INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA

WORLD CONGRESS

Topic IV - POLLUTION INSURANCE

- METHODS, COVERAGE AND BENEFICIARIES

by

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QUESTIONNAIRE

1. Environmental legal aspects

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

Damages will be discussed below under (a) constitutional (statutory) and (b) delictual damage claims.

(a) Constitutional damages

South African law relies on a constitutional, statutory, and common-law based liability in an environmental context.

As section 39 of the Constitution of the Republic of South Africa, 1996 provides that international law has to be considered, the effect of international instruments must be considered.[2]

Firstly on our *continent* the African Charter on Human and Peoples Rights[3] provides that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health',[4] and that '[a]ll peoples shall have the right to a general satisfactory environment

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[2] As enforced by s 39(1)(b); see also s 108(2), s 231, s 232 and s 233.

[3] Adopted on 27 June 1981 OAU DOC CAB/LEG/67/3/Rev 5.

[4] S 16(1) of the African Charter; see also Van der Linde M & Louw L "Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the *SERAC* communication" 2003 (3) *African Human Rights Law Journal* 167; see also Ebeku 161 in general for a comparative study of the right to a clean environment in various international constitutions, with specific emphasis on the position in African countries.

favourable to their development'.[5] Infringement would lead to potential liabilities, one of which could be the vesting of civil liability.

Secondly on a *national* level the fundamental right to the environment is found in section 24 of the Constitution:

'Everyone has the right to:

(a) an environment that is not harmful to their health and well-being;

(b) have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that:

  (i) prevent pollution and ecological degradation;

  (ii) promote conservation;

  (iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.'

The inclusion of section 24 in the Constitution clearly creates a statutory duty to protect the environment and to prevent pollution that could cause damage to the environment. The question remains whether this section is wide enough to create specific constitutional remedies which the injured party who suffers damage could enforce against the polluter who causes it. No specific remedies are mentioned in section 24(a) yet a court may grant 'appropriate relief' under the Constitution. Section 24(b), however, provides that '[e]veryone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures'. In contrast to section 24(a) above, section 24(b) does create a positive duty to take the required actions in order to reach the constitutional goals set out in the Bill of Rights. Section 24(b) also places an imperative on the State to secure environmental rights by legislation. Once again, no specific remedies are mentioned in this section. General constitutional remedies will therefore be available which might in limited situations include constitutional damages.

As stated in *Fose v Minister of Safety and Security* the court held that '[t]here is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce' fundamental rights.[6] In view of later case law supporting the possibility of claims for constitutional damages, it is submitted that it is possible to claim constitutional damages from a person who infringes upon the constitutional right to the environment as 'appropriate relief' under sections 24 and 38. In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and others* amici curiae*)*

[5] S 24 of the African Charter.

[6] Par 60.

the court acknowledged that constitutional damages may be claimed for damage caused by an infringement of a constitutional right. In *MEC Department of Welfare, Eastern Cape v Kate* the court confirmed that a claim for constitutional damages should succeed where it is the most appropriate remedy based on the facts and circumstances of a specific case. The remedy must also clearly fit the injury.[7] Although awards have been made by extending delictual liability in view of the Constitution, it is important to note that proving delictual liability is not a prerequisite for all claims for constitutional damages.[8]

Constitutional damages for loss in the absence of a common-law remedy will therefore only be possible where a damages claim is the most appropriate remedy in the specific circumstances.[9] Where the State fails to act in accordance with its duties, the Constitutional Court has acknowledged that it is also possible to sue for damages based on delict where the State fails to act in accordance with its statutory, common-law or constitutional duties.[10]

(b) Delictual damages

Social policy requires that 'harm rests where it falls', meaning that a person has to bear the loss that he suffers.[11] Only in legally recognised instances, in the absence of statutory liability, can the wrongdoer become legally liable to compensate the plaintiff.

