



DUTY OF CARE: A LEGAL ANALYSIS OF THE BUSINESS JUDGMENT RULE AND THE LIABILITY OF DIRECTORS FOR ENVIRONMENTAL DAMAGE IN THE SOUTH AFRICAN MINING INDUSTRY

Ву

Deon Ernst Joubert (Student No: 98037413)

Submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM (LLM) IN EXTRACTIVE INDUSTRY LAW IN AFRICA

Prepared under the supervision of:

Adv. Leonardus J. Gerber

Department of Public Law
Faculty of Law
University of Pretoria

April 2017



DECLARATION OF ORIGINALITY

I, Deon Ernst Joubert, hereby declare that this disserta	tion is my original work, and
other works cited or used are clearly acknowledged.	This work has never been
submitted to any University, College or other institution	of learning for any academic
or other award.	

Signe	d:		٠.	 	 	-		 •	 								
Date:		 		 	 				 								



ACKNOWLEDGEMENTS

To those in practice who inspire me:

Specifically, my wife Mireille Joubert and solicitor Rick Smith.

Thank you, Advocate Leon Gerber, for your hard work and dedication in producing such a practically relevant and informative master's degree.

Your assistance, knowledge and approachability throughout the course highlights your admirable character and is the cornerstone of the success of this highly intense course.



ABSTRACT

The South African mining industry is viewed as the locomotive of the economic development in South Africa and has been a leading contributor to the economy for more than a century. However, the price paid for economic growth has left South Africa with a "mining legacy" and mining companies now face an upsurge of politically and regulatory induced challenges. Directors of mining companies have to act with a certain level of duty of care, skill and diligence in order for them to navigate through these various challenges. The heightened awareness of environmental degradation caused by mining has seen a rise in stricter mining liability legislation in South Africa, with a specific focus on company and director liability. The result is that directors are now faced with the possibility of personal liability when performing their executive function. According to the business judgment rule, directors will be shielded from liability if they acted with the necessary duty of care.

The objective of this dissertation is to examine to what extent the business judgment rule will offer protection to a director of a mining company where the director caused environmental damage. The analysis of this study will be conducted in the context of the environmental damage caused by a mining company due to the decision making and 'governance' of the mining company's director or directors.

KEYWORDS

Business judgment rule, companies act, corporate governance, directors, damage, duty of care, environmental law framework liability, mining, mineral and petroleum development act, national environmental management act, sustainable development.



