation of the country in question.[24] This discussion will therefore use the terms "lender", "lending institution", "financial institutions" and "banks" interchangeably as is most appropriate.

### *2.3 Lender liability - a principle, doctrine or a body of law?*

Authors on lender liability use the terms principle, doctrine and body of law interchangeably to describe lender liability which creates a chasm as to the exact status of lender liability and makes it difficult to ascertain whether it is a principle or a doctrine. It is therefore essential for this study to determine its exact nature, by interrogating the different legal interpretations of a principle, a doctrine and a body of law.

> "A principle is a law or rule that has to be, or usually is to be followed, or can be desirably followed, or is an inevitable consequence of something, such as the laws observed in nature or the way that a system is constructed."[25]

Lender liability as a principle has persuasive authority especially in environmental law, with its roots in the PPP. Environmental law is unique in its ability to have a principle within a principle, and in that sense, some aspects of the notion of lender liability make it a principle.

On the other hand, a legal doctrine is

---

23 Further defined as a lender under a secured loan in s 1 of the *National Credit Act* 34 of 2005.

24 For South Africa this would be the *Banks Act* 94 of 1990 or a "mutual bank" as defined in the *Mutual Banks Act* 124 of 1993, or any other financial institution that is similarly licensed and authorised to conduct business and take deposits from the public, in terms of any national legislation.

25 Guido 1994 *Annual Survey of International & Comparative Law* 25.

> "…a framework set of rules, procedural steps, or test, often established through precedent in the common law, through which judgments can be determined in a given legal case".[26]

The lender liability consists of a large number of theories, for example, the good faith theory,[27] which ultimately qualifies it to be a doctrine. A body of law on the other hand is an organized and systematic collection of rules of jurisprudence, for instance, the body of the civil law, or *corpus juris civilis.*[28] Lender liability has gained acceptance as a substantive body of law[29] because it comprises of principles and theories alike. It did not exist as a separate body of substantive law prior to the enactment of the CERCLA in 1980. Lender liability was first recognised in a US District court in 1984 but subsequent decisions transformed the original theory.[30] It therefore started off as a principle and only became a substantive body of law after codification and court interpretation in the USA. For purposes of this study, its application as a principle under CERCLA will be interrogated.[31]

In countries like Brazil and South Africa, lender liability is not recognised as a principle either in law or in jurisprudence. The absence of direct statutory regulation holding lenders accountable for the consequences of their lending does not mean that lenders cannot be held accountable for the environmental harm or pollution caused by their borrowers.[32] They can be held liable under various theories and principles of law, and it is this amalgamated body of theories and principles that is termed "lender liability".

Lender liability therefore refers to the body of law amalgamated from an assortment of liability theories based on contract, delict and statute.[33] It exists where with the granting or extending of a loan the environmental liability of the borrower potentially

---

26 Emerson et al 2006 *Northwestern University Law Review* 3.
27 Mannino *New Developments in Lender Liability: Theories of Lender Liability* 3.
28 Black's Law Dictionary date unknown http://thelawdictionary.org/body-of-laws/.
29 Lender liability 2009 www.klehr.com/.../lawarticles/outline%20of%20lender%20liability.pdf
30 Joel 1991 *ELR* 10464
31 Joel 1991 *ELR* 10465. In the US lender liability was taken seriously by banks, businesses and the government which made it virtually impossible to get a loan without an environmental audit done first and agreeing to a number of conditions aimed at protecting the lender. The American Bankers Association in 1990 estimated that this principle resulted in changes in lending practices in nearly 75% of all the banks.
32 Plato 2009 www.researchgate.net/.../233666499_Lenders'_liability_for_e.
33 Giang *et al Lender Liability- Taking Stock in an Uncertain Time* 1.

becomes that of the lender.[34] It is therefore simply put the lenders exposure to its borrower's environmental liabilities.[35]

The collective element that unites these theories is that they are asserted against lenders.[36] Causes under these theories may arise when action that has been taken or not taken by a lender in relation to a loan, directly or indirectly results in loss to a borrower or a third party.[37] For purposes of this study, the loss under consideration is environmental.

### *2.4 Grounds under which the lender can be held liable*

The owner of a project (or the borrower) is obviously liable for the pollution that they cause, but it is the lender who, although seemingly unrelated, is the fuel to the project, and therefore making the damage a reality.[38] The simple act of lending is incapable of making the lender liable; [39] liability of the lender only arises if he lent money, causing or knowingly permitting the pollution to occur or when the lender assumes the position of the borrower, or when he exercises some sort of control over the project.[40] Although there are these numerous and vast conditions it should always be remembered that the act of lending money involves a bank applying its mind to the information before it and considering its risks, before making a decision to lend. It is this thought that is perhaps most repugnant to environmentalists that the environment comes second to financial considerations.[41]

---

34 Cotzee *Sustainability-Environmental Risks and Legal Liabilities of South African Banks* 60.

35 Lenders Liability Risks date unknown http://www.wib.org/publications__resources/directors_resources/directors_digest/2012/jul12/bahr.html#sthash.g4lI7Too.dpuf.

36 Giang *et al Taking Stock in an Uncertain Time* 1.

37 Giang *et al Taking Stock in an Uncertain Time* 1.

38 If he pollutes under the polluter pays principle; Silva 2013 *CEPMLP* 1.

39 This work will tirelessly try to disprove this ideal.

40 Silva 2013 *CEPMLP* 1.

41 The concept of sustainable development prescribes that there should be a balance of these interests, but in the banks economic considerations come first.

## *2.5 Environmental risks*

There is no unanimity to the definition of environmental risks. However, it is basically a threat that exhibits scientific uncertainty, irreversibility, and latency of effects and low probability of a catastrophic outcome.[42] For purposes of this study, an environmental risk is defined as a financial risk that has the potential of affecting the time present value of a loan portfolio.[43]

The essential requirement for avoiding liability is understanding the risks involved in the transaction. The lender needs to know, prior to lending, the potential environmental liabilities that the borrower might incur and the nature and value of the borrower's assets, particularly any intended securities, and the effect and potential effect on those assets.[44] For most banks, the environment is more likely to be a threat than an opportunity for profitable business lending. In this regard a widespread opinion is that the primary basis for incorporating environmental considerations into bank lending decisions is risk management.[45] Essentially, the decision to lend is facilitated by knowing the borrower and the related liabilities of the transaction; because the decision to lend is compelled by the need to make profit.

At common law there is no duty upon a bank to advise or warn a customer of the risks attendant upon something which the customer wishes to do but[46] inasmuch as lenders' obligations are to the shareholders and clients, environmental concerns are universal in nature and banks are expected to do their part. The thrust of this study is that banks should go the extra mile and consider environmental risks as real financial risk in the contract. There are two types of environmental risks which are liability risk and credit risk.

---

42 Thompson 1998 *International Journal of Banking* 129.

43 Thompson 1998 *International Journal of Banking* 129; Environmental risks are run at 4 stages of the contract, at the initial loan giving stage, the running stage, foreclosure and at the closure or decommissioning stage.

44 Silva 2013 *CEPMLP* 7-8.

45 Thompson 2004 *The British Accounting Review* 200.

46 *Redmond v Allied Irish Bank* P1c [1987] F.L.R. 307 367.

### *2.5.1 Liability risk or direct risk*

This is the possibility of the lender being held liable to pay a fine, clean-up cost and compensate an affected party.[47] It is possible under this risk that a lender may incur direct legal liability for cleaning up the contamination caused by an insolvent borrower.[48] Such direct risk places an obligation on the lender to do an environmental risk assessment before lending.[49] The probability of a bank being held directly liable is low since this is usually avoidable with foresight and the providing of appropriate and timely care.

This kind of a risk can be attracted when a lender wants to foreclose on a security that has been polluted.[50] Since foreclosure laws and regulations differ according to jurisdictions, it is concluded that those with stricter environmental laws pose a greater risk of liability to lenders.

#### 2.5.1.1 Foreclosure and due diligence

Foreclosure is a legal process in which a lender attempts to recover the balance of a loan from a borrower that has stopped making payments, by forcing the sale of the asset used as the collateral for the loan.[51] A lender that has made a loan on property that is subject to potential environmental liability may have the liability extended to them in the form of clean-up costs.[52] There is a further risk that when a property has

---

47 Silva 2013 *CEPMLP* 5.

48 Thompson 1998 *International Journal of Banking* 129.

49 Barclays date unknown http://www.home.barclays/citizenship/the-way-we-do business/sustainability-risk-in-lending.html. In the Barclays group, the assessment of the history of a piece of land and its potential for environmental contamination is said to ensure that any potential environmental degradation is reflected in the value ascribed to that security. It identifies potential liabilities which may be incurred by the Bank, if realisation of the security was to become a possibility. A tool named the Barclays Siteguard is used to assess the commercial history of a piece of land and its potential for contamination, as well as the operational implications of a business site's current or intended commercial use. Appropriate cases are referred to Environmental Risk Management (a department in the bank) for review. "In 2014, 4,277 commercial properties were screened using Siteguard with 1,397 cases referred. Lending managers also have access to a dedicated intranet which provides comprehensive information and guidance on managing environmental risk factors".

50 *Lusk v First Century Bank*, 2012 W. Va. LEXIS 241 (Sup. Ct. 4/27/12).

51 Timiraos et al *Wall Street Journal*. 44.

52 Taylor *Environmental Issues* 44.

been declared contaminated it loses value, and in some instances can become worthless.[53]

#### 2.5.1.2 Due Diligence

If contaminated property is used to secure a loan it can pose numerous problems for both the borrower and lender, which is why most banks regularly screen properties given as collateral for pollution as part of their "underwriting process".[54] Environmental due diligence is important during foreclosure, because, as an owner[55], the bank can be held liable for clean-up, unless it takes measures to protect itself.[56] If a bank takes collateral which is contaminated, at foreclosure it might face a loss under two circumstances; firstly, it might be forced to discount the property in order to get a buyer secondly, it might be required to rehabilitate before it sells the land. In both cases the bank will incur a financial loss.

### *2.5.2 Credit or indirect risk*

This is an indirect consequence in that environmental non-compliance may affect the borrower's ability to service their debt.[57] It exists where the borrower engages in an activity that damages the environment, and the subsequent escalation of costs or

---

53 Ezovski date unknown http://www.orms.com/docs/ORMS.Environmental_&_Foreclosures.ICBA.pdf. In 450 BC, Socrates the Greek philosopher said "there is only one good, knowledge, and one evil, ignorance". Two thousand years later, U.S. financier Warren Buffet said, "In the business world, the rear view mirror is always clearer than the windshield". In line with these two thought, it is argued that lenders that have unknowingly foreclosed on contaminated property and incurred financial losses resulting therefrom will surely agree with both sentiments.

54 Lender Underwriting date unknown http://www.rd.usda.gov/files/3565-1chapter03.pdf."The underwriting of a loan is the process by which the lender determines whether the loan is a good investment of capital. The process involves a simultaneous analysis of the creditworthiness of the borrower and the economic value of the property as an income-producing investment. If the borrower is creditworthy and the property has sufficient value under existing market conditions, the lender can enter into the loan with reasonable confidence that the investment will be a good one."

55 The law on foreclosure varies by jurisdiction. In other jurisdictions the lender becomes the owner of the property, while in others like South Africa, ownership does not pass to the lender. Where ownership passes, the risks are higher.

56 Ezovski date unknown http://www.orms.com/docs/ORMS.Environmental_&_Foreclosures.ICBA.pdf; Ginter *Sound Environmental Policies* 12. The most important function of due diligence therefore, is knowing, and it is the only protection of a banker from liability. This includes knowing the present risks, knowing the responsible person to address those risks, having the requisite knowledge to mitigate those risks and finally, simply knowing what needs to be done and when it needs to be done. Knowing in the end is the ultimate weapon that will protect the lender.

57 Silva 2013 *CEPMLP* 7-8.

reduction of revenue.[58] For example, costs may escalate as a result of complying with regulations, fines for non-compliance, costs of remediating a polluted site, and revenue may be lost due to damaged reputation.[59] These "financial" penalties will impair the borrower's profitability and cash flow, decreasing its ability to repay the loan thus, increasing the risk to the lender. It can also include the situation where the value of the security is impaired either by contamination or environmental regulations restricting the use of these assets. If the land taken as collateral is the one contaminated, remediation costs may reduce its market value.[60]

The importance of these risks, if clearly understood by the lender and are avoided, coincidentally achieve environmental protection.[61] It is therefore important to have strong environmental laws that are capable of forcing the lender to consider these risks not just as potential but as real risks. The business of lending institutions is primarily lending for the purposes of making profit as such conserving the environment has always been a secondary and least important consideration. Concepts such as sustainable development seek to make changes to this archaic perspective.

### *2.6 Sustainable development and green banking or financing*

The term, sustainable development (SD), was made popular in "Our Common Future", a report published by the World Commission on Environment and Development in 1987.[62] This study shall work with the definition by the European Community[63] which states that SD is a

---

58 Thompson 1998 *International Journal of Banking* 130.

59 Thompson 1998 *International Journal of Banking* 130.

60 Silva 2013 *CEPMLP* 5.

61 Barclays Bank in its Sustainability Risk in lending report stated that the bank has developed a series of environmental risk briefing notes in order to avoid this risk. The notes cover 10 broad industry headings which include agriculture, fisheries, oil, gas, mining, metals and waste management. These briefing notes are available to the public and they outline and guide the nature of the environmental and social risks that are considered, and the factors which mitigate those risks. Barclays Bank PLC date unknown https://www.home.barclays/citizenship/the-way-we-do-business/sustainability-risk-in-lending.html

62 Also known as the *"Brundtland Report"* Our Common Future included the most used definition of sustainable development: which is "development which meets the needs of the present without compromising the ability of future generations to meet their own needs".

> "Process of development which leaves at least the same amount of capital, natural and man-made, to future generations as current generations have access to".

This definition makes it clear that SD is about capital allocation, an area of competence for lenders. In the *Gabchicovo-Nagymoros*[64] case, the ICJ held that the concept of sustainable development requires integration of ecological considerations into all aspects of decision making including, presumably, financial markets. This is because lenders can influence the consumer's (in this case the borrower's) behaviour heavily through the financial products they offer.[65]

Today, many banks are aware of the risk of losing their good reputation and customer's in future if they carry on ignoring their environmental and social footprints. Many banks have therefore started to represent environment-friendly financial products. Most lenders have adjusted their businesses in line with the notion of sustainable development.[66] There is also a phenomenon called "green banking", which mainly concentrates on socio-economic and environmental factors of banking intending to protect the environment and conserve natural resources.[67]

Worldwide acknowledgment of the significance of the environment for lenders, banks in particular, came when a substantial number of banks from around the world signed the United Nations Environmental Programmes "Statement by Banks on the Environment and Sustainable Development".[68] The statement was an acknowledgement that banks have a significant part to play in achieving sustainable development hence signatories

---

63 European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development *The Role of the Financial Institutions In Achieving Sustainable Development* 1.

64 1997 I.C.J. 7, reprinted in 37 I.L.M. 162 (1998)

65 The preamble of the Equator Principles states that, "Signatory banks recognize that our role as financiers affords us significant opportunities to promote responsible environmental stewardship and socially responsible development"; Kaya 2010 *İşletme Araştırmaları Dergisi* 76. SD became a substitute for the reckless economic development that had become rampant by the 1970's. Awareness of sustainable development was however been slow to penetrate the financial sector (especially the lending segment) because it generally regarded itself as an environmentally friendly sector.

66 Kaya 2010 *İşletme Araştırmaları Dergisi* 76. These are also known as ethical, sustainable and alternatively social banks.

67 Kaya 2010 *İşletme Araştırmaları Dergisi* 136.

68 UNEP 1992.

undertook to ensure that their policies and business actions promote it. More precisely, it committed signatories to pursue common principles of environmental protection by using best practices of environmental management in their internal operations and integrate environmental risks into their checklist for risk assessment and management. To this end, the Equator Principles were developed based on the principle of sustainability.

### *2.6.1 The Equator Principles*

On June 4, 2003, ten of the most prominent banks from seven countries announced their adoption of the "Equator Principles" (EPs). The Principles set out guidelines on the management of social and environmental risks that banks voluntarily commit to follow when financing a project. They set standards for determining, considering and managing social and environmental risk in project financing. They apply to projects of more than US$10 million capital costs across all industry sectors[69] and are regarded the lenders "gold standard" for sustainable project finance.[70]

The banks that adhere to these standards commit to refusing loans for projects in which the borrower has not or is unable to comply with the required social and environmental policies and procedures that implement the EPs.[71] The principles have therefore become the acceptable standard for assessing and managing environmental and social risk in project financings. This common framework has improved consistency and accelerated momentum in approach and application in environmental management

---

69 They involve the financing of massive development projects worldwide which inevitably have environmental and social implications attached thereto.