Aquilian liability is, for example, such an exception to the rule of *res perit domino*. The main claim for damages will thus be brought as a delictual civil damages claim (South Africa does not follow the casuistic approach that tort law does, but applies general principles to determine liability – see below). [12] Our law is thus founded on general principles of liability,yet has not been free from some beneficial influence by tort law, by the adoption for

[7] *Steenkamp NO v The Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) par 29;; see also *MEC Department of Welfare, Eastern Cape v Kate* 491.
[8] See the cases of *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA).
[9] *MEC Department of Welfare, Eastern Cape v Kate* 490 to 491.
[10] *Steenkamp NO v The Provincial Tender Board, Eastern Cape* (CC) 29–55.
[11] *Res perit domino* is a fundamental premise in law; *Telematrix (Pty) Ltd t/a Motor Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 462. See in general Neethling J, Potgieter JM & Visser PJ *Law of Delict* 7th ed (2015) (hereinafter 'Neethling *et al*') 3.
[12] *Telematrix (Pty) Ltd t/a Motor Vehicle Tracking v Advertising Standards Authority* 468.

example of liability for 'nuisance', leading to a hybrid character of our current law of delict.[13] This type of influence of international law is endorsed by section 39 of our Constitution that provides that international law has to be considered in the development and interpretation of our law.

Because of the development in South Africa of extensive delictual principles and experience gleaned from their vast application in a wide range of claims dealt with in the past, delictual liability is most attractive as an alternative to statutory liability.[14]

For a civil damages claim the injured party must prove 5 (five) requirements/elements:

(1) conduct (either a commission – positive conduct; or an omission – failure to act where a legal duty to act exists);

(2) wrongfulness (conduct that causes harm as assumed to be wrongful unless a ground of justification exists that the harm caused is legally justified that does not allow a civil claim to succeed);

(3) fault (either intent or negligence: no specific degree of fault is required for pollution damages), in some instances by either statute or common law, a strict liability (liability even in the absence of either intent or negligence) exists;

(4) causation (the conduct must cause the damage; this is tested according to both factual and legal causation); and finally

(5) damages must be suffered.

Although mainly common-law principles apply to environmental delicts, some statutory rules and principles could govern or impact on these delictual claims. The principles of the fundamental rights contained in the Constitution have to be applied to determine and interpret those requirements where open-ended standards apply, for example, in the determination of wrongfulness, negligence and legal causation.[15] In some instances a statutory exclusions could exclude fault as a requirement for the liability of the wrongdoer, and thus create a strict liability regime for specific situations or industries.[16] Claims against employers for

[13] See *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 410.

[14] See on the suitability of our law of delict to accommodate new risks Neethling J "Aanspreeklikheid vir 'nuwe' risiko's: Moontlikhede en beperkinge van die Suid-Afrikaanse deliktereg" in Faure M & Neethling J (eds) *Aansprakelijkheid, risico en onderneming: Europese en Zuid-Afrikaanse perspectiven* (2003) (hereinafter 'Faure & Neethling') 17, 33, who support the view that the law of delict offers 'elastic and adaptable principles' that can be applied to novel situations and new risks; these are specifically suitable to environmental damage claims.

[15] S 8, s 38 and s 39. Van der Vyfer JD "The Private Sphere in Constitutional Litigation" 1994 (57) *THRHR* 378–379.

[16] S 30 of the National Nuclear Regulator Act 47 of 1999; liability in terms of s 17 of The Genetically Modified Organisms Act 15 of 1997 and strict liability in common law..

occupational injuries and diseases are, for example, limited to the statutory benefits provided and expressly exclude the possibility of a civil claim against the employer.[17]

Although legislation allows for the award of penalties and fines payable by the polluter, these are not awarded to the injured party as a form of compensation, but are payable to the state for purposes of remediation.

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1. How are environmental damages described under the law?

No single definition for 'environmental damages' exists in our law. In accordance with a very wide spectrum of environmental legislation, a broad spectrum of descriptions can be found to describe environmental damages is specific industries or activities.

Terminology such as 'environment', 'ecological', 'natural' and 'pollution'; as well as 'damage', 'harm', 'loss' and 'infringement' are used interchangeably in various statutes, bills, white and green papers, academic publications and textbooks, both national and international. The National Water Act[18] serves as an example: Section 1 defines the term 'pollution': (xv) 'pollution' means'the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it less fit for any beneficial purpose for which it may reasonably be expected to be used; or harmful or potentially harmful (aa) to the welfare, health or safety of human beings; (bb) to any aquatic or non-aqueous organisms; (cc) to the resource quality; and (dd) to property.'