LIST OF ACRONYMS

AMD Acid Mine Drainage
CC Constitutional Court

CSR Corporate Social Responsibility

DMR Department of Mineral Resources

EIA Environmental Impact Assessment

EMP Environmental Management Plan

EMPR Environmental Management Programme Report

FSB Financial Services Board

GDP Gross Domestic Product

JSE Johannesburg Stock Exchange

MPRDA Mineral and Petroleum Resources Development Act 28 of 2002

MPRDAA Mineral and Petroleum Resources Development Amendment Act 49 of

2008

NEMA National Environmental Management Act 107 of 1998

NEMAA National Environmental Management Amendment Act 62 of 2008

NEM: AQA National Environmental Management: Air Quality Act 39 of 2004

NEMBA National Environmental Management: Biodiversity Act 10 of 2004

NEMPAA National Environmental Management: Protected Areas Act 57 of 2003

NEMWA National Environmental Management: Waste Act 59 of 2008

NWA National Water Act 36 of 1998

SCA Supreme Court of Appeal



TABLE OF CONTENTS

DECL	ARATION OF ORIGINALITY	2
ACKN	OWLEDGEMENTS	3
ABST	RACT	4
KEYW	ORDS	4
LIST C	DF ACRONYMS	5
TABLI	OF CONTENTS	6
1.	INTRODUCTION	8
1.1.	Background	8
1.2.	RESEARCH QUESTIONS	8
1.2.1.	Primary question	8
1.2.2.	Secondary questions	9
1.3.	AIMS AND OBJECTIVES	9
1.4.	METHODOLOGY & PARAMETERS	10
1.4.1.	Research methodology	10
1.4.2.	Research parameters	10
1.4.3.	Limitations of research	11
1.5.	RELEVANCE OF THE RESEARCH	11
1.6.	CHAPTER OVERVIEW	12
2.	THE SOUTH AFRICAN MINING INDUSTRY	13
2.1.	Introduction	13
2.2.	ECONOMIC BENEFIT AND MINING INDUSTRY CHALLENGES	14
2.3.	MINING AND THE ENVIRONMENT	17
2.3.1.	Mining methods and the environment	17
2.3.2.	Mining life cycle and the environment	19
2.4.	MINING AND SUSTAINABLE DEVELOPMENT	20
2.5.	CONCLUSION	21
3.	ENVIRONMENTAL LIABILITY FRAMEWORK	22
3.1.	Introduction	22
3.2.	THE CONSTITUTION OF SOUTH AFRICA, 1996	22
3.3.	THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998	25
3.3.1.	Statutory duty of care	25
3.3.2.	Environmental principles	26
3.3.3.	Other important statutory provisions	29
3.4.		
0.⊣.	THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002	31



4.	THE DIRECTOR AND THE DUTY OF CARE	34
4.1.	Introduction	34
4.2.	THE DIRECTOR AND CORPORATE GOVERNANCE	34
4.2.1.	The Director	35
4.2.2.	Corporate governance	36
4.3.	DUTY OF CARE, SKILL AND DILIGENCE	38
4.3.1.	The South African common law	38
4.3.2.	The Statutory duty of care	40
4.4.	Conclusion	42
5.	THE BUSINESS JUDGMENT RULE AND DIRECTOR LIABILITY	43
5.1.	Introduction	43
5.2.	THE SOUTH AFRICAN STATUTORY BUSINESS JUDGMENT RULE	43
5.2.1.	Business judgment rule doctrine	43
5.2.2.	The South African statutory business judgment rule	45
5.2.3.	The business judgment rule test	47
5.3.	DELICTUAL LIABILITY	50
5.3.1.	Conduct	50
5.3.2.	Wrongfulness	51
5.3.3.	Fault	52
5.3.4.	Causation	55
5.3.5.	Damage	57
5.4.	Conclusion	57
6.	CONCLUSIONARY REMARKS	58
BIBLIC	OGRAPHY	60
PRIMAR	Y SOURCES	60
Legisla	tion	60
Case la	aw60	
SECONI	DARY SOURCES	62
Journa	ls 62	
Books	64	
Online	resources	65
Report	s 65	



1. INTRODUCTION

1.1. Background

The South African mining industry is a high-risk industry that presents the directors of mining companies with a wide range of decision making challenges. Additionally, the South African environmental legislative framework makes ample provision for the civil liability of a mining company, and consequently its directors, for environmental damage. In navigating through these challenges a director of a mining company must act with a certain level of duty of care, skill and diligence. Where directors act in a careless or incompetent manner they are personally liable for any harm the company suffered as a result. However, according to the doctrine of the Business Judgment Rule a company director, who acts honestly and in good faith, will not be held liable for a business judgment that led to the harm suffered by the company. The Business Judgment Rule was incorporated into South African company law and provides directors with a level of protection from personal liability, where they acted with the necessary duty of care.

1.2. Research questions

1.2.1. Primary question

Given the background of the dissertation, the primary question that must be asked in this research study is:

To what extent does the Business Judgment Rule provide protection to directors of mining companies from liability for damage caused to the environment?

The South African environmental law framework provides for company and director liability, jointly and severally. However, the business judgment rule's primary focus is shielding directors from liability where the company or shareholders institute a claim for damages against the director.

Specifically, civil liability.
 Section 77(2)(b) of the *Companies Act*, 71 of 2008 stipulates that a director of a company may be held liable based on the common law principles relating to delict for any losses or damages which the company may suffer due to a breach of the duty of care and skill in terms of section 76(3)(c).