70 Equator principles date unknown http://naturalresourcecharter.org/sites/default/files/AbouttheEquatorPrinciples.pdf. "Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements". In project financing the lender is paid solely or almost exclusively out of the money generated by the project, for example by the electricity sold by the financed power plant. The borrower is usually an SPE (Special Purpose Entity) that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets; Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards ("Basel II"), November 2005. http://www.bis.org/publ/bcbs118.pdf.

71 Equator principles date unknown http://naturalresourcecharter.org/sites/default/files/AbouttheEquatorPrinciples.pdf.

within the project finance industry globally, including development and application of broad environmental and policies.[72]

Under the EP, borrowers are obliged to do a Socio-Environmental Assessment[73] for any proposed project. The projects are then categorised into either high, medium or low environmental and social risk, using the IFC's categorisation process which applies across all industry sectors.[74] These categories are: Category A –which represents projects with substantial potential adverse effects which are diverse, irreversible or unprecedented social or environmental impacts; Category B –encompasses projects with limited potential adverse social or environmental impacts which are generally site-specific, and can be reversed by mitigatory measures; and Category C –encompasses projects with minimal to no social or environmental impacts. Category "A" or "B" projects undertaken in non-OECD countries or non-high income countries, borrowers are required to establish a Social and Environmental Management System.[75] For projects that impact the affected communities negatively, a free, prior and informed consultation process is a prerequisite. A grievance mechanism should be established to address and resolve community concerns, complaints and to basically ensure disclosure and community engagement continues throughout construction and operation of the project.[76] The EP's require categorisation into A or B Categories be independently reviewed.

---

72 Equator principles above.

73 Equator principles, June 2006 http://www.equator-principles.com/. A Social and Environmental Assessment is a process that determines the social and environmental impacts and risks (including labour, health, and safety) of a proposed project in its area of influence. For the purposes of Equator Principles compliance, this will be an adequate, accurate and objective evaluation and presentation of the issues, whether prepared by the borrower, consultants or external experts. Depending on the nature and scale of the project, the assessment document may comprise a full-scale social and environmental impact assessment, a limited or focused environmental or social assessment (e.g. audit), or straight-forward application of environmental siting, pollution standards, design criteria, or construction standards.

74 Equator principles date unknown http://naturalresourcecharter.org/sites/default/files/AbouttheEquatorPrinciples.pdf.

75 Equator Principles date unknown http://naturalresourcecharter.org/sites/default/files/AbouttheEquatorPrinciples.pdf.

76 Equator Principles date unknown http://naturalresourcecharter.org/sites/default/files/AbouttheEquatorPrinciples.pdf.

### *2.6.2 ISO 14001:2015*

These are voluntary standards which require an organisation to adopt an environmental management system that it can use to enhance its environmental performance, by managing its environmental liabilities in a systematic manner to achieve sustainability.[77] ISO 14001 belong to the series of ISO 14000 environmental management certification which "provide a framework for the development of both the system and the supporting audit program". ISO 14001 "specifies the actual requirements for an environmental management system and it applies to those environmental aspects that the organization has control over and which it can be expected to have influence on." Implementing such an environmental management system is very expensive but the advantages in the long run are immense.[78]

As well-grounded as these voluntary standards are, the crux of the matter is that they are voluntary. NGOs have always complained that they are not being implemented consistently and some projects which have extremely negative environmental impacts have been funded without the necessary safeguards.[79] On the other hand, the principles themselves are not a sufficient force to align the banks' commercial interest with the environmental concerns.[80]

Adherence to sustainable development in the financial sector is therefore voluntary such that it is doubtful whether it is enough to align the commercial interests of lenders with the requirements of sustainable development.[81] It is submitted that these voluntary standards only mandate banks to take into consideration environmental risks to the

---

77 ISO 14001:2015 2015 www.iso.org/iso/catalogue_details?csnumber=60857

78 ISO 2015 http://www.iso14000.com/FAQs.htm#FAQ12. The advantages according to ISO include the following, "Improved perception of the key environmental issues by their employees and a better (greener) public image of the organization; an increase in the efficiency and use of energy and raw materials (less waste); an improved ability to meet compliance with environmental regulations; and dependence on a system rather than just the experience and capabilities of an individual to manage the environmental function of an organization".

79 Telos 2004 www.telos.nl/Publicaties/.../downloads_getfilem.aspx?id=180263. For example, the Baku-Tbilisi-Ceyhan (BTC) oil pipeline that goes through three countries (Azerbaijan, Georgia and Turkey) and should lead to large socioeconomic benefits in the region. However, several NGOs have had doubts about the environmental and social impact of the project on the region.

80 Discussed under credit risks above.

81 Amalric 2005 https://www.nachhaltigkeit.info/media/1317385761phpOHcawW.pdf

extent that they impact the project, thus becoming credit risks, but disregarding the overall environmental impact. These voluntary standards are also only available to screen projects for social and environmental risks such that they make limited contribution to the achievement of sustainable development. This is because the national laws in the countries in which the projects are realised have to be on par with these standards.[82]

### *2.6.3 Transferability of environmental liability.*

Although an extremely important subject matter in this discussion, it is not applicable to the jurisdictions researched in this study. It should however suffice to give an overview of the concept in order to paint a holistic picture. It seeks to question whether after the lender has attracted to himself environmental liability he can then transfer that liability legally, just like any other duty. Transferability is statutorily regulated and its terms and conditions vary depending on the specific jurisdiction. In most jurisdictions, relying on the PPP makes transferability impossible.[83]

## ***2.7 Relevant environmental law principles***

A principle is defined as a general truth, which guides our actions, serving as a theoretical basis for the various acts of our life, and the application of which results in a predefined consequence.[84] It can also be defined as a reason that argues in one direction, but does not oblige a particular decision, ultimately if a principle is said to be a principle of law; it means that an official must take it into account, if it is relevant, as

---

82 In developing countries especially, their notion of sustainable development places more emphasis on economic rather than environmental issues.

83 Environmental Compliance Insider date unknown http://environmentalcomplianceinsider.com/topstories/liability-for-contaminated-land-can-a-company-wash-its-hands-of-environmental-liability-for-land-it-sells. In those jurisdictions that recognise transferability it is only possible when the seller meets certain conditions, the conditions are that, it must be in explicit terms that the land is being sold "as is" and that the buyer is assuming all environmental risks. There should therefore be an understanding of a general *voestoots* clause. Secondly, the seller must not make any false assurances about the condition of the property intending to and inducing the buyer to enter into the deal on the seller's terms. Ideally the seller should give the buyer a chance to assess the property;lastly the buyer must be sophisticated enough to understand what he is getting himself into.

84 *Gentini* case (*Italy v. Venezuela*) M.C.C. (1903); B. Cheng *General Principles of Law as applied by International Courts and Tribunals* 376.

a consideration.[85] If reference is made to the application of principles of law in adjudication, it can be concluded that they represent legal standards which are more general than commitments thus not specifying particular actions.[86]

### *2.7.1 Polluter pays principle*

The PPP states that whoever is responsible for damage to the environment should bear the costs associated with it - therefore the proposition that those who cause damage or harm to others should "pay" for those damages. The principle appeals directly to our sense of justice.[87]

Identifying the actual polluter is the problem. The PPP needs to answer four questions: What is it that constitutes pollution? Who are the contemplated polluters? How much must the said polluters pay? To whom should they make the payment?[88]

To answer these questions, pollution is defined as any by-product that harms or violates the property rights of others.[89] The contemplated polluter would be a person, company, or organisation whose activities are generating the pollution. And finally, payment should be equal to the damage caused and it should be paid to the person or persons harmed or being harmed.[90]

According to the principle, inanimate objects and the environment do not incur costs, people do. It does not only consider the damage to physical property, but extends to encompass the interests of the owner. Therefore polluters are those who "damage" or impose "costs" on the environment.[91]

---

85 Sands *Principles of International Law* 233.
86 Bodansky 1993 *Yale Journal of International Law* 501.
87 Cordato date unknown https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/8241.pdf.
88 Cordato date unknown https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/8241.pdf page 4.
89 Brain Share date unknown learn.brainshare.ug/book/download/the-polluter-pays-principle.
90 Cordato date unknown https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/8241.pdf page 7.
91 Unknown *The polluter pays principle* date unknown iret.org/pub/SCRE-6.PDF.

A "polluter" can also be defined, not as somebody who is harming others, but as one who is using his property and resources in a way that is not conservatory.[92] In this case there are no victims to compensate and the amount to be paid is therefore determined by the extent to which it will deter the disfavoured activity. The payment contemplated (whether there are real victims or not) naturally goes to the government as tax. In this instance, the PPP is used to promote an environmental agenda more than simply ensuring that real polluters pay compensation to their victims. This is also in line with the sustainable development concept that there should be conservation for future generations; therefore the government through the principle of public trust ensures that the environment is protected for future generations

The PPP also serves to steer the conduct of potential polluters such as lenders,[93] although elements of wrongfulness are crucial in the expansion of liability.[94]

### *2.7.2 Precautionary principle*

The precautionary principle has four central components: taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions; and increasing public participation in decision making.[95] It is applicable when an activity raises threats of harm to human health or the environment. Precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.[96] This encourages policies that protect human health and the environment in the face of uncertain risks.

This principle is most realised in legislation that seeks to hold the lender liable because it anticipates and tries to avoid environmental damage before it occurs. It is a

---

92 Unknown *The polluter pays principle* date unknown iret.org/pub/SCRE-6.PDF.
93 Soltau 1999 *SAJELP* 38.
94 Wrongfulness is discussed below in 2.8.2
95 Kriebel et al 2001 *Environ Health Perspective* 874.
96 SEHN *The Networker Vol 3 No 1* www.sehn.org/Volume_3-1.html.

preventive measure, which would in due course serve to lower mitigation costs of environmental damage.[97]

## *2.8 Relevant theories of environmental harm*

A legal theory is a principle under which a litigant proceeds, or bases its claims or defences in a case. It can also be the law or a body of rules of conduct which have binding legal force and effect, prescribed, recognised, and enforced in a jurisdiction.[98]

The relevant theories for this discussion would be under delict, in the form of the negligence theory, good faith and the instrumentality theory. The purpose of discussing these theories is that they can be used by a litigant as a basis for a claim against the lender.

### *2.8.1 The instrumentality or control theory*

This theory exists were the lender exercises such control over the day to day operations of the borrower, that he essentially makes decisions for the borrower. It has also been termed the joint, direct venture or partnership liability theory.[99] This is not to say that by the mere lending and monitoring, liability would be invoked. The agency principle reasons that the amount of control should not be tantamount to making the lender the borrower or to making the borrower an agent of the lender[100] or for the relationship to look like a partnership.[101] The different roles which should substantially remain clear and separate in this case become so intertwined that the lender essentially becomes the borrower by controlling the latter's assets, stock and cash.[102]

---

97 Stevens 2002 *Sustainable Development Law and Policy* 13-15.
98 USLEGAL.COM 2015 http://definitions.uslegal.com/l/legal-theory/.
99 Stanley *Lender Liability* 10.
100 O'Donovan *Lender Liability* 7.
101 Eugene date unknown http://www.sheppardmullin.com/media/article/713_Lender%20Liability%20Article%20-%20Eugene%20Kim.pdf. The lender is liable to borrower and third parties because of the control it exercises over the borrower's day to day operations.
102 Eugene date unknown http://www.sheppardmullin.com/media/article/713_Lender%20Liability%20Article%20-%20Eugene%20Kim.pdf

### *2.8.2 Good faith*

A party to a contract keeps good faith by not doing anything that would deprive the other of the benefit of the deal.[103] Good faith performance requires cooperation on the part of one party to the contract so that the other party will not be deprived of his reasonable expectation.[104] It is not a new phenomenon in South African law but with specific reference to lender liability it is unclear how far the principle is relevant. On one hand, there is the common law principle that a bank has no duty to warn or advise a customer concerning the risks attendant upon something that the customer wishes to do, while on the other there is the new common law duty created by the Canadian Supreme Court in 2014. In *Bhasin v Hrynew*[105] that parties must generally perform their contractual obligations honestly and reasonably and not precariously or arbitrarily. It is clear that the failure to warn the borrower of possible risks is in itself a dishonest discharge of the lender's duties.

In environmental law, this duty is even more illuminated by the fact that it is everyone's duty to protect the environment,[106] and for the banks as lenders, there is no better way to discharge this duty than to advise a borrower of the potential environmental risks.

#### 2.8.2.1 Duty of care

It is generally accepted that there is a duty of care on the bank, especially when dealing with the affairs of the client. The standard of care against which this conduct has to be measured is that which may reasonably be expected of a person engaged in that profession. In coming to a decision as to whether this duty has been dispensed with, it is critical to look at the particular circumstances of the case.[107]

---

103 Matthew *La.L.Rev* 1182.
104 Matthew *La.L.Rev* 1184.
105 *Bhasin v Hrynew* 2014 SCC 71.
106 Beyerlyn *et al International Environmental Law* 33.
107 Malan *Bills, Cheques and Promissory Notes* 440-441, For example a huge lender like the World Bank, with the relevant resources to do a thorough background check of its client, evaluate the environmental impacts of the clients and make an informed decision of whether or not to do business with that client obviously owes a greater duty than a backyard lender.

Although there is a general rule that the lender does not owe the borrower any more duties than is conventionally required of him,[108] the implication of the failure to disclose the environmental risks to the client is in itself negligent, in a purely environmental sense. This assertion should be understood in the context that the lender, like everyone else, has a duty to protect the environment which can be discharged by informing the borrower of the potential environmental risks of their project.

In South African law, the requirements for a delict are, *inter alia*, negligence and wrongfulness (sometimes called unlawfulness). The existence of the duty of care is used to establish wrongfulness under the circumstances discussed below.

### *2.8.1 Negligence*

Negligence is underpinned with the requirement that a plaintiff must show that the lender owed him a duty of care, that the lender breached that duty and potentially caused the plaintiff injury.[109] This is a direct environmental risk in that the lender can be sued by the government or third parties for negligence.

In South Africa negligence, is not *per se* inherently unlawful, that is to say, it is unlawful only if it occurs under circumstances that the law recognises it as unlawful. It is only where the negligence manifests itself in a positive act causing physical harm that it is presumed to be unlawful, but it is different in the case of a negligent omission. A negligent omission is only unlawful if it occurs in situations that the law regards as appropriate to give rise to a legal duty to avoid negligently causing harm.[110]

---

108 Eugene http://www.sheppardmullin.com/media/article/713_Lender%20Liability%20Article%20-%20Eugene%20Kim.pdf page 5.

109 Eugene *Lender Liability Taking Stock in an Uncertain Time* 4.

110 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.

### *2.8.2 Wrongfulness*[111]

Conduct is labelled as wrongful if it offends the *boni mores* of a society.[112] In determining "*boni mores"* concepts such as reasonableness, foreseeability, duty of care, harm, public policy and so forth come into play.[113] There is, however, one golden thread which runs through all pronouncements that is, conduct which is *contra bonos mores* and therefore unlawful, is vested in the legal convictions of society.[114] The philosophical and jurisprudential ratio for this criterion of wrongfulness is that from time immemorial, society recognised that it is unable to function in an orderly and harmonious manner unless its members adhere to a certain code of conduct which prevents harm to each other.[115]

In *Minister van Polisie v Ewels*[116] the (then) Appellate Division recognised that wrongfulness is also found in circumstances where the legal convictions of the community require a legal duty to protect others from injury, and not only when there was a negative duty to avoid causing injury. There is no doubt that not only is the concept of wrongfulness an essential, but also a completely separate element of liability, which is rooted in the legal convictions of the society. In discussing wrongfulness it is important to take into account the community's attitude towards a

---

111 McKerron *The Law of Delict* 14. In Roman-Dutch law a distinction between *commissio* and *omissio* was drawn to determine wrongfulness. Roman law did not recognize omissio as wrongful Roman-Dutch Law only regarded *omissio* as wrongful when there was a negative duty to avoid causing injury to others, and not a positive duty to shield others from injury.

112 McKerron *The Law of Delict* 14: There is need to ascertain the prevailing legal convictions of the community in which the principle is to be applied as norms, values and legal convictions differ substantially from place to place and also from time to time. *Strydom v Strecker and another* (3037/2012) [2015] ZAGPPHC 631 (10 September 2015) para 28-30. Thirdly, the legal convictions are required to be worthy of legal protection. Finally, the legal convictions of any community must by necessary implication also be informed by the values and norms of our society as embodied in the Constitution.

113 *Rose Lillian Judd Nelson v Mandela Bay Municipality* Case No. 149/2010 (unreported) para 14; the list is endless and leaves the reader bewildered and confused.

114 *Rose Lillian Judd Nelson v Mandela Bay Municipality* para 14.

115 *Rose Lillian Judd Nelson v Mandela Bay Municipality* para 15. Whilst a breach of such code of conduct is in certain circumstances regarded as merely unethical or immoral, there are other circumstances where a particular breach is regarded as unlawful or wrongful, and which warrants legal interference and protection. Unlawful conduct falls under the latter category, and it is rooted in the legal convictions of the community.

