

When Insolvency meets the Environment: Directors and liquidators should develop a corporate green thumb

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Introduction

1. Corporate South Africa has long been aware of the influence that environmental considerations have on the successful operation of a business. In 2020 concepts such as environmental conservation, environmental responsibility and environmental accountability have become almost as important as paying taxes, as a result of the shift in morality around the world that is now geared towards environmental sustainability.
2. South African companies must develop a corporate green thumb by complying with environmental legislation, from the operational phase right through to the dissolution of companies.
3. According to Stats SA, the total number of liquidations increased by 11.9% during the first six months of 2019, as compared to the first six months of 2018. This shows a marked increase in liquidations and the unfortunate reality in South Africa at the moment is that companies have had to close their doors quite quickly and permanently due to unfavourable conditions in the local and international economies.
4. We highlight herein some of the risks that directors and liquidators may face in their personal capacities, as a result of non-compliance with environmental legislation.

Environmental obligations of directors, prescribed officers and liquidators

5. While a company remains solvent, its directors and prescribed officers (being persons who, despite not being a director of a company, exercises or participates in the exercise of general executive control and management over the company's business) must consider the following:
 1. Section 76 of the Companies Act 71 of 2008 ("the Companies Act") addresses the standard of conduct expected from directors (and prescribed officers) and states at subsection (3) that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director:
 - a. in good faith and for a proper purpose;
 - b. in the best interests of the company; and
 - c. with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as carried out by that director, and having the general knowledge, skill and experience of that director.
 2. Section 76(4) of the Act states that in respect of any matter arising in the exercise of the powers or the performance of the functions of a director, a director will have satisfied the obligations in section 76(3) of the Companies Act, if the director:
 - a. has taken reasonably diligent steps to become informed about the matter;
 - b. has made a decision, or supported the decision of a committee or the board with regard to that matter; and
 - c. had a rational basis for believing, and did believe, that the decision was in the best interests of the company.
 3. In further compliance with this section, the director is required to communicate to the board, at the earliest practicable opportunity, any material information that comes to his or her attention, unless he or she reasonably believes that the information is publicly available or known to the other directors or is bound by a legal or ethical obligation of confidentiality.
 4. In addition to the Companies Act, many South African companies voluntarily follow the set of corporate governance principles and leading practices as set out in King Code IV.
 5. Principle 3(14)(d) of the King Code IV provides that the governing body of a company should oversee and monitor, on an ongoing basis, how the consequences of the organisation's activities and outputs affect its status as a responsible corporate citizen. This oversight and monitoring should be performed in line with measures and targets agreed with management in areas such as the environment (including responsibilities in respect of pollution, waste disposal and the protection of biodiversity). As stated in principle 13(25), details of monitoring and compliance inspections by environmental regulators, findings of non compliance with environmental laws, or criminal sanctions and prosecutions for such non compliance should be disclosed in order for an organisation to be considered an ethical and good corporate citizen.
 6. Consequently, guided by the King Code IV, it would be reasonable to conclude that directors must, in exercising their powers and performing their duties in terms of the Companies Act, have due regard to and comply with environmental legislation.
 7. In this respect, in terms of section 24P of National Environmental Management Act No 107 of 1998 ("**NEMA**"), there exists a duty on "*an applicant for an environmental authorisation relating to prospecting, exploration, mining or production*" to ensure that financial provision is made for rehabilitation. This ensures that rehabilitation is conducted on projects related only to the mining industry (which is arguably one of the most environmentally impactful industries next to the manufacturing and agricultural industries).
 8. Additionally, according to section 28 of NEMA, any person who causes, has caused or may cause significant pollution or degradation of the environment and is, *inter alia*, in control of land or premises from which significant pollution or degradation of the environment is caused, must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring. Persons in control of such land or premises, where owned or operated by a company, would include its directors and, should liquidation intervene, its liquidator/s. NEMA sets out in various provisions how this prescribed duty of care should be exercised.
6. However, once an insolvent company is liquidated, it may not have the financial means to fulfil its obligations under environmental legislation, an unintended consequence of which could be environmental damage. In these circumstances, the following should be noted:
 1. Section 24P(6) of NEMA excludes application of the Insolvency Act to any form of provisioning as contemplated in this section. Financial provisioning is potentially the saving grace for mines in protecting the environment during the liquidation process. This is however not always the case.
 2. In addition, where the liquidator is duty bound to manage an insolvent company's environmental obligations (including those imposed through licences and permits), such duty will extend until the remediation of the property or closure of a site. Moreover, officials from the Department of Mineral Resources and Energy ("DMRE") or the Department of Environmental Affairs Forestry and Fisheries ("DEAFF") may, in terms of sections 28, 31L and 31N of NEMA, direct, amongst others, directors or liquidators, as the case may be, (being persons who sit in a representative capacity for the company or who control the company's affairs) to take specific steps to comply, or direct them to take steps (non-specific) to remediate environmental damage, or, where these departments have taken it upon themselves to remediate such damage, they are empowered to proportionately recover these remedial costs from those parties who contributed to such damage, or even those parties who received a benefit from the measures taken to remediate the environmental damage.
 3. Where the financial provisioning is insufficient for purposes of environmental remediation, the duty to manage a company's environmental obligations can also be categorised as a cost of the liquidation, as contemplated in section 97(2)(c) of the Insolvency Act 24 of 1936. These costs will be paid out of the insolvent company's free residue (i.e. proceeds from unencumbered assets), before other statutory preferent creditors (including employees) and concurrent creditors are paid.
 4. However, where an environmental claim is made by either the DMRE or the DEAFF for recovery of costs expended to remediate environmental damage in terms of sections 28(8) and 31N(2)(b) of NEMA, and such a claim cannot be satisfied from the financial provisioning for environmental remediation, the balance of this claim will be classified as being concurrent.

Liability concerns

7. Where a company and the environment meet, personal liability for those in charge of the company may arise under the following circumstances, amongst others:
 1. Directors and prescribed officers who do not exercise their powers and perform their duties in accordance with the provisions of section 76 of the Companies Act, with due regard to their duties under environmental legislation, may, in terms of sections 77(3) read with 218(2) of the Companies Act, be held personally liable for any loss or damage suffered by any person as a result of such a contravention, including instances where such a contravention results in environmental damage.
 2. Section 49A of NEMA states that an offence is committed where one unlawfully, intentionally or negligently commits any act or omission which causes or is likely to cause significant pollution or degradation or is likely to have a detrimental effect on the environment. The possible penalties that can be imposed in accordance with section 49A range from a fine of between five million and ten million rand or imprisonment for a period of one to ten years (or both a fine and imprisonment). Therefore, where significant pollution or degradation or a detrimental effect to the environment is/was caused whilst the company is/was under the control of certain directors, prescribed officers or liquidator, those persons may either have a fine imposed against them, or be imprisoned.
8. Furthermore, under section 38 of the Constitution of South Africa 1996, class actions may be brought where a class or group of claimants' right to an environment that is not harmful to one's health or well being has been threatened or infringed upon. The claim will be delictual in nature, and therefore the class of claimants in those proceedings could become a concurrent creditor in subsequent liquidation proceedings.

Conclusion

9. Any environmental harm caused by a company while governed by certain directors and prescribed officers could result in that person being held personally liable for any loss or damage to any other person, or for the costs of environmental remediation. This is true even after a director leaves the company, and therefore remains relevant in the event of the liquidation of the company.
10. It is therefore clear that it is not only in the best interests of the environment to develop a corporate green thumb by complying with environmental legislation, but it is additionally in the best interests of directors, prescribed officers and liquidators to ensure such compliance, in order to limit personal liability from arising.