For our national insurance products, however, the cover is broadly described as *environmental impairment* cover. The word 'damages' is not applied as a standard term.

<u>Note to international rapporteur:</u> It is not possible to provide a comprehensive list with all the statutory definitions of damage. Please redirect a request to me if you need more information on terminology?

1.2.2. Who may be (either directly or indirectly) made liable?

[17] Compensation for Occupational Injuries and Diseases Act 130 of 1993 s 22.
[18] Act 36 of 1998.

The duty of care and remediation of environmental damage is defined in Section 28 of the National Environmental Management Act[19] (hereinafter 'NEMA'): '1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped and rectify such pollution or degradation of the environment.'

The polluter may be the state, a natural person or a juristic person, and all can be held liable in accordance with the civil liability regime or in terms of a specific statutory liability regime [see the information on constitutional issues under 1.1 above]. This duty applies to owners, occupiers and even to mere users of land on which environmental damage can occur.[20]

The measures as required by section 28 of the National Environmental Protection Act are very extensive, and include the investigation, assessment and evaluation of the impact that the pollution has on the environment,[21] the duty to inform and educate employees as to their manner of work and the impact that their conduct can have on the environment,[22] to cease, prevent or modify activity that pollutes or harms the environment,[23] to contain or prevent the movement of pollutants or cause of degradation,[24] to eliminate the source of pollution[25] as well as to remedy the effects of pollution or degradation.[26] This creates extensive statutory duties for any person who is involved in an activity that has the potential to cause pollution damage or degrade the environment.

In addition, the following persons are responsible specifically for <u>the costs incurred to remedy or rehabilitate</u>:

[19] Act 107 of 1998.
[20] S 28(1); reg 2, enacted in terms of s 44 of NEMA, requires any person using a vehicle within a coastal zone to take all reasonable measures to avoid, minimize or rectify any harm caused.
[21] S 28(3)(a).
[22] S 28(3)(b).
[23] S 28(3)(c).
[24] S 28(3)(d).
[25] S 28(3)(e).
[26] S 28(3)(f).

(a) persons either directly or indirectly responsible for the pollution or degradation, or even for any potential pollution or degradation;[27]
(b) owners of the relevant land or their successors-in-title;[28]
(c) persons in control of land, or who used the land at the time of the pollution or degradation 'when the activity or process is or was performed or undertaken, or the situation came about'; [29]
(d) any persons who acted negligently in failing to prevent such pollution or degradation as required in terms of NEMA;[30] and
(e) even a person who benefited from the preventative or remedial measures taken in terms of section 28(7).[31]

In accordance with the common law principle of vicarious liability, an employer is liable for the damage caused by his employees; and a client can even be liable for damages caused by an independent contractor who performs services for the client.

Various statutes also allocate liability. For example the directors of a company or members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment,. This could including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented'.[32]

1.2.3. How is the determination of causal link of environmental damages?

For a civil and statutory claim, the requirement of causation is proven where the plaintiff can in the first instance prove a factual causation – most often tested by a flexible application of the *conditio sine qua non*-test.

In the second place legal causation is required where there is a chain of consecutive or remote consequences, to limit the endless chain of factual causation and liability for damages that are too remote. Best-known theories that apply in our law include the flexible approach based on policy consideration; reasonableness; fairness and justice; the theory of adequate causation;

[27] S 28(8)(a).
[28] S 28(8)(b).
[29] S 28(8)(c)
[30] S 28(1), s 28(8)(d).
[31] For example where the Director-General or Head of a State Department took the relevant measures upon themselves.
[32] S 38(2).

the direct consequences criterion; the theory of fault and the reasonable foreseeability criterion. Our courts appear to prefer a flexible criterion based on public policy considerations, which require taking constitutional imperatives into consideration.[33]