116 *Minister van Polisie v Ewels* 1975 (3) 590(A) 596H-597G.

particular societal obligations or duties. Such attitudes are however in a constant state of flux and vary from time to time.

The cumulative effect of the authorities referred to in the above overview suggests that this study should establish the following elements of wrongfulness First, whether the legal convictions of the community are established as the criterion for wrongfulness in all cases of delict.[117] This requires a consideration of whether the conduct of banks that irresponsibly lend money for activities that cause damage to the environment is wrongful in the eyes of the society. The conditions and the sensitivities of each society vary from that of the next.

Nevertheless, it should be highlighted at this juncture that these considerations are tedious and jurisprudential with their ambit and scope far wider than this research. It is therefore simply concluded that developing countries lean more towards development at the expense of environmental considerations.

For purposes of this research therefore, the applicable laws and voluntary standards adhered to shall be taken to be the moral conscience of the society, and that of banks in particular, since they are not legally obligation to adhere to these standards.

## *2.9 Practical implications of the decision to lend*

After considering Jaris and Fordham's[118] observation that banks do not pollute rivers, it is essential to delve into a discussion of why a lender should be liable for environmental damage. First and foremost, it should be appreciated that Jaris and Fordhams' observations follow a limited approach because they are not taking a holistic view of the problem. A life-cycle or a cradle-to-grave approach is required to see the obvious.[119] Although the work of banks can be classified as "clean" with respect to the

---

117 *Rose Lillian Judd v Nelson Mandela Bay Municipality* para 26.

118 Jaris *et al Lender Liability Environmental Risk and Debt* 2.

119 Study.com date unknown http://study.com/academy/lesson/cradle-to-grave-definition-analysis-approach.html. The cradle is where you start life and of course the grave is where you end it. The term "cradle to grave" means from the beginning to the end. In this case it is used in reference to a lenders perspective on the environmental impact created by his product or lending and the life cycle which it will fuel.

environment, it is the effect of their work that is the major cause of pollution, and without positive steps to trace back to them in the chain of causation, banks will continue to be free environmental liability.[120]

The sole purpose of a bank is to make profit but it is inexcusable that it should make this profit at whatever costs. If by its provision of funds it enables the pollution to continue, then it follows that it should not benefit from its own wrongdoings and should be held liable for the pollution. In a sense these banks can be viewed as facilitators of industrial activity which causes environmental damage.

The environmentalist point of view, that one cannot use his own resources to the detriment of the environment is a crucial philosophical world outlook because it poses a direct threat to the lender. Lenders have "deep pockets" and if a clean-up is required they are able to finance it,[121] why then should they be allowed to walk scot free when they have contributed to the detrimental use of the environment, a resource held in trust for mankind.

### *2.10 Conclusion*

It is the contention of this chapter that, having analysed all the potential means by which a lender can be held liable for environmental harm, it all boils down to the fact that the bank has the chance of obtaining, by proper enquiry, the type of information that may put it on guard.[122] The lender liability principle is however a highly complex regime for which the causation must be established. For the purpose of establishing this causation, equivalent liability is said to attach "to those who acted, those who did not act when they were supposed to, those who did not care about others' actions, those who financed what others did and those who benefited from what others did".[123] On the other hand, there is the proposition that a bank cannot be held liable merely

---

120 Qu 2010 ccsenet.org/journal/index.php/jpl/article/download/7192/5539.
121 Hooley 2001 *Cambridge Law Review* 405.
122 Ellinger et al *Modern Banking Law* 519.
123 Piazzon date unknown www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf.

because it has not subjected the client's business to microscopic examination nor is it expected that officials of banks should become amateur detectives.[124]

[124] Pagets *Law of Banking* 442.

# Chapter 3 Statutory interventions and limitations in other jurisdictions

## *3.1 Introduction*

The idea behind lender liability developed from the concept of socially responsible investment, which stemmed from a religious rather than an environmental basis. Religious denominations eschewed financial ties to business that was described as sinful, this included slave trade or the production of intoxicants.[125] Other scholars have traced it even earlier to Jewish law proscriptions against specified business transactions. These ideologies have been for centuries the prophetic voice outside the gates of the financial world but have since been mainstreamed by investors, viewing their attention mainly on environmental and social issues as prudent financial risks. In the modern era it gained prominence in the 1960's when the US civil rights activists appealed to institutional shareholders to use their voting powers to improve corporate policy. In 1977 the US General Board of National Council of Churches recommended that its members withdraw all funds from banks that invested in South Africa, because of apartheid.[126]

The principle of lender liability in the USA then developed as a separate body of law, by the enactment of CERCLA of 1980.[127] It is believed to have considerably influenced the development of environmental laws and further refine the relationship between a lender and a borrower in the environmental sphere. Although the USA is not the only country with explicit statutory provisions that can hold the lender liable, it is perhaps a good starting point because the principle has its roots there. There are also countries such as Brazil and South Africa, wherein the principle is non-existent, or perhaps just not recognised as such. However, these jurisdictions have statutes that are capable of making lenders liable for environmental harm. For purposes of this research, the USA is

---

125 Richardson *Socially Responsible Investment Law* 73.
126 Caroll *Socially Responsible Investment Of Public Pension Funds* 412-413.
127 Eugene http://www.sheppardmullin.com/media/article/713_Lender%20Liability%20Article%20-%20Eugene%20Kim.pdf

used to illustrate a jurisdiction with explicit statutory provisions for lender liability. Brazil is used to demonstrate the impact of the judiciary in holding the lender liable for environmental harm in a jurisdiction were lender liability is not statutorily provided for.

The importance of statutory regulation cannot be emphasised enough in this context, because in the absence of a statute, it is hard to hold a lender liable for environmental harm using the common law or from reading such liability into existing statutes. The inclusion of the lender liability in statute buttresses the position of a lender to act as an environmental police, by scrutinising borrowers to certify their compliance with environmental standards and denying loans to those who fail to meet the required standards.[128] Traditionally, this kind of policing is regarded as falling out of the mandate of a lender,[129] but environmental protection is *sui generis* in that it imposes a duty and an obligation upon all to protect the environment.[130]

### *3.1.1 Judicial activism*

Judges have always had a fundamental role in development and enforcement of effective laws for the protection of the environment. This has mainly been achieved through the adoption of principles from other jurisdictions and common law, and adapting them to acceptable levels of realism in their jurisdiction.[131] Although many of the legal problems significantly differ, the solutions are of universal application such that judges in many countries have made headway in developing environmental law. A common example is that of the Indian Supreme Court which has, since 1985, used the guarantee of the right to life under Article 21 of their *Constitution* as the basis for developing a powerful set of principles for the protection of the environment.[132] In the same way the lender liability principle has developed in the USA and in Brazil. Such

---

128 Thompson *International Journal of Bank Marketing* 243. The lender can also know the risk he faces at foreclosure.

129 Thompson *International Journal of Bank Marketing* 243.

130 Moral obligations toward the future 2000 global.oup.com/us/.../pdf/Future_Chapter.pdf. The principle of obligation states that whenever a person's free action (A) can significantly harm some person B or B's important interests, A has a conditional moral duty not to act in a way that will not harm B.

131 Carnwath 2014 *Journal of Environmental law* 1.

132 *Rural Litigation & Entitlement Kendra v State of Uttar Pradesh AIR* 1985 SC 652.

development of the law championed by the judiciary and not expressly by the legislature is termed judicial activism. As a practice, judicial activism has received much criticism, highlighting the difficulty that the court faces in its quest to manage the environment for a nation.[133]

This research raises concerns as to whether the judiciary is qualified or capacitated enough to make scientific or economic findings, or declarations of a high degree of magnitude. A good example is that of the Indian Constitutional Court which ordered that all buses in the city be converted from diesel fuel to compressed natural gas in 3 years.[134] Such an order is an assertion by the judiciary independent of consultations with the public, and has financial and socio-economic impacts. In essence, it is, on the one hand, a text book answer to a real life problem; while on the other hand, it is a necessary evil as the law is never comprehensive and clear enough to cover all possible scenarios.

It is therefore submitted that, with specific reference to lender liability which developed through judicial activism in the USA and in Brazil, it was a necessary evil.

## *3.2 United States of America*

### *3.2.1 Background and historical setting*

The lender liability principle in the USA has its roots in the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA)[135] enacted by Congress[136] in 1980. This Act basically extends liability to third parties (which would

---

133 Jackson and Rosencranz 2003 *Entl Pol'y* 91

134 Pahwa *A perspective on why delhi high court insisted that taxi aggregators run only CND-Powered vehicles 2015* www.product-life.org.

135 CERCLA overview date unknown http://www.epa.gov/superfund/policy/cercla.htm.The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress on December 11, 1980. This law created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.

136 FAQ date unknown http://www.federalcrimefaq.com/what-is-the-difference-between-federal-law-and-state-law/. It is important for a reader coming from a different jurisdiction from the USA to understand the exact equivalence of a federal law. The United States Constitution provides for a federal government that is superior to state governments in such matters as the authority to govern

include lenders) and creates a compensation fund for a quick clean-up. The provisions of the Act have resulted in liability schemes that hold any party, in a chain of property ownership, responsible for the full cost of environmental clean-up.[137] This means that any person who was a party to the pollution can be held liable.

Cases decided under this Act are numerous and confusing, therefore the precedent is wide and twisting. Lender liability cases arose in the mid-1980s, when a series of court decisions found lenders liable for enforcing repayment terms under loan agreements.[138] During this period, the courts expanded the theories that held the lenders liable and regularly awarded significant damages to plaintiffs. By the late 1980s and early 1990s some of the cumbersome theories fell away and some of the high profile cases from previous years began to be reversed.[139] Despite this curtailing development, a boom in the number of lender liability cases was experienced in the mid-1990s, partially owing to the boom of the second-lien market in which companies carrying debt loads were swollen by low-cost and stress-free money. Owing to the current economic climate, borrowers and affected third parties have once again started bringing claims against lenders under various theories, in order to maximise their recoveries and to increase their leverage on the negotiating table.

### *3.2.2 Liability under CERCLA*

CERCLA is also known as the 'superfund" and it authorises the Environmental Protection Agency (EPA) to investigate and respond to a release or threatened release of

---

international affairs, national defence, and currency-related issues. The Fourteenth Amendment to the U.S. Constitution makes the Bill of Rights applicable to each of the states. CERCLA is a federal law passed by the U.S. Congress. Federal laws are codified in the U.S. Code while state law, on the other hand, is the law that governs in each state. State laws are passed by state legislatures and signed by a state's governor. State law exists in conjunction with but can sometimes conflict with federal law.

137 Wolford 67 *Notre Dame L. Rev* 1161.

138 *K.M.C. Co. v. Irving Trust Co*. 757 F.2d 752 (6th Cir. 1985) para 35 found that a lender who terminated a loan in terms of a loan agreement could still be sued for lack of good faith if he does not notified the borrower prior to termination; *State National Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 page 667 affirmed the position in the above case by awarding against a lender who issued a threat to terminate the loan under the "change in management" provision in a bid to prevent the borrower from rehiring its former CEO.

139 *Penthouse International, Ltd. v. Dominion Federal Sav. & Loan Association* 885 F.2d 963 (2d Cir. N.Y. 1988); *Kruse v. Bank of America* 202 Cal. App. 3d 38 (1988.

hazardous substances into the environment. EPA is enabled to recover clean-up costs from parties that are liable, or potentially responsible for contamination.[140]

Under CERCLA liability and obligation for remediation of contaminated properties may attach when hazardous substances are present at the "facility",[141] the term facility includes buildings and structure amongst others.[142] The liability is strict, joint and several, covering those parties that owned, operated or were involved with hazardous substances at the facility.[143] This contemplated liability can adversely affect the borrower and loan collateral, and can even pose direct liability risk on a lender.

"Potentially responsible parties" (PRP) may avoid liability for remediation by concluding "settlement negotiations".[144] These parties are divided into four classes, namely: the current owners or operators of contaminated property: previous owners or operators of contaminated property if disposal of hazardous substances on the property occurred during such ownership or operation; persons that arranged for disposal or treatment of hazardous substances; and persons that transported hazardous substances to or from any site.

Liability under the Act is very broad such that it literally covers anyone that had anything to do with the hazardous substance,[145] and it is strict and joint. Since strict liability means that everyone that falls within one of the statutory classes of responsible parties can be held liable without regard to fault a party does not have to do any positive or negative act such as mishandling or releasing hazardous substances or

---

140 Section 107 of CERCLA defines a liable party as: "(1) the current owner and operator of a contaminated property; (2) any owner or operator at the time of disposal of any hazardous substances; (3) any person who arranged for the disposal or treatment of hazardous substances, or arranged for the transportation of hazardous substances for disposal or treatment; and (4) any person who accepts hazardous substances for transport to the property and selects the disposal site".

141 Preamble CERCLA.

142 42 U.S.C 9607 (a). The term facility means "any building, structure, installation, equipment, pipe or pipeline (including any pipe into a seer or publicly owned treatment works) well, it, and, lagoon, impoundment, ditch, landfill, storage container, moto vehicle, rolling stock, or aircraft or any sit or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located but does not include any consumer product in consumer use or any vessel'

143 Whetzel *et al* 2013 www.rlf.com/.../6992_Commercial%20Real%...

144 CERCLA Chapter 121 sec 9621 (f) 2C.

145 CERCLA Chapter 107 sec 9607, exemptions under CERCLA discussed in next heading.

violate any laws in order to become a CERCLA PRP.[146] A PRP may be responsible for the total cost of rehabilitation which includes cleaning the contaminated site, restoring the damaged natural resources and undertaking the appropriate health and environmental assessments.[147]

PRP can be held jointly and severally liable for rehabilitation[148] with costs only being apportioned where a PRP can prove that although the harm is of a singular nature, there is reasonable basis to divide liability.[149] The contemplated apportionment would be a fact-intensive enquiry, with each case depending on its facts and circumstances.[150]

A lender can potentially become liable under CERCLA by involvement in the lender's business, for example, by simply organising the transportation of hazardous material from the lender's site.

### *3.2.3 Foreclosure*

It is risky for a lender to foreclose on potentially contaminated property[151] especially if the lender takes ownership of the property as the lender may lose its protection under CERCLA's creditor exemption.[152]

Once a collateral property has been discovered to be contaminated, its value will plunge, and it will become both a financial and environmental risk to the lender. If the borrower then fails to repay the loan, the lender will have very few options. If the

---

146 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 482.
147 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 482.
148 Section 107(a)(3). CERCLA.
149 Prosser *Law of Torts* 313-314.
150 *United States v. Chem-Dyne Corp*. 572 F. Supp. 802 [(S.D. Ohio 1983)] page 808.
151 Taylor et al date unknown http://www.balch.com/files/Publication/f1011576-8ecf-458f-b099-02558c0fd0ca/Presentation/PublicationAttachment/909765c3-46c3-42e5-a06a-0246604635f0/BrelandArticle-Environmental_Issues.pdf. The obligation to remediate environmental contamination lies on all PRPs, including lenders, who might innocently foreclose on property without knowing that it is contaminated, and, in some cases, have sold it, only to learn years later that it was contaminated. In this case, the lender must share responsibility for clean-up. The laws seek to ensure remediation of all polluted sites by casting its nets wide to encompass any party that benefitted from the pollution and to deter future contamination.
152 Whetzel *et al* 2013 www.rlf.com/.../6992_Commercial%20Real%... . Lenders' environmental liability at foreclosure in the USA entails that banks take up the title of an owner. Many lenders do not want title. Title is a risk since it imparts liability to the lender for payments to vendors, premises' liabilities, and even environmental hazards.

lender chooses to foreclose and liquidate the contaminated property, the value will be very low such that only a fraction of the loan balance may be recovered.[153]

When it was initially adopted, CERCLA contained a "safe harbour" provision for secured creditors which stated that lenders that did not participate in the management of the borrower affairs were not "owners or operators" as contemplated by the law and thus were not liable under CERCLA.[154] As a result, lenders that simply held a mortgage or collateral property were not regarded as participating in the management. The courts however disagreed on the scope of the safe harbour protection, particularly whether protection continued after foreclosure,[155] especially considering that in the USA lenders become "owners" upon foreclosure.[156] It therefore remained unclear what qualified as "participating in the management".

In light of this confusion the Eleventh Circuit's *Fleet Factors* decision,[157] added flames to the fire by suggesting that lenders would be legally responsible for contaminated property simply because they financed the project.[158] On 1992, the United States Environmental Protection Agency (EPA) sought to clarify the confusion caused by this case by issuing regulations that ensured that the "mere ability to control management" would not attract liability to the lender under CERCLA.[159] This position was termed the "lender liability rules" and they aided in clarifying what qualified as "participating in management" and when exactly a lender would become an "owner" after foreclosure. In 1994, these lender liability rules were held a nullity in *Kelley v EPA*, when the court held that EPA did not have the statutory authority to restrict liability under CERCLA

---

153 Klepper date unknown https://www.lw.com/.../lender-liability-under-CERCLA.

154 42 U.S.C. § 9601(20)(E): with the term "owner or operator" defined to exclude "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."