⁴ The Business Judgment Rule will be discussed in chapter 5.

See section 76(4)(a).



1.2.2. Secondary questions

To answer the primary research question, the following secondary research questions need to be answered:

Firstly, to determine whether a director acted with the necessary duty of care, the question must be asked what does a mining company, given the nature of the industry, expect from its directors?

The second question that needs to be answered is whether the current South African environmental legislation framework provides for a sufficient 'liability' regime to hold a director accountable for environmental damage?

The third research question is twofold and central to the primary research question. The first part of the question asks what is the definition of a director and the second part of the question asks; when are directors careless in their conduct?

The fourth question encapsulates the primary research question and asks to what extent does the business judgment rule offer protection to directors from liability for damage caused to the environment?

1.3. Aims and objectives

In answering the secondary questions posed by the research question the study will have to achieve the following objectives:

The first objective is to contextualise the mining industry and the role of mining company directors in South Africa. The study will briefly focus on the economic benefit of the mining industry as well as the growing challenges it faces. The impact of the different mining methods and mining life cycles on the environment and the growing emphasis on sustainable development will provide further background of what is required of directors in the mining industry.



The second objective is to examine the corporate environmental liability framework of South Africa. The study will examine specific mining related legislation that focus on corporate liability for environmental damage.

The third objective of this study will analyse the definition of a director and the importance of corporate governance in avoiding company liability. The study will then examine the duty of care and skill that is required by directors and to what extent directors will be held liable for their careless conduct.

The final objective of this study is to examine the Business Judgment Rule doctrine and the extent of the protection it offers to directors from liability for damage caused to the environment. This will require an enquiry into the requirements of a delictual claim against a director for environmental damage, in the context of the protection of the Business Judgment Rule.

1.4. Methodology & Parameters

1.4.1. Research methodology

The research study will mainly comprise of a literature review of relevant textbooks, law journals, legislation, case law and internet sources that relate to: The mining industry, environmental framework legislation, the liability of directors and the business judgment rule, corporate governance and the duty of directors of mining companies.

1.4.2. Research parameters

This research will largely be conducted within the scope of the South African common law as well as the following pieces of legislation: The *Companies Act*, 2008, The South African *Constitution 1996*, The *National Environmental Management Act*, No. 107 of 1998 (the *NEMA*) and The *Mineral and Petroleum Resources Development Act*, No. 28 of 2002 (the *MPRDA*). The research will examine the elements of delictual liability and some principles that relates to corporate governance, as well as the industry reports of the South African mining sector.



1.4.3. Limitations of research

Unfortunately, the nature of the dissertation will not allow for a comprehensive overview of the following relevant aspects:

Firstly, director liability. This is an exhaustive field in South Africa law with more than enough relevant aspects that can be incorporated.

Secondly, it is not realistic or practical to provide an inclusive analysis of all the environmental and mining related regulations and legislation. The focus of this dissertation is on the aspect of liability for damage caused to the environment and not that of the statutory violation or the noncompliance of authorisations.

Lastly, a number of amendments to the *NEMA* and the *MPRDA* have been published. The *National Environmental Management Amendment* Act 62 of 2008, the *National Environmental Management Laws Amendment Act* 25 of 2014 as well as the *Mineral and Petroleum Resources Development Amendment Acts* (2012 and 2016).

It is submitted that these amendments have triggered misperceptions and uncertainty in the industry due to their ambiguous implementation time frames. The study will therefore not allow for a detailed analysis of these amendments but will, where relevant, highlight these amendments. However, it is further submitted that, for the purpose and relevance of this study, the central and key elements that relate to the principal legislation remain present despite it being amended.

1.5. Relevance of the research

A substantive part of the master's degree, *Extractive Industries Law in Africa*, focused on what effect the social and environmental impact on mining has on the mining company itself. The topic is therefore relevant for two distinct reasons.