1.2.4. Does your legislation provide for strict or fault-based environmental liability?

In most cases liability is fault-based. By exception a strict liability regime is recognised only where it applies in terms of common law, such as in cases of nuisance where a person uses his property in an unreasonable way or in terms of the doctrine of the abuse of rights, or where it is introduced by statute.[34] Strict liability is thus a rare exception to the norm that fault is required and requires an express rule to that effect.[35]

It does appear from national legislative measures that there is a universal increase in the introduction of strict statutory liability regimes, especially for activities in high-risk industries. [36] see for example Hazardous Substances Act,[37] the Marine Pollution (Control and Civil Liability) Act,[38] the National Nuclear Regulator Act,[39] and strict liability product liability in terms of the Consumer Protection Act.[40]

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

Yes. The South African national framework legislation is the National Environmental Management Act.

Under it, various statutes have been enacted aimed specifically at the different components of the environment for example The National Environmental Management: Waste Act; and the National Environmental Management: Air Quality Act,[41] National Environmental

[33] *Smit v Abrahams* 1994 (4) SA 1 (A) 18; *S v Mokgeti* 1990 (1) SA 32 (A) 40.
[34] Neethling & Potgieter 387. *Van Schalkwyk v Van der Wath* 1963 3 SA 636 (A).
[35] Faure & Neethling 75.
[36] The Genetically Modified Organisms Act 15 of 1997.
[37] Act 15 of 1973; s 16 creates a regime for vicarious liability for contravention of the provisions of this Act.
[38] S 9(3).
[39] S 30.
[40] Act 68 of 2008.
[41] Act 39 of 2004.

Management: Biodiversity Act 2004,[42] and The National Environmental Management: Waste Act.[43]

Some other specific statutes deal extensively with other aspects of the environment and are not merely subordinate to the NEMA, such as the Marine Pollution (Control and Civil Liability) Act.[44]

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

The State Department of Environmental Affairs id the primary state department. It is divided into various branches: which for purposes of this topic include (a) Biodiversity and Conservation; (b)Climate Change and Air Quality; (c) Chemicals and Waste Management and (d) Oceans and Coasts.[45] The Department of Mineral Resources, however, is the state department governing any aspect of mining, reconnaissance operations (prospecting), exploration of petroleum products (natural oil and gas), minerals, development and related issues.

As far as enforcement is concerned, in general the Minister of the portfolio, and the Director-Generals of the Departments[46] can enforce these duties, by issuing a directive or compliance order to the relevant persons, and by authorising officers to execute their duties and powers.[47]

Secondly, Environmental Management Inspectors (hereafter 'EMI') commonly called Green Scorpions are a network of environmental enforcement officials from different government departments. This includes The Department of Environmental Affairs, provincial environmental departments and other provincial and municipal organs of the state. They are appointed in terms of the National Environmental Management Act (NEMA) of 2008.

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[42] Act 10 of 2004.
[43] Act 59 of 2008.
[44] Act 6 of 1981.
[45] www.environment.gov.za.
[46] This will be the Director-General of Environmental Affairs and Tourism in terms of s 1 item 9 of the NEMA and the Environmental Conservation Act 73 of 1989.
[47] S 28(4).

1.4.1. What is the scope of activity of these entities?

In terms of NEMA the powers of various authorities where the environment is, or has been, seriously damaged, endangered or detrimentally affected by any activity include the powers to direct a person to cease any activity and take such steps as the authority deems fit to eliminate, reduce or prevent the damage, danger or detrimental effect.[48]

The mandate and functions of EMI, According to the DEA website are that , "EMI must see to it that environmental legislation is followed and enforced. The EMIs have the powers to:
Investigate: question witnesses, inspect and remove articles, take photographs and audiovisual recordings, take samples and remove waste
Inspect: enter premises to ascertain whether legislation is being followed and seize evidence of criminal activity
Enforce: search premises, containers, vessels, vehicles, aircraft and pack animals; seize evidence and contraband; establish road blocks and make arrests.
Administrate: issue compliance notices and admission of guilt fines
The EMIs are not empowered to prosecute cases in court. All cases continue to be handed over to the National Prosecuting Authority (NPA) for prosecution. The EMIs therefore work closely with prosecutors country wide to ensure the successful prosecution of offenders.