155 *United States v. Mirabile No*. CIV. A. 84-2280, 1985 WL 97 para 4. This case contemplated whether a lender that acquired ownership through foreclosure and sells the facility within a few months is stll liable under the "indicia of ownership" clause.

156 *Guidice v. BFG Electroplating & Manufacturing Co.* 732 F. Supp. 556 (W.D. Pa. 1989 563 reiterated that a lender that forecloses on contaminated property is liable under CERCLA as an "owner" even after foreclosure.

157 *United States v. Fleet Factors Corp*. 19 F. Supp. 1079 (S.D. Ga. 1993) para 12.

158 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 484.

159 57 Fed. Reg. 18,344 (Apr. 29, 1992).

through regulation.[160] Soon thereafter, EPA issued a guidance memorandum stating that it would continue to follow the rules as its enforcement policy.[161] Regardless of EPA's position lenders harboured a genuine concern that there was no guarantee that the guidance would be followed by courts in the context of actual CERCLA litigation with third parties, or that EPA's policies would not change.[162]

In 1996 the US financial industry fruitfully lobbied congress to amend CERCLA to obtain a safe harbour from lender liability suits relating to clean-up costs for contamination. This resulted in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act[163] of 1996 which amended CERCLA to restore lender liability protection. The effect was that the 1996 Amendments codified the previously annulled lender liability rules of EPA.[164] This goes to show that the real motive behind any financial institution is to achieve the highest returns for its investor's while environmental considerations come second.

Perhaps most importantly, the 1996 Amendments addressed the most important question that had been left open after the EPA's lender liability rules had been annulled: whether a lender can be held liable as an "owner" at foreclosure under CERCLA.[165]

The amendment required the lender to show that it holds its security interest primarily to secure the repayment of the loan or alternatively an obligation on behalf of another person.[166] The courts held that the person that held title to a facility under a sale-

---

160 *Kelley v. EPA* 15 F.3d 1100 (D.C. Cir. 1994), page 1103, 1109.

161 60 Fed. Reg. 63517 (1995).

162 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 485. This is because unknown environmental problems are a far greater source of loss to lenders than fire, vandalism, theft, or title risks. Klepper *Lenders and Environmental Liability* (above).

163 Pub. L. No. 104-208, 110 Stat. 3009-462.

164 *Kelly v. Tiscornia* 44 ERC 1951 (6th Cir. 1996) para 12 ruled that the 1996 Amendments were a reinstatement of the EPA's lender liability rules and an attempt to codify its provisions. The 1996 Amendments added a definition of "lender" that was broad and clearly stated that the secured creditor exemption applied to any person "that is a lender" that did not "participate in management."

165 Section 485.

166 42 U.S.C. § 9601(20)(G)(iv) Applicable security interests include "a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a non-affiliated person."

leaseback arrangement was held to be holding a security interest in the property.[167] In addressing this requirement, courts focused on determining the reason that the entity held indicia of ownership that was being used as a security interest.[168] Under secured creditor exemption, a lender that holds an applicable security interest does not qualify as an "owner or operator" under CERCLA prior to foreclosure, unless they "participate in management."[169]

After foreclosure, a lender must be able to prove that it has made commercially reasonable efforts sell the property at the "earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements".[170] Under the safe harbour provision, the lender takes ownership of the property during the period prior to selling, becoming responsible for the sell, re-lease, liquidation of the facility, maintaining business activities, winding up the operations of the business and undertaking any lawful means to address the release or threatened release of a hazardous substance. The lender is in a position to take any measures to preserve, protect or prepare the facility prior to its sale.[171] Although there are all these vast requirements, CERCLA itself does not shed light on what it means by "constituting commercially reasonable efforts to divest property", bringing about a lot of speculation to the term.[172]

The case *Hess v Chase Manhattan Bank,*[173] dealt with a bank that had bought property under foreclosure and soon thereafter sold the property to a third party. The bank was held liable for fraud because it failed to disclose the environmental liabilities that it was well aware of to the buyer. This case overturned a federal decision issued prior to the 1996 Amendments which had held that a lender that foreclosed on property and sold it within a reasonable time (four months), qualified for the security interest holder

---

167 *Kemp Industries, Inc. v. Safety Light Corp.* 857 F. Supp. 373 (D.N.J. 1994) 861.
168 *In re Bergsoe Metal Corp.* 910 F.2d 668, (9th Cir. 1990) 671.
169 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 487.
170 42 U.S.C. § 9601(20)(E)(ii).
171 42 U.S.C. § 9601(20)(E)(ii)(II).
172 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 487.
173 *Hess v. Chase Manhattan Bank* 220 S.W.3d 758 (Miss. 2007).

exemption despite the bank's obvious failure to tell the buyer of the environmental contamination.[174]

#### 3.2.3.1 Exemptions to CERCLA

Since its promulgation CERCLA has been amended numerous times, and now provides defences and exemptions to the general rule that lenders are liable for environmental damage. Of importance to this discussion are the CERCLA Lender Liability Rule and the Secured Creditor Exemption.

The CERCLA *Lender Liability Rule of 1992* commenced when EPA proclaimed that participating in the management of a facility does not include the mere capacity or unexercised right to influence facility operations.[175] The term "mere capacity" is said to have been included in order to expressly overrule the decision in *United States v Fleet Factors,*[176] that lenders could be held as operators if they merely had the ability to influence facility operations. This lender liability rule was later struck down on the basis that EPA lacked authority to issue the rule as a binding regulation, but the principles of the rule were later adopted as policy statements by the EPA and the Department of Justice.

The secured creditor exemption protects lenders by insulating them from liability as a potentially responsible party,[177] limiting the liability of a person who, without participating in the management of a facility, holds indicia of ownership for the primary purpose of protecting a security interest in the facility[178] at foreclosure. To qualify for this exemption a lender must show that it holds a security interest in the property and does not participate in the management of the property.[179]

Even lenders that are within the prerequisites for the CERCLA secured creditor exemption, and that foreclose with the intention of taking advantage of the safe

---

174 *Northeast Doran, Inc. v. Key Bank of Maine* 15 F.3d 1 (1st Cir. 1994).
175 Abcede,1995 *National Petroleum News 1*
176 *United States v. Fleet Factors Corp*. 19 F. Supp. 1079 (S.D. Ga. 1993) para 36.
177 42 U.S.C. § 9601(20)(E).
178 42 U.S.C. § 9601(20)(A).
179 Section 20 A CERCLA.

harbour provisions, need to consider the possibility of environmental liability outside this safe harbour. This is because environmental liability could still attach to the lender in several ways.[180] Protection may not be available to any third party to which the lender might seek to transfer foreclosed property. As a result, the value of the underlying collateral could be reduced by at least the amount necessary to remediate any contamination.[181] Furthermore, CERCLA only protects lenders from specifically hazardous substances, to express exclusion of petroleum, limiting the applicability of the Act. Therefore, other statutes covering other liabilities may be called upon to invoke liability.[182] Additionally, CERCLA only covers contaminated areas without reference to other environmental regulations which should be complied with, for example, air and water quality regulations.

Since contamination is an ongoing occurrence, omissions or negligence on the part of the lender can be fateful. In the *F.P. Woll Co*[183] case, even though the lender had punctually sold the property after foreclosure, it was held "the question of whether the lender had engaged in active management or operation of the facility during the time a release occurred was factual and could only be resolved on summary judgment or at trial".

### *3.3 Brazil*

Brazil in this context is used to demonstrate a country that is almost in the same predicament as South Africa, in that it only has legislation potentially capable of holding the lender liable and where the courts have purposively interpreted the legislation so as to read into it the lender liability principle. It is such progressive judicial activism that is needed in the current South African context in the absence of statutory provisions.

The Brazilian Constitution is perhaps the first and most important signal to lender liability. It gives a positive duty to the government and the community to preserve the

---

180 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 487. Even if a lender qualifies for the secured creditor exemption from CERCLA liability, this does not negate liability if a particular state has a stricter lender liability regime.

181 Ahrens and Langer 2008 *Bloomberg Corporate Law Journal* 487.

182 Burcat *et al* 21 *ELR* 10470.

183 *F.P. Woll Co. v. Fifth & Mitchell St. Corp.* 96-5973, 1997 U.S. Dist. LEXIS 11685 (E.D. Pa. July 31, 1997) 14.

ecologically balanced environment for present and future generations.[184] Banks are by necessary implication part of this community tasked to promote the environment and therefore their lending decisions and business transactions should be guided accordingly. This is the reason that there is a hidden environmental risk to lenders that go beyond the traditional due-diligence analysis.[185]

The Latin risk theory *ubi emolumentum ibi onus*[186] has influenced the development of the Brazilian environmental liability. In terms of this theory, the one who benefits from the environmental resource should also bear the related risk.[187]

### *3.3.1 The Constitution*

Article 225 of the *Constitution of Brazil* is the heart of the Brazilian environmental liability: it states that everyone has the right to an ecologically balanced environment:

> "Which is a public good for people's use and is essential for a healthy quality of life, and both the government and the community have the duty to defend and preserve it for present and future generations.... Conduct and activities considered harmful to the environment shall subject the violators, be they individuals or legal entities, to criminal and administrative penalties, without prejudice to the obligation to repair the harm."[188]

This provision is long, detailed, and expansive and unlike other legal systems, Brazil does not enunciate a right to a healthy or clean environment. Rather, when expressing a right to an ecologically balanced environment, it implies that nature is to be valued for its own sake,[189] recognizing limits to growth and the necessity of preserving the balance of nature. This constitution rejects the anthropocentric notion that nature exists solely for human use.[190] It makes environmental protection a legal concern for government

---

184 Article 225 of the *Brazilian Constitution of 1988*.
185 Zambão 2014 *Miami Int'l & Comp. L. Rev.* 57.
186 Trayner *Latin Maxims and Phrases* 594-595.
187 This is the same as the polluter pays principle.
188 C.F. Oct. 15, 1988, art. 225 (Braz.)
189 This is called the eco-centric approach and it is based on the understanding that all life forms and elements of the biosphere have equal worth independent of their value to human interests and that they should be recognised and protected as rights holders alongside humans. Stone 1972 *Southern California L Rev* 454.
190 Cannon *Environmentalism and the Supreme Court: A Cultural Analysis* 6.

and society to be considered just as they consider other matters[191] and a balance to be struck amongst these competing interests.[192]

### *3.3.2 Judicial activism*

In 2009, the Superior Court of Justice issued alarming decisions in lawsuits relating to environmental damage which imply that lenders can be considered indirect polluters under a strict, joint and several liability scheme, even before foreclosure.[193] A decision published in December 2009,[194] involving the Federal Public Ministry and a hardware manufacturer regarding environmental damages in a mangrove area, would not have deserved much attention by lenders had the Superior Court of Justice not broadly analysed the additional entities that could be liable for the environmental damages, without regard to culpability. Even though there is no financial institution that has been part of a suit involving a sensitive coastal ecosystem, this higher court, through a unanimous decision, sent an alarming message, stating that:

> "For the purpose of determination of the proximate cause in environmental damage cases, one who commits [the act] shall be equated with one who does nothing when he or she should act, who allows it to happen, who does not care what is being done, who is financing so that it can be done, and who benefits when others act".[195]

In light of this judgement, the lender liability principle is highlighted in that, even those that finance should be liable for environmental damage. For purposes of this study this is termed "judicial lender liability". In its purest sense it is the expansion of the polluter-pays principle by the judiciary in order to establish causation and hold the lender liable. It is in itself rational and legally correct because the *Brazilian Constitution* creates an obligation upon all, including lenders in relation to the environment. Section 225 of the

---

191 C.F. Oct. 15, 1988, art. 170.

192 This in its own sense is what can be termed sustainable development.

193 Schnapf date unknown http://www.environmental-law.net/2012/08/banks-growing-concerned-over-liability-concerns-in-brazil/. These recent developments resemble market conditions in the United States in late 1980s when lenders became concerned about their potential liability after a number of conflicting court decisions. It is in line with the factors present that saw the development of the lender liability in the USA.

194 S.T.J.-T2, REsp 650728, Relator: Min. Benjamin Herman, 23.10.2007, revista do superior tribunal de justiqa [R.S.T.J.], 02.12.2009 (Braz.) cited Zambão 2014 *Miami Int'l & Comp. L. Rev.* 51.

195 S.T.J.-T2, REsp 650728, Relator: Min. Benjamin Herman, 23.10.2007, R.S.T.J.,02.12.2009 (Braz.), cited Zambão 2014 *Miami Int'l & Comp. L. Rev.* 51.

Brazilian Constitution defines the environment as "a common usage asset, essential to a good quality of life, and imposes on public authorities and on the community the duty to protect and defend it for present and future generations".

In the same year, the Supreme Court issued another decision to the effect that banks can limit liability by establishing diligent inquiry, but confirmed liability where banks disbursed funds with knowledge of the environmental concern. This court stated

> Regarding BNDES [Brazilian Development Bank], the simple fact that it is the financial institution responsible for financing the mining activities .... at a first analysis, does not establish that it can be a defendant in the case. However, if there is evidence that this government-owned corporation [BNDES] was even aware of serious and severe environmental harm [and] ... has released intermediate or final disbursements to the mining project. In this case, BNDES shall be under a joint and several liabilities for damages" .

Brazilian environmental law therefore requires the polluter, regardless of fault, to remediate the damage he has caused to the environment.[196] A polluter is broadly defined as including any person that is directly or indirectly responsible for causing the environmental damage. Moreover, all directly or indirectly involved parties are jointly and severally responsible for remediation.

In line with the *Mangrove* case, the notion of an "indirect polluter" was widened to include lenders, environmental agencies, engineers, architects, real estate developers and brokers that facilitated third-party activities that caused or may cause environmental harm.[197]

The Constitution of Brazil assigns to the federal government, states, district and municipalities the responsibilities for the protection and preservation of the countries flora and flora. The legislative authority is exercised concurrently by the federal government, states and municipalities[198] with the legislative authority of municipalities being limited to matters of local interest and to supplement federal and state laws.

---

196 Article 14 of the *National Environmental Policy of Brazil*.
197 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf 4l.
198 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf.

The Brazilian *National Environmental Policy* of 1981[199] establishes applicable environmental principles, objects, instruments and bodies, and is the major legal tool for the implementation of all government and civic initiatives. It is perhaps the equivalent of the NEMA in South Africa.

The *National Environmental Policy,* states that "the polluter is obliged, independently of fault, to indemnify or repair the damages caused to the environment and to third parties, affected by its activity".[200] It defines a polluter as either a natural or legal person, public or private, who is responsible, direct or indirectly, for the activity that caused the environmental degradation.[201] In the legal sense, this amounts to strict liability; and all the parties entangled in the environmental damage are held to be jointly and severally liable for its rehabilitation. Strict liability can be defined as liability that "does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe."[202] Moreover, suing a polluter under the Brazilian laws requires no demonstration of recklessness or malpractice.[203] The only elements required to be established are causation and injury.

The *National Environmental Policy* further imposes a joint and several liability[204] by providing that liability may be apportioned amongst two or more parties or limited to a selected few in a group, at the litigator's discretion.[205] The policy further provides that the financing and incentives of governmental must condition the approval of financial projects to the licensing of the project as well as to the enforcement of environmental rules.[206]

---

199 *National Environmental Policy* in 1981 (Law No. 6938/1981)

200 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf 4.

201 Article 3 (iv) *National Environmental Policy*.

202 Black's Law Dictionary 998 (9th ed. 2004).

203 Brazilian Law date unknown http://latinlawyer.com/reference/article/40585/brazil/.

204 Strict liability can be ascribed to the polluter by the simple verification that the action or omission resulted in damage to the environment, without any regard to fault negligence, malpractice or recklessness on the part of the polluter. Brazilian law, http://latinlawyer.com/reference/article/40585/brazil/.

205 Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (definition of liability) http://thelawdictionary.org/liability/.

