



PRESS RELEASE

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Environmental law: Compliance moves from back office to boardroom

In a recent case, a company director was convicted of transgressing environmental laws and handed a five-year sentence, suspended for five years on condition that the director undertakes rehabilitation of environmental damage. This case has created renewed interest in risks of director liability under the National Environmental Management Act 107 of 1998 (NEMA) as well as corresponding provisions of the Companies Act No. 71 of 2008.

Donald Gibson, Partner and Practice Lead for the Performance, Assurance and Transaction Services team of Environmental Resources Management (ERM) in Sub-Saharan Africa, says recent landmark decisions such as this one, and environmentally progressive judgments, suggest that compliance is currently a hot topic, with many companies reviewing their compliance strategies.

ERM recently convened a panel discussion where experts addressed the rapid evolution of South African environmental law enforcement over the past 20 years, and what it means to companies today.

Panel member Melissa Fourie, Executive Director of the Centre for Environmental Rights, said that the risks for companies who do not comply with regulations are higher than ever before, and that it has already been demonstrated that a director of a mining company can successfully be prosecuted for environmental violations, without the option of a fine.

“Unfortunately, there is also still a disparity between reports generated by companies and what they are actually doing,” Fourie said. “This in itself poses risk for a company, its management and its investors. Instead, there is opportunity for companies to be more transparent and engaged with stakeholders, which is preferable to being taken to court.”

Gibson said: “Views out there reflect a gap between company reporting and a company’s actions. A strategy for compliant reporting should be built in to an overall business plan, and could prevent damage to the environment, save time and money and protect reputation.”

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Ian Sampson, head of the Environmental and Clean Energy Department at Shepstone & Wylie, advises both the public and private sector on a range of environmental issues. “Should companies be afraid of director liability? Not if they are compliant,” he says. “Directors must be aware, though, that NEMA includes director liability provisions that mean if someone was a director of a company involved in an environmental issue at the time that an issue occurred, they may be sued in their capacity as a director of that company and not just the company itself.”

Former legal counsel for Safety, Health and Environment at Anglo American in South Africa, Carol Dixon, said that the changing regulatory environment and particularly the risk of director liability and class action lawsuits would be “foremost in most mining company directors’ minds”. She indicated that a strategy that provides for mitigation of risk of possible incidents as well as risk of litigation would be important.

“Compliance in the health and safety arena has always been a top priority for responsible mining companies. Companies are acutely aware of the value of engaging with communities and other stakeholders from the start.”

Sampson said that NEMA imposes both criminal and civil liability, and directors must be able to prove that they took all reasonable steps to prevent the commission of an offence. “We see class action suits being brought by various groups around the world today which, in many cases, could have been prevented by adherence to a defined end-to-end strategy that incorporated adherence to environmental protection.

Gibson agrees and says that “it is important for our clients to be aware of changes in the legal and business landscape” he said. “We support companies taking a proactive approach toward achieving compliance, measured against both domestic regulations and international best practice. The key here for companies lies in keeping abreast of legal responsibilities in the evolving landscape of environmental law. Regulatory changes are frequent and agility is required to adapt accordingly.”

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During the past three years we have worked for over 50 percent of the Global Fortune 500 companies delivering innovative solutions for business and elected government clients and helping them manage the sustainability challenges they face.

ERM has been involved in projects across every country in Africa for over 35 years, and in 2003 established a permanent presence in the region to meet the growing needs of our clients. We now employ over 200 people working out of offices in South Africa (Cape Town, Durban and Johannesburg), Mozambique (Maputo) and Kenya (Nairobi).

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