Roles of EMI in relation to the South African Police Service

The South African Police Service continues to play a crucial role in enforcing environmental legislation and EMIs work closely with the SAPS in the investigation of environmental crimes. In terms of the National Environment Management Act, all police officers have the powers of an EMI."

The biggest exposure to liability most companies have is from technical non-compliances with conditions imposed in an Environmental Authorisation (often called RoDs) issued in terms of NEMA or similar permit conditions, such as the conditions contained in a Waste Management License issued in terms of the National Environmental Management, Waste Act, 2008 and others.For this reason it is important to carefully design an environmental

[48] S 31A(1).

management programme to ensure awareness and ongoing compliance with each of the conditions in any authorization which the company has. A further exposure is undertaking a listed activity without an environmental authorization.

Where a company is failing to comply with a permit condition or with some other provisions of an environmental statute, a compliance notice may be issued by the DEA. When issuing a compliance notice, the DEA does not have to believe there is any actual harm to the environment from the transgression but simply that there is non-compliance with a technical, legally binding requirement.

The DEA also has power to issue a directive. Unlike a compliance notice the authorities may only issue a directive if they believe that actions by the company are actually causing pollution or other damage or degradation to the environment. The obligation in the statutes is to take reasonable measures to avoid such pollution or damage. A directive may result in the closure of operations.

The contravening person may also be directed to rehabilitate the environment at his own expense.[49] Where a person fails to comply, the authority may take or instruct any other person to take these steps and all expenditure may then be claimed from the former.[50] This may include more than just the minimum environmental clean-up costs incurred, as remediation and restitution to the previous position in addition to the basic clean-up costs.

1.4.2 How do they operate, and on which legal grounds?

The state departments are mandated by the Constitution and the various statutes, primarily NEMA, that governs their activities and powers. See also the information in par [1.4.1] above.

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

Yes, procedures are determined by statute – primarily in accordance with the NEMA, but the different statutes contain provisions for activities that fall under the scope of that

[49] S 31A(2).

[50] S 31A(4); see also *MEC: Department of Agriculture, Conservation and the Environment, Dr ST Cornelius v HTF Developers (Pty) Ltd* par 2.

statute, and provide for example for minimum and maximum fines, penalties and terms of imprisonment. see also par [1.4.1 above].

1.5.1. Who is in charge of keeping the environmental protection?

The state Department of Environmental Affairs, and public authorities as identified by the legislation [see specifically par 1.4.1 above]. This includes local governmental and subordinate authorities or nominated non-governmental organisations and specific state-controlled enterprises.

1.5.2. How does this system work?

The authorities require environmental impact assessments (hereinafter 'EIA's) before authorising activities that could have a negative environmental impact. They may investigate and act upon any complaint or manifestation of environmental degradation. They have free access to do site and activity assessments. The EMIs have the powers to:

(a) Investigate**:** question witnesses, inspect and remove articles, take photographs and audiovisual recordings, take samples and remove waste
(b) Inspect: enter premises to ascertain whether legislation is being followed and seize evidence of criminal activity
(c) Enforce: search premises, containers, vessels, vehicles, aircraft and pack animals; seize evidence and contraband; establish road blocks and make arrests.
(d) Administrate: issue compliance notices and admission of guilt fines

The powers of various authorities where the environment is, or has been, seriously damaged, endangered or detrimentally affected by any activity include the powers to direct a person to cease any activity and take such steps as the authority deems fit to eliminate, reduce or prevent the damage, danger or detrimental effect.[51] This may include issuing compliance orders and directives, as well as interdicting a person to cease activities.

The person may also be directed to rehabilitate the environment at his own expense.[52] Where a person fails to comply, the authority may take or instruct any other person to take these steps and all expenditure may then be claimed from the former.[53] This may include more than just

[51] S 31A(1).
[52] S 31A(2).
[53] S 31A(4); see also *MEC: Department of Agriculture, Conservation and the Environment, Dr ST Cornelius v HTF Developers (Pty) Ltd* par 2.

the minimum environmental clean-up costs incurred, as remediation and restitution to the previous position in addition to the basic clean-up costs.