206 Article 12 of the *National Environmental Policy*.

There are two substantial features to be considered. First, the imposition of this liability does not need to be 'fingerprinted' or linked directly back to a particular party, for liability for damages to be imposed.[207] Second, the party that brings a civil suit has the freedom (or power) to decide which of the direct and indirect polluters to pursue for damages. In this instance, the defendants maintain the right to sue responsible parties for contribution (if both are direct polluters) or for recovery (if the defendant is an indirect polluter). The higher courts of Brazil concur with the strict, joint and several nature of environmental liability, as declared by the Superior Court of Justice.[208]

In Brazil a plaintiff can decide which defendant to sue for environmental remediation or compensation, and the selection of defendants is at the discretion of the Public Ministry. However, any request for joinder of parties is not acceptable.[209] The defendant cannot even raise the issue of basis for apportionment, since under Brazilian law a single defendant can be held liable for the entire harm.[210] In the view of Brazilian law, the defendant's right to sue responsible parties for contribution can only be sought in a different action, where the defendant that is liable can assert culpability and legal theories of cost allocation. In a decided case, it was stated that;

> "in cases where the law imposes strict liability, as in matters related to the environment ... the fault of a third party will never enter into the discussion in the same action ... because the secondary claim (based on culpability) does not concern in the solution of the main claim (based on strict liability)".[211]

It therefore follows that lenders can be considered indirect polluters given that the only legal elements required establishing damages are injury and causation. Causation would be established when the result would not have occurred without the party's conduct, or if the defendant's conduct is an important or significant contributor to the injuries. In

---

207 Faber *Cases and Materials on Environmental Law* 891.

208 In addition to Federal Statutes, courts have jurisdiction to decide environmental harms with effects that are limited to the territory of the state. The analysis here focuses on the federal law, even though the states and municipalities also have power to protect the environment. C.F. Oct. 15, 1988 art. 23 (Braz.). Federal legislation also contemplates criminal sanctions relative to environmental protection, which is not addressed here.

209 Zambão 2014 *Miami Int'l & Comp. L. Rev.* 47 55.

210 Zambão 2014 *Miami Int'l & Comp. L. Rev*. 47 55.

211 T.J.R.S, Ap. Civ. No. 70032034183, Relator: Des. Carlos Roberto Lofego Canibal, 16.12.2009, Didrio da Justiga do Rio Grande do Sul [D.J.R.S.], 8.2.2010 (Braz.) (quoting Hugo Nigro Mazzili, *A defesa dos interesses difusos em juizo*, 260

this context, credit is an essential prerequisite to the realisation of large initiatives; and therefore a lender would fall within this standard.[212] However on the other hand the elements for injury are factual.

That being said, the contractual agreement of the involved parties will not refrain the Brazilian public prosecutors from suing all of them in a civil suit.[213] On the other hand, a single party may be held liable for redressing the entire environmental damage. The said sued entity shall have a right of recourse against another party that caused the environmental damage of the project, to the extent that it can prove that the damage can be attributable to that other party.

Lenders that are aware of environmental damages created by their borrowers should bear strict, joint and several liability for such damage.[214] This is because, as mentioned earlier, Brazil's National Environmental Policy law provides the basis for this liability, requiring only causation and injury to be established before a court in order to impose liability upon a direct or even indirect polluter. In such cases the lenders are commonly identified within the category of indirect polluters.[215]

In addition, a demonstration of the cause-effect relationship between the damage caused and the action or inaction, suffices to trigger the obligation to redress the environmental damage. Accordingly, proving the inexistence of the causality link between the environmental damage and the act (or omission) performed by a specific entrepreneur is the only chance for being absolved from liability for an environmental damage, considering that the mere inexistence of fault does not exclude this responsibility.

The idea that the causal link is sufficient to triggering strict liability has resulted in the shift of the burden of proof. In this sense, the Public Prosecutor's Office does not need to prove the existence of a causal link between the damage and the activity of the borrower, since such burden falls on the alleged polluter to discharge.

---

212 Zambão 2014 *Miami Int'l & Comp. L. Rev.* 47, 56
213 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf.
214 Zambão 2014 *Miami Int'l & Comp. L. Rev* 47-55.
215 Zambão 2014 *Miami Int'l & Comp. L. Rev* 47-48.

#### 3.3.2.1 Project financing and environmental due diligence

Project financing is basically a mode of financing wherein the lender accepts future revenue for a project as a guarantee for a loan.[216] It is a common practice in Brazil. The credit granted is essentially repaid by way of cash flow and profit from the financed project. The world's senior financial regulator[217], the Bank of International Settlement, defines "Project Financing" in the International Basel II Framework as:

> "…a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure .... In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. The borrower is usually an SPE [Special Purpose Entity] that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets ...."[218]

This gives rise to an indirect environmental risk in form of disruption in the operation of the project resulting in the borrower failing to repay the loan. Because of these apparent environmental risks, banks in Brazil typically evaluate the environmental profile of a project before making a financial commitment to that project.[219] This process is termed by some authors as 'environmental due diligence'.[220]

Independent of the limits of lenders liability, environmental due diligence is a key instrument to avoid credit risk, especially in project finance transactions. It is unclear to Brazilian lenders whether such detailed oversight of their borrower's environmental

---

216 NFZ zone 2013 www.nfvzone.com/news/2013/02/09/6913826.htm.

217 Felsenfeld and Bilali Date Unknown https://www.law.upenn.edu/ 925.

218 Basel Commentary on Banking Supervision, A Revised Framework 49.date unknown www.bis.org/publ/bcbs128.htm.

219 Furthermore, the *National Environmental Policy* further established that lending by public financial institutions should be done to entities that have the necessary environmental licences and are in compliance with all environmental laws and regulations.

220 Piazzon date unknown http://www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf 4l: The assessment is done using the following criteria:" (i) history of the use and occupation of the site and nature and condition of the project; (ii) potential liability for clean-up of pre-existing contamination at the site; (iii) (degraded areas or areas that should be preserved; (iv) debt clearance certificates, in order to attest whether there are any judicial and/or administrative proceedings relating to environmental matters; (v) the policies for disposal of residues of the project, and the nature and condition of off-site disposal locations to be used; (vi) licenses, permits, authorizations and technical reports already issued for the site; and (vii) the legal department environmental files of the area and the files of the outside law firms that have handled environmental matters".

compliance matters would result in them being considered to be participating in the management of the project and, consequently, increasing the risk of being considered to be jointly liable in the event of environmental damage.

The lack of delimitations in Brazil over what is and is not permitted for banks, constitutes a barrier for them to take steps to require their borrowers' operations to be conducted in a safer manner to protect the environment.

### *3.3.3 Foreclosure*

As discussed earlier under foreclosure in the USA, there is a risk associated with foreclosed collateral. A financial institution can be called, for example, to remediate contamination of a foreclosed property, a demand that can exceed the amount of the loan.[221] In a decision by the Superior Court of Justice in November 2009 in which the plaintiff was the State Public Ministry of Paulo, the defendant a sugarcane company, was found liable for environmental damages simply because it had acquired a property already damaged by previous owners.[222] The prior owners had completely deforested the property, disrespecting the legal reserve and permanent preservation areas requirements applicable to Brazilian forests. Based on the *propter rem theory*, the responsibility to repair would arise from the legal link between the owner of the property and the property itself. Therefore, *propter rem* obligations adhere to the title of the property and are automatically transferred to the future owners.[223] This is a direct risk for a lender at foreclosure.

It should also be appreciated that Brazil has an enthusiastic bench with progressive judgements on environmental law. Some of the environmental laws that seem not to be taken seriously are given gravity by the court.[224] Judge Herman Benjamin of the Superior Court of Justice,[225] states that:

---

221 Zambão 2014 *U. Miami Int'l & Comp. L. Rev.* 57.
222 *Min. Herman Benjamin*, 23.10.2007, R.S.T.J., 11.11.2009 (Braz.) cited Zambão 2014 *Miami Int'l & Comp. L. Rev.* 56.
223 Zambão 2014 *U. Miami Int'l & Comp. L. Rev.* 57.
224 Like in the above mentioned case *Min. Herman Benjamin*.
225 Zambão 2014 *U. Miami Int'l & Comp. L. Rev.* 60.

> Everyone has the duty, whether they are property owners or not, to guard the preservation of mangroves, a necessity even greater in times of climate change and the rising of sea levels. The destruction of mangroves for direct economic use, under the constant encouragement of easy money and short-term benefits . . . [of] speculative real estate... feature[s] as serious harm to an ecologically balanced environment and to the welfare of the community, which conduct shall be promptly and intensely restrained and sanctioned by the Government and the Judiciary.[226]

This is read with:

> First, ownership is a source of rights and duties. Second, those who acquire a property already illegally deforested, or with other irregularities before the environmental law protection, receive it not only with its positive attributes and betterments, but also with the environmental burdens, including the duty to recover the native vegetation of the legal reserve and the permanent preservation area.

Brazilian courts have recognized that joint and several liability is a better remedy for the environmental goals set by Article 225 of Brazil's Federal Constitution, which is the heart of the Brazilian environmental liability: besides setting forth a mandate to the legislature to take action, the Federal Constitution established the defence of the environment as a fundamental social right with a constitutional claim for compensation.[227] The law also maintains a private right to seek damages for environmental harm as long as the legal requirements are met.[228]

### *3.4 Conclusion*

After discussing the possible risks[229], it is clear that a credit risk under statute is the most realistic risk that a lender can face in a jurisdiction. However, the most dangerous are uncertain environmental liabilities, like those found in Brazil. This is because the greatest weapon to combat these risks is knowledge, which enables one to plan effectively. It is therefore concluded that in any jurisdiction, it is paramount that the lender acquires the requisite knowledge in order to prepare for all the environmental risks that he may face. This sort of certainty will go a long way in achieving sustainable development, and more particularly, protecting the environment, because the lender can arrange his business accordingly.

---

226 S.T.J.-T2, REsp 948921*, Min. Herman Benjamin* 23.10.2007, R.S.T.J.,11.11.2009 (Braz.)
227 Brandl et al *Harv. Envtl. L. Rev*. 83.
228 Zambão 2014 *U. Miami Int'l & Comp. L. Rev.* 63.
229 The discussion of the statutory codification under USA and judicial interpretation under Brazil.

Clarity on lender liability in statute is something that has more to do with the society's outlook and its appreciation of wrong or right. An analysis of the progression of lender liability especially in America suggests that the American society had reached a stage, mentally, in its appreciation of the importance of preserving the environment for its sake. This is a departure from the anthropocentric approach that is highly favoured by developing countries.

How the lender liability principle is acknowledged and appreciated in a jurisdiction is highly dependent upon how the environmental right is couched in the constitution. However, the inclusion of an environmental right in the constitution does not guarantee that it will be upheld. Where the environmental right is contained in the constitution, its couching has a bearing on the state's obligation and the rights and duties of everyone in the jurisdiction. This point was clearly highlighted by the example of Brazil where the couching of the right has allowed a purposive interpretation capable of holding lenders liable. Where the couching of the right is anthropocentric, it becomes extremely problematic to develop laws that protect the environment for the sake of the environment, when there is no human harm caused by the damage to the environment.

It becomes even harder for the judiciary to do as Brazil did, that is, to purposively interpret the law so as to hold all "polluters seen and unseen" accountable. This purposive interpretation can also be tantamount to making judges "surrogate regulators", and therefore undermining the concept of separation of powers. It is most ideal that if the lawmakers see it fit to regulate unseen polluters, they should do so in no uncertain terms.

Although it is appreciated that these sentiments are predominantly academic and unrealistic expectations of the law, they are the ideal. Law basically tends to develop much slower than the society, but it should be borne in mind that it also has a very important function of regulating the conduct of the citizens and when called upon, it should be seen to do so.

Another very important consideration is that of the "north versus south debate"-the appreciation and the evolvement of laws differ significantly between developing and developed countries.[230] The societal outlooks and ideals appreciated and valued are worlds apart. Moreover, the problems faced by developing nations have more to do with poverty alleviation such that purely environmental concerns become a fallacy when faced with a hungry population. Hence the concept of sustainable development is understood and looked at differently in developing countries thus the development of principles such as lender liability become more academic than practical when weighed next to economic and social considerations.[231]

---

230 Beyerlin 2006 *ZaöRV* 260

231 Green economy- date unknown http://www.fessustainability.org/sites/all/themes/FES/favicon.ico. ShaZukang from India also emphasised this by saying "By definition, sustainable development is about integration among the three pillars: social, economic and environmental and ensuring their consistency. But in practice, this is not easy because our problems and challenges do not specialize. At Rio+20 there is a need to practically bring these three pillars together, so countries are confident that the social agenda, the environmental agenda and economic agenda are mutually reinforcing".

## Chapter 4 South African statutory framework

### *4.1 Introduction*

For purposes of discussing a lender in South Africa, the scope of the study is limited to a bank. A bank is defined in section 1 of the *Banks Act*,[232] and the business of a bank includes lending money.[233] It is unclear whether the South African lender liability regime is existent, especially comparing it to the discussed jurisdictions, since there is no law or precedent that expressly holds the lender liable. It is the intention of this study to show that there is a risk of lender liability in South Africa.

An analysis of the environmental laws, beginning with the constitutional provisions, reveals that the law is elusive as to whether the lender can be liable for environmental damage. However, the banking laws read with the environmental laws, give a more informative and holistic picture. If one looks further into the involvement of banks in voluntary regimes that are aimed at increasing their environmental responsibility, one can conclude that banks acknowledge their environmental liability.

As a point of departure, this discussion examines the *Constitution of the Republic of South Africa*[234] (hereinafter referred to as the Constitution) which is the supreme law of the land. This is followed by a discussion of the *National Environmental Management Act* (NEMA)[235]. Lastly, a brief overview of the sector specific environmental legislation and banking laws will conclude the discussion.

---

232 94 0f 1990; Pansari date unknown http://news.acts.co.za/blog/2013/04/when-is-a-bank-not-a-bank. A bank in South Africa is a public company registered as a bank according to section 11(1) of the *Banks Act* 94 of 1990 – and the Registrar of Banks is the person responsible for determining what qualifies as the "business of a bank" by the publication of notices which define the term.

233 For purposes of discussing South Africa a lender shall be the party who extends credit under a credit facility as provided for under the definition of a credit provider in the *National Credit Act*.

234 *Constitution of the Republic of South Africa*, 1996.

235 Act 107 of 1998.

### *4.2 The Constitution*

The relevant section for this discussion is section 24 of the Constitution which states that:

> everyone has the right: to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This is an environmental right, and it has become a trend to incorporate such rights in the constitution in many countries.[236] The Brazilian stance to clearly impose an obligation on the country's citizens to protect the environment is preferable since it provides a framework that makes it easy to hold a lender liable for environmental damage.[237]

The South African environmental right has two parts: a fundamental human right; and a directive principle requiring the state to take positive steps towards the attainment of the right.[238] The first part is that everyone has a right to an environment that is not harmful to their health or wellbeing. This would mean that the environmental right is only infringed where environmental harm caused by pollution or degradation affects people's health or wellbeing, and not where the ecosystem or ecological integrity is jeopardised.[239] Environmental protection under this environmental right is arguably not dependent on "pure" ecological protection and will only be triggered when environmental harm caused by pollution, for instance affects human health or

---

236 It is the content of the right that differs depending on what it emphasises, some confer environmental human rights, whilst some require the government to protect the environment by legislative and other means, imposing an obligation upon the state. Kidd *Environmental Law* 21.

237 See the *Brazilian Constitution* discussed in chapter 3.2.

238 Kidd *Environmental Law* 22.

239 Du Plessis *Environmental Law and Local Government in South Africa* 249.

wellbeing.[240] This phrasing of the constitution is the reason that lender liability is not expressly mentioned in any statute and can only be inferred – there is no obligation to simply protect the environment especially were its protection has no benefit for human beings.

Furthermore, in developing countries such as South Africa, development is of paramount importance and it is juxtaposed with the ideology that the environment should be protected for the peoples' benefit and for the benefits of future generations[241]. This notion, in South Africa, is coined sustainable development.[242]

### *4.2.1 "Reasonable legislation and other means"*

The constitution mandates that environmental protection must be reached by legislative and other measures. It is obviously clear that the legislative measures are directed to the state, but it is the "other means" that may not necessarily be limited to the state.[243] With reference to section 8 (2) of the Constitution

> "A provision of the bill of rights binds a natural or a juristic person if and to the extent that it is applicable, taking into account the nature of the duty imposed by the right"

Given that non-state parties such as banks may and often do act in a way that is detrimental to the environment, it could be argued that section 24 does apply to them in so far as the "other measures" are concerned.[244] Some authors have argued that adoption of voluntary measures is also part of "other measures" and lenders particularly

---

240 Du Plessis 2011 *SAJHR* 293-294. Compared with *Brazil's Constitution* which implies that nature is to be valued for its own sake, while recognizing limits to growth and the necessity of preserving the balance of nature, and rejecting the anthropocentric notion that nature exists solely for human use.

241 *BP Southern Africa v MEC for Agriculture, Conservation & Land Affairs* (unreported)03/16337) [2004] ZAGPHC 18. The environment right in the constitution is on *par* with all the other rights such as rights to property entrenched in s25 of the Constitution. When dealing with all these other rights, the environmental rights requirements should be part and parcel of the factors to be considered without any a prior grading of the rights. As such the rights should be a balanced where competing interests and norms are concerned.

242 Section 1(1)(xxix) of NEMA defines "sustainable development" 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."

243 Kidd *Environmental Law* 24.

244 Kidd *Environmental Law 24*. This would entail compliance in a negative sense- not doing anything to undermine the protection of the environment.

in South Africa find themselves adopting voluntary measures in order to protect the environment.[245]

## *4.3 National Environmental Management Act (NEMA)*

NEMA sets out that an entity's environmental accountability shall exist throughout the life cycle of the project.[246] The environmental responsibilities contemplated include the safety, health and environmental consequences of any policy, programme, project, product, process, service or activity within the project. This means that the life cycle of a project should be accounted for, otherwise known as the cradle to grave approach as espoused in the guiding principles of NEMA. Of particular importance to this discussion is the planning phase of the project life cycle, were the controller of the project gets funding. This study will conclude that the funding under the planning phase is regulated by NEMA.

### *4.3.1 Polluter pays principle*

The PPP is widely understood to be based on common sense, intuitively fair and analogous to the slogan "you break, you pay." The principle seeks to hold the polluting party accountable for the environmental damage.

It originated from Principle 16 of the Rio Declaration[247] and NEMA echoes this by saying:

> The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.[248]

---

245 Du Plessis *Environmental Law and Local Government in South Africa* 250. For example, the equator principles.

246 NEMA section 2(4) e).

247 Rio declaration principle 16; "National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interests, and without distorting international trade and investment."

248 Section 2 (4) (p) of NEMA as read with s24 of the Constitution which directs the government to take measures to ensure that remediation of environmental damage takes place.

The PPP is an economic principle aimed at consumer protection by making sure that the polluter bears the burden of rehabilitating the environment which he has polluted.[249] It is an economic principle because the implementation of the principle has cost implications for the polluter. Furthermore, in the South African context, it functions as a principle for the allocation of liability.[250]

The principle can be used to impose sanctions for wrongful conduct, or to necessitate corrective measures to restore the damaged environment to the *status quo ante*.[251] The PPP may also serve to steer the conduct of potential polluters[252] such as lenders.[253] The notion of lender liability is therefore an extension of this principle.

#### 4.3.1.1 Preventative Principle

Underlying this principle is the idea that "reacting to crises, only when they happen, is far more expensive (and in more than just the pecuniary sense) than forestalling or preventing them before they happen".[254] It dovetails with this discussion in that, when a lender conducts its business, for example in granting a loan, it should apply its mind to the application and make a judgement call.[255]

In South Africa, NEMA calls pollution and degradation of the environment to be avoided and where they cannot altogether be avoided, be minimised and remedied.[256]

### *4.3.2 Section 28 (1) of NEMA*

> 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

---

249 Oosthuizen *SAJELP* 356.
250 Lynn 1987 *The Journal Of Environmental And Natural Resources Law* 462.
251 Sands *Liability* 869; Milton 1999 *SAJELP* 55-56.
252 Soltau 1999 *SAJELP* 38.
253 In the USA, lenders were forced to do a thorough environmental due diligence because of the lender liability rule 1996
254 This principle is the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which sought to minimise the production of hazardous waste and to combat illegal dumping. The preventive principle was an important element, of the European Community's Third Environmental Action Programme, adopted in 1983.
255 Credit risk analysis and due diligence.
256 Section 2(a)(ii) of NEMA

environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

Section 28 of NEMA establishes unique environmental principles of paramount importance including the PPP and the preventative principle.[257] The words of this section should however be interrogated in order to establish whether the spirit of the Act intended to include lenders as polluters. The first hurdle in this process is the obvious fact that the section is not specific, but is couched in terms that are so broad that it can potentially hold anyone liable. This, although it fails to give clarity, is in itself an environmental risk for a lender. As discussed before; the most important thing is for a lender is to know his risks so that he may plan his affairs accordingly.

The point of departure in this discussion is a conscious realisation of the previously discussed concept of indirect polluters. Just because banks do not pollute rivers[258] does not mean that the effects of their lending should be ignored. As indirect polluters, it is their work that has caused the greater part of pollution in the whole world. On the other hand, this extremist approach must be moderated with the realisation that: development is an integral part of human life and it is this development, funded by the lender, which has led to the "polluted earth" that is seen today. A discussion of this section therefore lies somewhere in the middle of these considerations.[259]

4.3.2.1 "Has caused or may cause significant pollution or degradation"

This section considers previous and potential degradation, with causation being the central issue for discussion. In deciding whether there was causation the "but for" or the *sine qua non* test is used. This test seeks to establish whether there would have been pollution without (but for) the lender's conduct.[260]

---

257 Scholtz 2005 *TSAR* 69.

258 Fordham 1993 *Lender Liability Environmental Risk and Debt* 2.

259 Bourma *Sustainable Banking* 29-30.

260 Thus this element of a delict states that factual causation is a necessary, but not a sufficient, condition for liability – there must also be legal causation in that the damage is not too remote. This is because a single act can in principle give rise to an endless chain of harmful events, and the requirement of causation attempts to place some limit on liability – otherwise the perpetrator of the act would in theory be liable for a potentially endless chain of events. A distinction is accordingly made between factual causation – where the question is whether a factual causal nexus exists

It is difficult to establish environmental liability because it is difficult to link one specific polluter's emissions, in this case the lender, with particular harmful environmental effects (that is, difficult to isolate a clear causal chain).[261]

Since one act may be the cause of an almost infinite chain of possible harmful consequences, the courts have applied the concept of remoteness, or legal causation, to limit the defendant's liability.[262] This was illustrated in the *Natal Fresh Produce case*,[263] where the applicant failed to obtain an interdict prohibiting the manufacture and distribution of hormonal herbicides on the ground that the necessary causal link between the manufacture of the herbicides and their alleged harmful effects had not been established.

The basic question is whether there is a close enough relationship between the wrongdoer's conduct and the consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.[264] In *International Shipping Co (Pty) Ltd v Bently,*[265] the court held that a demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. A second enquiry arises, namely whether there is a sufficiently close link between the wrongful act and legal liability – that is the question of remoteness or legal causation. Thus in *Smit v Abrahams*,[266] it was held that reasonable foreseeability cannot be regarded as the single decisive criterion in determining liability, and that the importance and efficacy of the predominating criterion in resolving questions of legal causality lies in its flexibility.[267]

---

between the act and the harmful consequences – and legal causation, which is concerned with the question of which of the harmful events the defendant should be liable for in law.

261 *Minister of Police v Skosana* 1977 (1) SA 31 (A) (herein after referred to as the Skosana case). Expert evidence will often be decisive in establishing factual causation.

262 *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147. For the distinction between factual and legal causation, see *Tuck v Commissioner for Inland Revenue* 1988(3) SA 819 (A) 832–833; also the *Skosana* case 34; *S v Mokgethi* 1990 (1) SA 32 (A) at 39.

263 *Natal Fresh Produce Growers Association v Agroserve Pty Ltd*1990 (4) SA 749 (N) 754-755.

264 *S v Mokgethi* 40-41.

265 *International Shipping Co (Pty) Ltd v Bently* 1990 (1) SA 680 (A).

266 1994 (4) SA 1 (A).

267 Para 17E–F.

Furthermore, where the act of pollution emanates from more than one source, as is typical with atmospheric pollution, where a number of industrial smoke-stacks foul the air, it may be difficult to establish which polluter is responsible for the specific damage causing the harm. When dealing with multi-source pollution, the Apportionment of Damages Act[268] may assist potential plaintiffs, because it provides that joint wrongdoers may be sued in the same action.[269]

4.3.2.2 Section 28(2) of NEMA[270] "In control of"

This section imposes liability on whomsoever is "in control of" a situation which may cause significant pollution or degradation to the environment. However, the Act does not define what this phrase means. In trying to interpret it, reference should be made to its interpretation in other jurisdictions. The following instances could be interpreted to have established an element of control[271], namely where:

a) the lender bank has a high degree of oversight over operations, for example, in a project finance[272] lending context, this could transpire from or be motivated to include the receiving of regular reports, and audits;

b) the lender exercises 'step in rights' in respect of a project (typically, within a project finance context where the project company is not performing, the lender takes the project company's position via the 'step in rights');

---

268 Act 34 of 1956

269 Section 2(1) of the *Apportionment of Damages Act.*

270 It states as follows: "Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which-
(a) any activity or process is or was performed or undertaken; or
(b) any other situation exists,
which causes, has caused or is likely to cause significant pollution or degradation of the environment."

271 Coetzee *Sustainability-Environmental risks and legal liabilities of South African banks* 63.

272 Basel Committee on Banking Supervision, International 2005. http://www.bis.org/publ/bcbs118.pdf. "Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements. In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. The borrower is usually an SPE (Special Purpose Entity) that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets".

c) the lender has foreclosed a securitised asset; and

d) The lender bank has either taken equity in the business as part of the finance package or has taken a seat on the board.

This list, though thorough, needs further explaining and contextualising. Of particular importance to this discussion is the foreclosure requirement.

4.3.2.2.1 Foreclosure

In South Africa the foreclosure proceedings are initiated after the borrower has failed to pay a secured debt. The lender (the mortgagee) has a right to foreclose the bond and to have the property sold if the payment is not forthcoming on the due date.[273] The only requirement is that there should be a court order authorising the execution.[274]

This is to say that unlike in the USA, ownership does not pass to the lender. However, having regards to section 28 (2) of NEMA it can be argued that at foreclosure the bank will be "in control" of the property over which it seeks to foreclose. This would entail that the bank is required to take reasonable measures to make sure that significant pollution or degradation does not happen. Therefore the counter argument that since it is not the owner, the bank does not have such a responsibility, falls away in light of the phrasing of section 28(2) which clearly expands the horizon of the section to encompass those people that are not owners.

4.3.2.3 "Reasonable measures"

Section 28 also places a duty of care on each citizen to prevent pollution or degradation of the environment by stating that reasonable measures[275] must be taken by any person who causes, has caused or may cause pollution. As already established, the process of lending "may cause" pollution therefore this provision potentially applies.

---

273 Silberberg et al *The Law of Property* 429.
274 *Nedcor Bank v HJ Kindo and Anor* (A566/00) [2002] ZAWCHC 10 para 4.
275 Soltau 1999 *SAJELP* 8.

Some scholars have suggested that these reasonable measures include: an environmental impact assessment, "to cease, modify or control any act, activity or process causing the pollution or degradation; to contain or prevent the movement of pollutants of degradation; to eliminate the source of pollution or degradation; and to remedy the effects of pollution or degradation".[276] These measures are extensive and are in broad terms. More specific guidelines must be promulgated to ascertain the applicable reasonable measures for a lender.[277] In saying that a lender should take reasonable steps to prevent potential pollution the duty of care that is equally burdened with everyone else is invoked. As a member of the community, the lender should do its part in protecting the environment. It is this realisation that leads to the promulgation of the lender liability rule in America. South Africa has, however, not yet reached that level of specificity in its environmental liability regime, and it stands to be seen whether such broad and all-encompassing provisions are capable of holding the lender liable even on a technicality, in court.[278]

In determining whether reasonable measures have been taken, the concept of negligence plays a central role in court proceedings. In terms of common law, negligence is determined by establishing the foreseeability of harm and whether reasonable steps to prevent such harm have been taken.[279]

### *4.4 Other legislation*

Although the Constitution and NEMA are the starting points of discussions, other legislation is of equal importance. A few will be highlighted and analysed because the liability regime is similar.

---

276 Kruger *Insurance for Environmental Damage: A South African Perspective* 17.

277 Soltau 1999 SAJELP 46; Glazewski *Environmental Law in South Africa* 150.

278 Refer to the debate on sustainable environment.

279 Soltau 1999 *SAJELP* 46 refers to criteria set out in *Pretoria City Council v De Jage* (451/95) [1996] ZASCA 144 para 2. In terms of s 28(5)(c) of NEMA, when considering any measure taken, the DG, make sure that you have stated this in full earlier, must take into account the severity of any impact on the environment and take into account the principles set out in s 2 of NEMA.

The basic PPP is seen as a common thread in all liability. However, the legislature has extended the four corners of liability to be best suited for mining and water, for example, where there is liability for previous and future pollution.[280]

If the polluter is asked to remediate, but fails or refuses to do so, the government may remediate and then recover costs.[281] The costs, must be "reasonable", and may consequently be recovered jointly and severally from an array of parties that include, but also extend beyond the parties responsible under the duty of care, in the first instance.[282] These provisions when given the literal interpretation are a direct threat to the lender. It is such provisions that have been used in Brazil to recover remediation costs from lenders.

This is especially true for part 8 of the *National Environmental Management Waste Act*[283] (NEMWA or the Waste Act) wherein a lender could potentially face a risk in lending where land held as security is found to be contaminated.[284] The contaminated land provisions has retrospective application thereby applying to contamination that

---

280 Section 19 *National Water Act* 36 of 1998 (NWA) deals with pollution prevention and has almost the same implication as s28 of NEMA (save to say that s19 applies specifically to water while s28 is a generic provision). Section 19 requires an owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken, or any other situation exists which causes, has caused or is likely to cause pollution of water resource, to take all reasonable steps to prevent such pollution from occurring, continuing or recurring.

281 S19 (5) (d) NWA allows the catchment management agency to recover costs from anyone who negligently failed to prevent the activity or process being performed or undertaken, or the situation from coming about. S28 (8) (d) of the NEMA is worded widely in the same manner but is qualified by the proviso "provided that such person failed to take the measures required of him or her under subsection (1)": Both the NWA and the NEMA further allow the regulator to recover costs proportionately from any person who benefited from the project.

281 With some variation, both Acts also allow for liability to be apportioned among those from whom costs may be recovered. See s 19(6) NWA; s 28(9), (11) NEMA.

282 Section 19(7) NWA; s 28(10) NEMA; s 19(5) NWA; s 28(8) NEMA. Section 41 MPRDA also incorporates the PPP by requiring applicants of prospecting or mining rights to make financial provisions for the rehabilitation or management of negative environmental impacts. The provisions are meant to ensure that the state will not bear rehabilitation costs. Before this provision, mining companies would either sell the company or leave the country in order to avoid remediation.

283 Act 59 of 2008.

284 Section 35 of NEMWA commencement date of s35 was 2 May 2014.

occurred before the commencement of the act[285] and contamination that is likely to arise at a different time from the actual activity that causes the contamination.[286]

CERCLA basic principles relating to contaminated land appear to be similar to the Waste Act.[287] However, CERCLA deals more extensively with the vast regulation issues.[288] CERCLA, in the 2002 Brownfields Revitalisation Act,[289] established a comprehensive liability scheme, holding certain categories of parties liable to conduct or pay for the clean-up of releases of hazardous materials.[290] The Brownfields Amendment Act responded to the liability concerns of certain landowners, by providing authority for a grant programme and enabling the Environmental Protection Agency (EPA) to obtain a windfall lien[291] on certain properties owned by bona fide prospective purchasers.

The Standard Bank in South Africa in its Sustainability Report of 2014 acknowledged the potential risk it faced in accepting contaminated land as security, in direct relation to this Act.[292] It went further to announce an increase in the due diligence on land in order to adequately value and avoid negative equity or liability. In terms of environmental

---

285 Section 35(a) NEMWA.

286 Standard Bank Group Sustainability Report 2014 http://annualreport2014.standardbank.com/downloads/Standard-Bank-Group-Annual-integrated-report-2014.pdf. It acknowledged that this is a real risk to them and they have implemented risk mitigation control measures to ensure that their position is duly protected: S35 of NEMWA applies to the contamination of land "even if the contamination (a) occurred before the commencement of this Act;
(b) originated on land other than land referred to in section 38;
(c) arises or is likely to arise at a different time from the actual activity that caused the contamination; or
(d) arises through an act or activity of a person that results in a change to pre-existing contamination.
It seeks to force remediation".

287 That is identification and assessment of sites, listing of sites in a national list, strict liability and retrospectively.

288 See US EPA Publication No 330-F-11-002.

289 Part IIA of the Environmental Protection Act 1990.

290 EPA Office of Site Remediation Enforcement, 2011 www.epa.gov/compliance/resources/.../handbook/index.html.

291 Bona fide prospective buyers are not held liable as owners or operators under CERCLA but the contaminated property they acquire may be subject to a "windfall lien". A windfall lien is a statutory lien on a property for the increase in the fair market value of the property attributable to EPA's clean-up campaign. The windfall lien can only arise on properties where the United States spends money cleaning up the property.

292 Standard Bank Group Sustainability Report 2014 107. It is not clear why they singled out this particular provision and did not consider other environmental acts as capable of arising liability. The report does not justify the position.

due diligence this is a good step in the right direction and has been said elsewhere in this study, that lenders will not implement measures to protect the environment unless there is a real risk that they face, in this case provided in statute as is the case in the USA.[293]

#### 4.4.1.1 Wrongfulness

As stated earlier[294] the concept of wrongfulness entails a number of underlying considerations such as reasonableness, foreseeability, the duty of care, harm and public policy. The question therefore when dealing with lenders, for example, with reference to mining: is whether or not it is wrong for a bank to have benefitted from the transaction and then walk scot free in light of the issue of historical polluters.

It is argued that if historical polluters[295] are justifiable in being called upon to remediate because the effects of their business are perpetual, then the same moral blameworthiness attached to them is also attached to lenders. After all, most mining activities would not have been possible without lending institutions.