In addition: *Control of emergency incidents* is dealt with specifically by NEMA section 30: *ƒ* "incident" means an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed; *ƒ* The responsible person or, where the incident occurred in the course of that person's employment, his or her employer, must, as soon as reasonably practicable after knowledge of the incident *ƒ* (a) take all reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons; *ƒ* (b) undertake cleanup procedures; *ƒ* (c) remedy the effects of the incident; *ƒ* (d) assess the immediate and long-term effects of the incident on the environment and public health.

2. Legal aspects on environmental insurance policies (answer is required)

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

NEMA makes no mention of any liability or other insurance, whether mandatory or elective. No central legislation exists that regulates environmental insurance. In some industries, mandatory insurance cover is required, for example in the nuclear, water sanitation and waste management industries. Yet there is no specific insurance contract law legislation.

All insurance is regulated by the Insurance Act of 18 of 2017, which came into operation on 17 January 2018. Insurance industry is supervised by a Twin Peaks system; with supervision by the Financial Sector Conduct Authority resorting under the Department of Trade and Industry, and prudential issues resorting under the Department of Finance.

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

The relevant legislation, specifically the regulations issued under the various acts that apply to the different components of the environment (specifically statutes issued under the NEMA framework legislation) prescribe mandatory insurance cover, and government departments within the specific industry (i.e. Department of Water and Sanitation) then stipulate the nature and extent of cover required on an *ad hoc* basis.

2.3. Does the law provide for compulsory environmental insurance?

2.3.1. If so, which would be the relevant risks, covered items and limits?

Yes, in some industries mandatory insurance is required. Most of these are required by subordinate legislation (provincial or local government regulations; ordinances or rules). The risks covered depend on the environmental components in play, i.e. water, or for example soil. Activities where water leaks, pollution etc are the risks, the cover should be sufficient to remediate the environment and clean-up pollution. The form of insurance can be first-party property insurance; first party insurance to the benefit of a third party, or third party liability insurance.

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

Where it is, for example a State tender procedure, tenders or proposals must already contain proof of insurance cover (usually a submission in the form of a letter of underwriting).[54]

In other situations where cover is mandatory, cover should usually be obtained when EIA's have been completed and the authorisations for a specific activity are issued. Therefore, cover must have been procured before commencement of such an activity. The cover must in most cases be in force, or renewed, for the duration of the activity.

2.4.1. In which step of a venture should such policy be submitted under the law?

Proof of cover can be required during the initial application period (for permissions/licenses/permits etc to commence with a harmful activity); or during the initial impact assessment period, or may in some cases be required only upon commencement of the activity.

[54] See for example on insurance cover to be procured for water pollution in a state tender procedure *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality and Others* (8221/16) [2017] ZAKZDHC 15.

It can also be made a continuous duty, in that proof of renewals of cover must be submitted to the governing authority annually. It will depend on the specific industry and the specific statute.

3. Operational methods for pollution insurance (answer is required)

3.1. Which are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

Both. But also in many instances direct first-party property insurance, direct liability insurance and often a mandatory first party insurance to the benefit of a third party.

Companies can also explore relevant environmental management programs as well as adequate insurance and risk transfer solutions to mitigate against potential complex financial and reputational issues.

3.1.1. What kinds of risks should be covered thereunder?

Cover can be required for any type of environmental risks. Water pollution; air pollution; soil pollution; nuclear risks; oil spills etc.

3.2. Does the law or administrative rule define upper limits for losses or coverage?

Yes. There is, however, no single piece of legislation that sets limits across the board. Statutes are diverse. In some instances legislation determines limits for a specific activity, and for a specific risk to a component of the environment. The government in tender procedures mostly in their Requests for Tenders stipulate the limits and nature of cover required on an *ad hoc* basis.

3.2.1. Which are the criteria that should apply to limits' definition?

Criteria include a financial limit that might be (a) event-based; (b) occurrence-based; or (c) aggregate cover. Furthermore (d) time limits or (e) activity limitations are possible.

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

Yes. It appears that private ventures as a rule have to rely more heavily on private insurance cover, whereas state-owned enterprises might resort under broader cover procured by the state itself. In limited situations such an enterprise may even be exempted from obtaining separate cover where the state is willing to accept the risks and carry costs and damages of a specific activity if it is in the public interest.

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

No.

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

Primarily the procedures as set by NEMA and the ECA apply, yet specific legislation has been promulgated for the operations of mines and management of environmental risks. The Mineral and Petroleum Resources Development Act 28 of 2002; Mine Health and Safety Act 1996; and the Mining Titles Registration Act 1967. Legislation in this industry deals extensively with the duty of clean-up and restoration, and also criminal sanctions for contravention. In this case the activity-specific legislation is extensive and requires EIAs (Environmental Impact Assessments), permits, licences and specific insurance cover for example against fire damages; seepage; water pollution and so forth.

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

Yes. Extensive disclosures are required. In addition, the risk assessments are also done with reference to the mandatory EIAs required by government.

3.6.1. Which are the most usual ones?

Disclosures of nature of risks; potential increase in risks; compliance with statutory requirements; disclosure of EIAs; financial status and competency.

4. Coverage under pollution insurance (answer is required)

4.1. Which are the major covered risks relating to civil liability arising from pollution?

Surface water and groundwater pollution is the most prevalent; then soil pollution; soil subsistence and soil erosion risks; and to a lesser degree air pollution (seldom for damages, more often only clean-up and restoration costs). The latter resulting mostly from the problems in proving causation for purposes of a civil claim.

4.2. Which are the major covered guarantees for events arising from pollution?

See above. Please request additional detailed information if the question requires other data?

4.3. Which are the major covered operational risks arising from pollution?

See above: mining, power plants both coal and nuclear; waste management, water sanitation, and the storage and transportation of hazardous goods form the major operational risks. Chemical manufacturing processes may also contribute to air and soil pollution, but to a lesser degree.

4.4. Does the insurance cover fines?

No. It usually only covers emergency response; legal defence costs; clean-up costs; legal liability for damages; ecological restoration costs; increased costs of working and third party bodily harm and injury.

4.5. Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?

Not as a general rule. There may, however, be cover for personal injuries such as occupational health and injuries in the mining sector (i.e. asbestosis) which could indirectly cover injuries that lead to an infringement of dignity; or in the case of an enterprise, and reputational issues etc.

4.6. Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

Cover might be for a group such as all mine workers suffering from asbestosis; or all farmers in an agricultural area who suffer losses due to water pollution by another enterprise or industry. Yet, the lack of aesthetic appeal, moral damages etc. is not a risk covered by most environmental policies.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

5. Beneficiaries (answer is required)

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance?
Beneficiaries can be any individuals, legal entities (juristic persons such as companies),

state-owned or private institutions, collectives such as traditional ethnic groups who collectively utilise land.

6. Market status (answer is required)

The Environmental Impairment Liability (EIL) insurance market in South Africa is steadily growing due to legislative changes, regulatory enforcement and increased corporate growth.

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

Data not available

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

Data not available

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

All activities that have the potential of posing a risk of environmental impairment: including manufacturing; storage; transport; power supply; mining and agriculture.

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

Data not available

6.3.1. What percentage of the aforesaid losses was covered under insurance?

Data not available

7. Academic development (answer is required)

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

No specific institutes exist that study such a narrow form of insurance, yet studies are done on postgraduate levels and by industries on the development of environmental insurance and complexities and issues pertaining to it.

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialize in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

The issues are only dealt with as a sub-issue of either insurance law in general (very seldom including specifics on environmental insurance cover) and environmental law (again, very little focusses on the insurance aspects). No original texts exist only on environmental insurance, except for B Kuschke "Insurance against Damage caused by Pollution" (UNISA 2009); some journal articles include B Kuschke "Insurance Claim Triggers for Cover against Environmental Damage caused by Hydraulic Fracturing" 2016(3) Journal for Environmental Law and Policy.

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