## *4.5 Banking law*

After having considered the environmental mandate of the bank, it is critical for this discussion to analyse how much of these obligations can practically be tied to banks. The statutory regime in South Africa imposes a number of obligations on lenders, and a couple of the underlying principles such as reckless lending and the "know your client" requirement, in an environmental sense, can potentially include environmental due diligence. It is generally accepted that there is a certain degree of care that is expected of the lender to both his clients and third parties.[296]

---

293 This is an effect of the polluter pays principles, that it can stir the conduct of potential polluters into regularising with the threat of repaying remedial costs.

294 Heading 2.7.1 "Wrongfulness".

295 Under the MPRDA.

296 *Columbus Joint Venture v Absa Bank Ltd* (65/2000) [2001] ZASCA 108 para 5.

### *4.5.1 Due diligence*

This topic was previously discussed[297] in relation to Brazil were the court in no uncertain terms clearly said that the bank has a duty to do its due diligence when dealing with a client, that is, environmental due diligence. In America on the other hand, the obligation to do due diligence is realised by the fact that a lender can be held liable for the environmental damage of a client if, while knowing the client's business and the potential risk, lent the client money. This study seeks to establish whether these standards are applicable in South Africa.

#### 4.5.1.1 The banker-client relationship

The banker-client relationship is based on trust. Therefore although the lender has no obligation to act as a detective and thoroughly investigate the client's business, the lender is not expected to take the information provided to him on face value.[298] There is a duty to make independent enquiries and verify the client's story. This duty is just a safeguard; it is not onerous, impracticable or costly.[299] Chapter 3 of the *Financial Intelligence Centre Act,*[300] (FICA) provides for "know your client" requirements[301], which include verifying the identity and the nature of the transaction. It is however a very shallow obligation that is incapable of including a detailed environmental due diligence. The obligation would therefore not require the bank officials to become detectives because the steps required are no more than would be taken by a prudent businessman to safeguard himself.

---

297 See paras 2.5.1.2 and 3.3.2.1 above.

298 *Underwood v Bank of Liverpool and Martins* [1924] 1 KB 775 page 793.

299 *Energy Measurements (Pty) Ltd v First National Bank of South Africa* SA Ltd 2001 (1) SA 132 (W) page 132. In this case the bank received some documents from the client and took them on face value. It did not bother to verify the client's story and neither did they apply their minds to the application form, the credit information or the project outcome it had been furnished with. They did not look for or seek any information other than that provided for it.

300 *Financial Intelligence Centre Act* 38 of 2001(hereafter referred as FICA).

301 Section 21 FICA.

#### 4.5.1.1.1 National Credit Act

The application of the *National Credit Act* (NCA)[302] is limited to juristic persons (businesses) with an asset value or annual turnover of less than one million rand, but not if such a juristic person enters into a large agreement (i.e. for more than R250 000).[303] It aims to promote responsible credit granting and use, and for that purpose, prohibits reckless credit granting.[304] Section 3(c) elaborates on this objective by stating that one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by consumers.[305]

#### 4.5.1.1.2 Reckless lending

The concepts of reckless lending and over-indebtedness as set out in part D of chapter 4 of the NCA will be discussed.[306] The two concepts are intrinsically linked and they shall be discussed together for clarity.

Over-indebtedness refers to the situation where the preponderance of available information at the time that a determination is made, indicates that the particular consumer is or will be unable to satisfy, in a timely manner, all the obligations under all the credit agreements to which the consumer is a party. For this purpose regard must be had to the consumer's financial ability, projections and obligations, the probable propensity to satisfy in a timely manner all the obligations under the various credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.[307] This provision suggests that a thorough search of the client's financial affairs should be done before lending.

---

302 Act 34 of 2005

303 Deloitte 2013 http://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_OverviewOfTheNationalCreditAct_16042014.pdf

304 Preamble to the Act.

305 Section 3(c)(i) & (ii) NCA; Renke 2011 *THRHR* 208 209.

306 Otto and Otto *The National Credit Act Explained* 58-63,77-79; Scholtz et al *Guide to the National Credit Act* ch 11; Vessio 2009 *TSAR* 274.

307 Section 79(1)(a), (b) NCA.

Reckless credit, on the other hand, can include a situation where the consumer becomes over-indebted as a result of reckless credit granting.[308] As such it is provided that a credit agreement is reckless if it is given under the following circumstances.[309]

> (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
>
> (b) The credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that
>
> (i) The consumer did not generally understand or appreciate the consumer's risks, cost or obligations under the proposed credit agreement; or
>
> (ii) entering into that credit agreement would make the consumer over indebted.

A holistic interpretation of these sections[310] clearly creates a positive obligation upon the lender to do a due diligence enquiry before deciding to lend. The Act further requires that in exercising this due diligence, regard be had to existing financial means, prospects and obligations.[311] Obligations are not defined in this Act, but legal obligations are definitely encompassed and these would include, for example, paying for an air quality permit or to have an environmental impact assessment.[312] This duty in an environmental context also amounts to environmental due diligence.

---

308 Reference should be had to s 80 of the NCA inorder to determine whether there has been reckless lending; *Desert Star Trading (Pty) Ltd v No 11 Flamboyant Edleen* 98/10) [2010] ZASCA 148; 2011 (2) SA 266 (SCA); [2011] 2 All SA 471 (SCA) (29 November 2010).

309 Section 80(1) (a), (b) NCA: although these few are explicitly limited the concept of reckless credit can only apply if the agreement is a credit agreement to which the NCA applies (16 S 4(1) NCA. A loan agreement is a credit agreement.

310 As read with the spirit of the Act.

311 Section 81 (2) NCA: the assessment required by this section is more comprehensive than a mere affordability assessment as the consumer's general understanding of the risks, costs and obligations should also be assessed and it should be evident from the assessment that regard was made of the consumer's debt repayment history; Van Heerden and Boraine *The money or the box: Perspectives on reckless credit in terms of the National Credit Act* 396.

312 These are obligations in relation to NEMA and NEMAQA and the credit provider or lender under this Act is required to know the specific circumstance of the client, therefore his obligations under the credit agreement encompass all other obligations that the borrower might have. There is however a corresponding obligation on the lender to divulge such obligation; *Horwood v Firstrand Bank Ltd* unreported South Gauteng High Court case nr 36853/2010.The court indicated (para 6) that not all failure by a consumer to fully and truthfully answer the credit provider's request for information as part of the prescribed assessment will entitle the credit provider to the complete defence mentioned

Section 83 does not require an allegation of reckless credit before a court can exercise its powers with regard to reckless credit. A court can *suo motu* look into the issue of reckless credit during court proceedings in which a credit agreement is being considered.[313] If the court makes a finding that there was reckless lending, it may make an order, as it deems just and reasonable in the circumstances, setting aside all or part of the consumer's rights and obligations under that credit agreement, or suspending the force and effect of that credit agreement in accordance with section 83(3)(b)(i).[314] This is a real risk that the lender may face.

Although reckless credit and lender liability are different concepts, they seek to achieve the same result - due diligence by a bank. Lender liability however goes a notch deeper by making the lender liable for the damage, a provision the National Credit Act does not cater for. If read with NEMA, for example, it could be possible to hold the lender liable on the basis that it failed to do its due diligence under this Act and therefore failed to adequately protect the environment, resulting in environmental damage.[315]

### *4.6 Voluntary standards*

As discussed above, the Constitution requires that damage to the environment be avoided, reduced or mitigated by "other measures" and these include voluntary standards.[316] Banks in South Africa are aware of the potential environmental risks that they may face under the different laws. Consequently, through the Banking Association of South Africa (BASA), lenders approached the Minister of Environmental Affairs

---

in s 81(4) NCA. What exactly would constitute such materiality was however left open by the court (para 15).

313 *African Bank Limited v Additional Magistrate Myambo NO and Others* (34793/2008) [2010] ZAGPPHC 105 298.

314 *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) para 47. The court held that "if the consumer has a valid complaint that, but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be just and reasonable to set aside the agreement".

315 Section 28 NEMA as read with s 81(2) NCA.

316 Discussed in 4.2.1: Du Plessis *Environmental law and local government in South Africa* 250 argued that adoption of voluntary measures is also part of the "other measures" and lenders particularly in South Africa find themselves adopting voluntary measures in order to protect the environment.

seeking exemption from environmental liability.[317] They submitted a code of environmental conduct containing obligations for lenders to guarantee compliance at the commencement of the bank-client relationship.

Via BASA, Business Unity South Africa and the National Business Initiative, banks have also engaged government raising concerns on the national environmental laws, policies and strategies.[318] The sector has made headways with the BASA code of environmental conduct and is collaborating with the Bank SETA to give bankers environmental and social training.[319] Furthermore, the voluntary Code for Responsible Investing in South Africa (CRISA or Regulation 28), was launched in 2011 to promote accountable investment, and encourage institutional investors to formally assimilate environmental and governance issues into their investment decisions.

The most significant however, is the Code of Conduct for Managing Environmental and Social Risk which codified the role of lenders in defending, upholding and achieving socio-economic and environmental rights. The code regulates a business's operations, procurement, lending practices, products and services.[320]

Other measures already discussed are the Equator Principles[321] and ISO 14001:2015.[322] As early as 2009, Standard Bank applied these principles and categorised projects into high, medium or low environmental risk (according to the IFC's categorisation process) and requested borrowers to demonstrate this in their Social and Environmental Assessment, and produce an Action Plan which meets the World Bank and IFC sector specific EHS guidelines and IFC Performance Standards.[323]

---

317 Leadership Magazine 2014 (hereafter referred to as the Leadership Magazine) www.leadershiponline.co.za/articles/environmental-sustainability-in-the-banking-sector-10290.html
318 Leadership Magazine 2014.
319 Leadership Magazine 2014.
320 It also sets out a benchmark Equator.
321 See para 2.6.1
322 See para 2.6.2
323 Beck 2009 www.standardbank.org.

### *4.6.1 Sustainability reports*

The major flaw in sustainability reporting by lenders in South Africa presently is that they do not provide a detailed account of their funding, particularly showing a percentage of that which is accepted or funded, and what is rejected and the reasons therefore.[324] Banks however have put in place environmental background checks and environmental policies to ensure environmental compliance through due diligence processes to manage environmental risks.[325] By rejecting loan proposals that are detrimental to the environment, banks are pushing project owners to improve their environmental compliance.[326]

## ***4.7 Conclusion***

Although the scope of the Constitution on whether a lender has an obligation to protect the environment is hazy, the lack of specificity in the environmental legislation especially when read with other laws, should come as a caution to the lender. The "other measures" in the Constitution may potentially refer to the lender especially when read with the polluter pays and the preventative principle. It is deduced that these provisions intend to put an obligation on the lender to put measures in place to avoid pollution, and if he fails to do so, he may be held liable as an indirect polluter. The deductions made in this chapter are made realistic in light of the Brazilian experience. The fact that there is no clear lender liability regime does not mean that the lender is free from environmental risks. It unfortunately means that the risks are even more dangerous because they are unknown and the lender can never fully plan his affairs in a way that frees him from those risks.

---

324 Leadership Magazine 2014.

325 These checks are in place for all large funding's and not just those over $10million which would qualify for screening under the Equator Principles.

326 Leadership magazine 2014. The World Bank and IFC put a premium on interest charged for environmentally risky projects. According to the magazine "it would be better to see South African banks finance riskier projects with a premium, or finance on the basis that if there is non-compliance, the bank can implement a premium on interest charged. Although that would be a worst-case scenario because by that point the environmental damage would already be done". In essence, their experts would rather see environmentally unsound projects get rejected for financing.

## Chapter 5 Conclusion and Recommendation

### *5.1 Chapter synopsis*

Chapter 1 was a basic introduction to the principle of lender liability and attempted or endeavoured to appeal to the moral blameworthiness of allowing a lender to be free of all liability, whereas the greater part of the damage caused by its client is a direct result of the decision to lend.

Chapter 2 discussed the general outline and basis under which a lender may be held liable. It also discussed the environmental risks that a lender faces due to the decision to lend.

Chapter 3 gave an in-depth analysis of the codification of the principle in the USA and the judicial activism that led to the realisation of the principle in Brazil. It offered diverse perspectives of the lender liability principle by giving contradictory approaches which, however, lead to the same end result.

Chapter 4 concluded that the lender liability as a principle is not clear in South Africa, although this does not mean that lenders cannot be liable for environmental damage done by their clients. It is this uncertainty that should be settled by either statute or purposive judicial interpretation.

### *5.2 Final conclusions*

The realisation of the principle of lender liability is perhaps the first major step towards sustainable development, not just in the banking sector but in the world as a whole. The ecological footprints of lending have to be curtailed in order to sustainably develop. It is the thrust of this study to argue that if lenders are subjected to tight scrutiny and are mandated to consider environmental risks as real risks just as they do financial risks, then the environment will inevitably be protected.

If all lending institution were to follow the equator principles, for example, for a start, this would ensure responsible lending and environmental due diligence. As it stands, it

is not clear whether there is an obligation on the banks to consider the effects of their lending. It is merely speculative that the current legal regime is capable of holding the lenders liable. As a result irresponsible lending is the order of the day and the current environmental damage, unless curbed by lender liability, will become catastrophic and this country will inevitably deplete all its natural resources.

Lender liability should therefore be seen as so much more than just an extension of the PPP. It is more like the belt and braces approach, with the actual polluter being subjected to stringent environmental conditions by the lender, thereby forcing him to curtail his pollution, and if the lender fails to force these environmental conditions on the lender, then he too, as the "deep pocket", can take the fall. The application of this principle is more than satisfactory for the environment, its results, spectacular and dreamlike, to say the least. It is the 'how to incorporate' the principle into South African law part, that is perhaps a bit hazy.

## *5.3 Recommendations*

The recommendations of this study shall be in two fronts: statutory amendments; and judicial activism. These recommendations shall be specific to South Africa and they shall be drawn from the lessons learnt from the USA and Brazil.

### *5.3.1 Statutory amendments*

The light regulatory touch of environmental law in South Africa fails to hit the nail on the head when it comes to lender liability.[327] Therefore lender liability as a body of law is non-existent in the jurisdiction and the laws when interpreted purposively may be capable of holding the lender liable, but this is not enough. Criticisers of South Africa's dainty regulatory touch repeatedly recommend that imitation of the more "robust" US approach would improve corporate environmental governance standards, and thus alleviate the risk of a systemic economic disasters in the future.[328]

---

327 King Code III s 5.
328 King Code III s 5.

Government, together with finance institutions, organisations and local stakeholders, have a substantial role to play in encouraging sustainable banking and its incorporation into the credit risk process in a coordinated effort.[329] This is currently not being done and hence the obligation upon government to preserve the environment by legislative and other means, in light of lender liability, is not being achieved.[330]

As it stands, the structure of the regulations governing banks does not by itself motivate them to act environmentally responsible because profit is their ultimate goal. There is therefore need for direct government action to take a stance on lender liability. For example, Norway through its ministry of finance clearly took a stance that everyone who invests in an unsustainable company is viewed as making the choice to develop unsustainably and should bear the consequences thereof.[331]

In South Africa it should not be viewed as alien that banks should bear the consequences of their lending,[332] and the light regulatory touch might be attributed to the fact that banking sector's financial muscle overpowers the government.[333]

It is submitted that if the lender liability principle is extended as a dominant consideration in lending and seen as a real risk, then it has the capacity to transform the capital market into a vehicle to achieve sustainable development.[334] This status can be achieved by reforms in the financial market to mitigate numerous markets and institutional barriers. The regulatory reforms being advocated for in this study are not absurd in their expectations of banks to take environmental permits or require authorisations. Statutory amendment to include the lender liability or a proactive judiciary that can motivate or alternatively compel lenders to consider the environmental ramifications of their decisions is crucial.[335] If successful, targeting

---

329 UNEP Banking on value 2007 http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf 12

330 Section 24 of the *Constitution.*

331 The report of the gravel committee, Ministry of Finance, 2003, Norway section 2.2.

332 After apartheid the black South Africans brought a lawsuit in the USA against international lenders for supporting the apartheid regime case discussed in Fryna 2004 *Journal of Modern African Studies* 363.

333 Richardson *Socially Responsible Investment Laws* 5.

334 Richardson *Socially Responsible Investment Laws* 3.

335 Richardson *Socially Responsible Investment Laws* 3.

financiers to fulfil present regulatory lacuna may help decrease initiation of polluting developments. Ideally such developments would never receive finance or would have to be predesigned to meet sustainable development standards so as to secure financing. This would make the lender a surrogate regulator.[336]

### *5.3.2 Judicial activism*

There is a lot that the judiciary can do to try and advance lender liability. The first is through judicial precedent in that they can interpret the law and ascribe a meaning which is purposive and progressive. This is what was done in the Brazilian courts.

### *5.3.3 Voluntary measures*

It is concluded that although there are a lot of very good voluntary measures that banks can adopt, the major problem is that they are voluntary and therefore unenforceable.[337] For example, the previous version of the Code of Banking Practice (2004)[338] clearly outlined that the provisions thereof would not be legally binding in any court of law or be used to sway the interpretation of the legal relationship between the client and the lender.

It has also been established that the major force behind adhering to these standards is not lender liability, but the reputational benefits associated with the adherence.[339] It is concluded that although there are a lot of very good voluntary measures that banks can

---

336 Richardson *Socially Responsible Investment Laws* 282.

337 UNEP banking on value 2007 http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf page 11; "South African financial institutions are more actively integrating environmental, social and governance issues in financing decisions, carrying outs sustainability credit risk assessments (SCRA) and committing to international frameworks such as the Equator Principles. we also find that South African institutions could make significant improvements in terms of formal SCRA practices and reporting".

338 2004 version of the code (it applied from 1 Oct 2004) contained in introductory provision (cl 1) accessed from http://www.banking.org.za/consumer-information/legislation/code-of-banking-practice.

339 UNEP Banking on value 2007 http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf 11 banks see these standards as an opportunity to boost their reputation and build relationships with other international banks or as an opportunity to access "on-lending" chances from foreign banks.

adopt, because these measures are unenforceable they are no checks and balances to ensure that the environment is really protect.[340]

This research therefore concludes that there is need for ultimate protection of the environment by way of a statutory amendment in South Africa that holds the lender liable for environmental damage caused by its reckless decisions to lend. The liability regime as it stands, starting from section 24 of the Constitution, is anthropocentric. As a result, amendments of subsequent legislation such as NEMA would not be supported by the Constitution and may be rendered redundant by the judiciary. It is understood that the amendments to the Constitution cannot be made lightly.

All hope is however not lost, section 24 of the Constitution can be purposively interpreted in light of the suggestions by Kidd that "other measures" necessary to protect the environment can include lender liability. Section 28 of NEMA can by further amendment or purposive judicial interpretation be extended in its ambit to include lenders. This would greatly influence the interpretation of other legislation in relation to their interpretation in light of lender liability.

---

340 UNEP banking on value 2007 http://www.unepfi.org/fileadmin/documents/banking_on_value.pdf p11,"South African financial institutions are more actively integrating environmental, social and governance issues in financing decisions, carrying outs sustainability credit risk assessments (SCRA) and committing to international frameworks such as the Equator Principles. South African institutions could make significant improvements in terms of formal SCRA practices and reporting".

# BIBLIOGRAPHY

## Literature


Ahrens and Langer 2008 *Bloomberg Corporate Law Journal*

Ahrens MH, Langer DS "Lender Liability under CERCLA Environmental Risks for Lenders under Superfund: A Refresher for the Economic Downturn" 2008 *Bloomberg Corporate Law Journal* 482-493

Beyerlin 2006 *ZaöRV*

Beyerlin U "Bridging the North-South Divide in International Environmental Law" *ZaöRV* 2006 259-296

Bodansky 1993 *Yale Journal of International Law*

Bodansky D "The United Nations Framework Convention on Climate Change: A Commentary" 1993 *Yale Journal of International Law* 451-55

Brandl and Bungert 1992 *HARV. ENVTL. L. Rev*.

Brandl E and Bungert H "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad" 1992 *HARV. ENVTL. L. REV.,* 24-30

Coetzee *Sustainability-Environmental risks and legal liabilities of South African banks*

Coetzee JH *Sustainability-Environmental risks and legal liabilities of South African banks* (LLM-dissertation NWU 2013)

Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right*

Du Plessis AA *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (LLD-thesis NWU 2008)

Du Plessis 2011 *SAJHR*

Du Plessis AA "South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty" 2011 *SAJHR* 279-307

Du Plessis *Environmental law and local government in South Africa*

Du Plessis AA *Environmental law and local government in South Africa* (Juta, Cape Town, 2015)

Donovan *Lender Liability*

James Donovan *Lender Liability* (Sweet and Maxwell, 2005)

Emerson *et al* 2006 *Northwestern University Law Review*

Emerson H. et al "What is Legal Doctrine?" 2006 *Northwestern University Law Review* 517-533

Faber *et al Cases and Materials on Environmental Law*

Daniel A. Faber *et al Cases and Materials on Environmental Law* (Oxford University Press, Oxford 2010)

Fryna 2004 *Journal of Modern African Studies*

Fryna JG "Social and Environmental Litigation Against Transnational Firms in Africa" 2004 *Journal of Modern African Studies* 363-388

Guido 1994 *Annual Survey of International & Comparative Law*

Guido A "General Principles of Law" 1994 *Annual Survey of International & Comparative Law* 1-37

Harvis and Fordharm *Lender Liability, Environmental Risk and Debt*.

*Harvis,* J and Fordharm M *Lender Liability, Environmental Risk and Debt* (London, 1993)

Hooley 2001 *Cambridge Law Review*

Hooley R "Lender liability for environmental damage" 2001 *Cambridge law review* 405-418

Jones 1988 *La.L.Rev*

Jones PM "Good faith theories of lender liability" 1988 *La.L.Rev* 1182-1200

Jaris and Fordham *Lender liability environmental risk and debt*

Jaris J and Fordham M *Lender liability environmental risk and debt* (London 1993)

Kaya 2010 *İşletme Araştırmaları Dergisi*

Kaya E "The Role of Banks In Process Of Sustainable Development and Sustainable Banking Practices in Turkey" 2010 *İşletme Araştırmaları Dergisi* 75-94

Kriebel et al 2001 *Environ Health Perspective*

Kriebel D *et al 2001The Precautionary Principle in Environmental Science. Environ Health Perspect*. 871–876.

Muller 2011 *Stell LR*

Muller G "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" 2011 *Stell LR* 742-758

Mannino, 1993 *A.B.A. SEC. BUS.L*

Mannino E "New Developments in Lender Liability: Theories of Lender Liability Litigation" 1993 *A.B.A. SEC. BUS. L.*155-186

Nicholson and Zuiderhoek 1993 *38 S.D. L. REV.*

Nicholson B and Zuiderhoek B "The Lender Liability Dilemma: Fleet Factors History And Aftermath" 1993 *38 S.D. L. REV*.

Plato, 2011 *Law and Financial Markets Review*

R Plato, lender liability for environmental damage in the absence of statutory regulation- lessons from the Israeli model part 1 2011 *Law and Financial Markets Review* 367-379,

Richardson *Socially Responsible Investment Laws*

Richardson B *Socially Responsible Investment Laws* (Oxford New York 2008)

Soltau 1999 *SAJELP*

Soltau F "The National Environmental Management Act and Liability for Environmental Damage" 1999 (6) *SAJELP* 33-41

Stone 1972 *Southern California L Rev*

Stone C "Should Trees Have Standing? Towards Legal Rights for Natural Objects" 1972 *Southern California L Rev* 450-501

Sands *Principles of international law*

Sands P *Principles of international law* 3 ed. (Cambridge University Press Cambridge 2012)

Silva 2013 *CEPMLP Annual Review* 6

Silva M "Is the lender environmentally liable for the simple act of lending" 2013 *CEPMLP Annual Review - CAR Volume 16* 1-20

Stevens 2002 *Sustainable Development Law and Policy*

Stevens M "The Precautionary Principle in the International Arena" 2002 *Sustainable Development Law and Policy* 13-15

Szecsy 1997 *Dick J Envtl L & Pol'y*

Szecsy A "From the Test Tube to the Dinner Table in Record Time: Liberalizing Effects on Domestic and International Regulatory Frameworks for Controlled Environmental Introduction of Genetically Engineered Agricultural Organisms" 1997 (2) *Dick J Envtl L & Pol'y* 177-192

Thompson 1998 *International Journal of Bank*

Thompson P "Assessing the environmental risk exposure of UK banks" 1998 *International Journal of Bank* 129-139

Thompson 2004 *British Accounting Review*

Thompson P "Bringing the environment into bank lending; implications for environmental reporting" *The British Accounting Review* 2004 197-218

Trayner *Where the advantage is, there is the burden or disadvantage*

John Trayner *Where the advantage is, there is the burden or disadvantage*. (maxims and phrases 3rd ed. 1883)

Vessio 2009 *TSAR*

Vessio M "Beware the Provider of Reckless Credit" 2009 *TSAR* 274-289

Zambão 2014 *U. Miami Int'l & Comp. L. Rev.*

Zambão B "Brazil's Launch of Lender Environmental Liability as a Tool to Manage Environmental Impacts" 2014 *U. Miami Int'l & Comp. L. Rev*. 47-103

***Case law***

*African Bank Limited v Additional Magistrate Myambo NO and Others* (34793/2008) [2010] ZAGPPHC 105

*BP Southern Africa v MEC for Agriculture, Conservation & Land Affairs* (unreported) 03/16337) [2004] ZAGPHC 18

*Columbus Joint Venture v Absa Bank Ltd* (65/2000) [2001] ZASCA 108

*Desert Star Trading (Pty) Ltd v No 11 Flamboyant Edleen* 98/10) [2010] ZASCA 148

*Energy Measurements (Pty) Ltd v First National Bank of South Africa* SA Ltd 2001 (1) SA 132 (W)

*F.P. Woll Co. v. Fifth & Mitchell St. Corp* 96-5973, 1997 U.S. Dist. LEXIS 11685 (E.D. Pa. July 31, 1997)

*Guidice v. BFG Electroplating & Manufacturing Co* 732 F. Supp. 556 (W.D. Pa. 1989)

*Hess v. Chase Manhattan Bank* 220 S.W.3d 758 (Miss. 2007).

*Horwood v Firstrand Bank Ltd* unreported South Gauteng High Court case nr 36853/2010

*In re Bergsoe Metal Corp* 910 F.2d 668, 671 (9th Cir. 1990)

*Italy v. Venezuela* M.C.C. (1903),

*Kelley v. EPA* 15 F.3d 1100 (D.C. Cir. 1994).

*Kelly v. Tiscornia* 44 ERC 1951 (6th Cir. 1996

*Kemp Industries, Inc. v. Safety Light Corp* 857 F. Supp. 373 (D.N.J. 1994).

*K.M.C. Co. v. Irving Trust Co* 757 F.2d 752 (6th Cir. 1985)

*Kruse v. Bank of America* 202 Cal. App. 3d 38 (1988)

*Minister of Police v Skosana* 1977 (1) SA 31 (A)

*Monarch Tile, Inc. v. City of Florence* 212 F.3d 1219 (11th Cir. 2000)

*Nedcor Bank v HJ Kindo and Anor* Nedcor Bank Ltd v Kindo and Another (A566/00) [2002

*Northeast Doran, Inc. v. Key Bank of Maine* 15 F.3d 1 (1st Cir. 1994).

*Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147

*Penthouse International, Ltd. v. Dominion Federal Sav. & Loan* 885 F.2d 963 (2d Cir. N.Y. 1988).

*Raymond v Allied Irish Banks* [1987] 2 FTLR 264

*S v Mokgethi* 1990 (1) SA 32 (A)

*SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ)

*Tuck v Commissioner for Inland Revenue* 1988(3) SA 819 (A)

*Underwood v Bank of Liverpool and Martins* [1924] 1 KB 775

*United States v Fleet Factors* 901 F.2d 1550 (11th Cir. 1990

*United States v. Mirabile* No. CIV. A. 84-2280, 1985 WL 97 (E.D. Pa. Sept. 6,1985)

**Legislation**

*Banks Act* 94 of 1990

*Constitution of the Republic of Brazil* of 1988

*Constitution of the Republic of South Africa*, 1996

*Comprehensive Environmental Response, Compensation and Liability* Act of 1980

*Financial Intelligence Centre Act* 38 of 2001

*Mineral and Petroleum Resources Development Act* 28 of 2002

*Mutual Banks Act* 124 of 1993

*National Environmental Management Act* 107 of 1998

*National Environmental Management: Waste Act* 59 of 2008

*National Credit Act* 34 of 2005

***Internet sources***

Beck 2009 www.standardbank.org

Beck N *Managing risks and lessons learnt: an emerging market bank's perspective on Equator Principles* 2009 www.standardbank.org accessed 13 October 2015

Black's Law Dictionary date unknown http://thelawdictionary.org

Black's Law Dictionary date unknown *What is body of laws?* http://thelawdictionary.org/body-of-laws/ accessed on 10 September 2015

Calderon 2015 https://prezi.com

Calderon L *The environment is everything that surrounds us and that we are* 2015 https://prezi.com/-2xu3gxvqtu5/the-environment-is-everything-that-surrounds- us-and-that-we/ accessed 11 November 2015

Cordato date unknown https://www.heartland.org

Cordato RE *A Proper Guide for Environmental Policy* date unknown https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/8241.pdf

Colvin *et al Coal and water futures in South Africa The case for protecting headwaters in the Enkangala grasslands* 2011
http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf

Ezovski date unknown http://www.orms.com

Ezovski date unknown *Foreclosing on Commercial Property? Environmental Due Diligence is an Important First Step*
http://www.orms.com/docs/ORMS.Environmental_&_Foreclosures.ICBA.pdf
accessed on 25 July 2015

Environmental Compliance Insider date unknown
http://environmentalcomplianceinsider.com
Environmental Compliance Insider date unknown *Liability for Contaminated Land – Can a Company Wash Its Hands of Environmental Liability for Land It*
http://environmentalcomplianceinsider.com/topstories/liability-for-contaminated-land-can-a-company-wash-its-hands-of-environmental-liability-for-land-it-sells
accessed on 25 July 2015

Hannah date unknown http://www.irmi.com/expert/articles/2000/hannah09.aspx

John A Hannah *et al Lenders and Environmental Liability* date unknown http://www.irmi.com/expert/articles/2000/hannah09.aspx accessed on 29 July 2015.

Felsenfeld and Bilali date unknown https://www.law.upenn.edu/

Felsenfeld C and Bilali G *et al The Role Of The Bank For International Settlements In Shaping The World Financial System* Date Unknown https://www.law.upenn.edu/journals/jil/articles/volume25/issue3/FelsenfieldBilali25U.Pa.J.Int'lEcon.L.945(2004).pdf accessed 29 September 2015

Gilder, Rumble and Dhladhla 2012 https://www.ensafrica.com

Guilder A and Rumble O and Dhladhla B et al Environment - South Africa 2012
https://www.ensafrica.com/news/Environment-South-Africa?Id=843&STitle=environmental%20ENSight accessed 11 November 2015

Ginter date unknown http://edrnet.com/community-banks-tip-sheet-sound-environmental-policy-building/

Brian Ginter date unknown http://edrnet.com/community-banks-tip-sheet-sound-environmental-policy-building/ accessed on 24 May 2015

Jasmin 2013 http://ecoadmirer.com

Jasmin H *6 reasons why you should care for our environment* 2013 http://ecoadmirer.com/6-reasons-you-should-care-about-our-environment/ accessed 11 November 2015

Kim and Giang 2009 www.sheppardmullin.com

Kim EC and Giang G 2009 http://www.sheppardmullin.com/newsroom-mentions-757.html accessed on 10 September 2015

Kriebel date unknown http://ehpnet1.niehs.nih.gov/docs/2001/109p871-876kriebel/abstract.html

Kriebel D*The Precautionary Principle in Environmental Science* Date Unknown http://ehpnet1.niehs.nih.gov/docs/2001/109p871-876kriebel/abstract.html accessed on 22 July 2015

Leadership Magazine 2014 www.leadershiponline.co.za

Leadership Magazine *Environmental Sustainability in The Banking Sector* March 4th, 2014 www.leadershiponline.co.za/articles/environmental-sustainability-in-the-banking-sector-10290.html accessed 14 October 2015Lenders Liability Risks date unknown http://www.wib.org

Lenders Liability Risks Date Unknown http://www.wib.org/publications__resources/directors_resources/directors_digest/2012/jul12/bahr.html#sthash.g4lI7Too.dpuf accessed on 11 May 2015

Renata, Lobo and de Rizzo date unknown www.migalhas.com.

Renata S P, Lobo and de Rizzo A *Lenders Fear Environmental Liability in Brazil* date unknown www.migalhas.com.br/arquivo_artigo/art20130429-03.pdf accessed on 22 July 2015.

Rea *Leadership magazine Environmental Sustainability in The Banking Sector Integrated Reporting & Assurance Services (IRAS)* March 4th, 2014 www.leadershiponline.co.za/articles/environmental-sustainability-in-the-banking-sector-10290.html

Michael Rea *Leadership magazine Environmental Sustainability in The Banking Sector Integrated Reporting & Assurance Services (IRAS)* March 4th, 2014 www.leadershiponline.co.za/articles/environmental-sustainability-in-the-banking-sector-10290.html accessed 14 October 2015

Taylor and Breland date unknown http://www.balch.com

Taylor EG and Breland *QH* date unknown *Environmental Issues* http://www.balch.com/files/Publication/f1011576-8ecf-458f-b099-02558c0fd0ca/Presentation/PublicationAttachment/909765c3-46c3-42e5-a06a-0246604635f0/BrelandArticle-Environmental_Issues.pdf accessed on 19 June 2015