Firstly, there is an international and national growing interest in corporate governance, director's duties and director liability in the mining sector. Directors are required to act with a certain level of duty and care in performing their tasks and the business judgment rule is viewed as a form of immunity for director liability and therefore a topic of international and national interest.



Secondly, the topic has practical relevance. The South African courts have adopted a very lenient approach to the directors' duty of care as well and still have to interpret the statutory business judgment rule in South African law. With mounting pressure on directors in the mining industry the courts will no doubt be called upon in the future to interpret the duty of care of directors and the roll of the business judgment rule in a mining and environmental context.

1.6. Chapter overview

Chapter one of the study provides a background of the questions that will be asked in the study and the objectives that underline the dissertation. It provides the methods used to conduct the study as well the parameters wherein it was conducted and the limitations it faced.

Chapter two of this study will attempt to contextualise the significant role of directors in the mining industry as well as what is expected from a mining company director in a South African context. The chapter will first highlight the economic benefit of the industry and its most notable and recent challenges. Environmental damage is an unavoidable consequence of mining and the second part of this chapter will examine the impact of the various mining methods and life cycles on the environment. The third part of the study will focus on sustainable development in the mining industry and the emphasis on mining directors to incorporate sustainable development principles into the corporate decision making processes.

The third chapter will examine the key mining liability legislation that is focused on corporate accountability. The current environmental legislative framework provides for an improved framework of liability for directors in the mining industry. Due to the nature of this study, this section only focus on the relevant environmental liability provisions: The South African *Constitution* 1996, The *National Environmental Management* Act, No. 107 of 1998 and The *Mineral and Petroleum Resources Development* Act, No. 28 of 2002.



The fourth chapter of this study will examine two different aspects that are central to the primary research question. The first part of this chapter will examine the definition of a director and the role of good corporate governance. The second part of the chapter will involve a closer look at the common law and statutory duty of care and skill of directors in South Africa.

Based on the context that was created in the preceding chapters, the fifth chapter of the study will then attempt to answer the research question. The chapter will examine the business judgment rule doctrine in South Africa as a form of protection against liability. The breach of a director's duty of care is dealt with the law of delict. The study will therefore proceed to examine the elements of a delict based on environmental damage and in the context of the business judgment rule.

The study concludes with a systematic evaluation of the preceding paragraphs and some conclusory remarks.

2. THE SOUTH AFRICAN MINING INDUSTRY

In the end, our society will be defined not only by what we create, but by what we refuse to destroy. - John C. Sawhill

2.1. Introduction

The South African mining sector is a high risk / high reward industry⁶ and plays a central role in the economic welfare of the country. Currently the industry faces various politically induced challenges which adds to the growing pressure mining companies, and consequently the directors, must deal with.⁷ Furthermore, all the various aspects of mining, the methods and its life cycles, are environmentally destructive and unsustainable.⁸ The nature of the industry and the challenges it face illustrates the importance of skilful and diligent directors who can apply the necessary sustainable development principles into their decision making.⁹

http://miningforzambia.com/mining-is-a-high-risk-business/ last viewed on 24 April 2017.

Fedderke J and Pirouz F The Role of Mining in the South African Economy 1.

⁸ Strydom and King (eds) Environmental management 526.

⁹ Strydom and King (eds) *Environmental management* 550.



2.2. Economic benefit and mining industry challenges

The mining industry in South Africa has shaped and developed the social, environmental and political landscape of South Africa for more than a century. Mining contributed directly to the establishment of the Johannesburg Stock Exchange (JSE), the development of the country's infrastructure and was the catalyst for the development of other economic sectors in South Africa. March 11

Mining as an industry is a major contributor to the social and economic outlook of a country. When properly managed, mining will typically result in the creation of wealth and jobs, housing, infrastructure and the upliftment of the community. Mining has a massive multiplier effect and it is estimated that for every R1 spent on a mine R4 is injected into the economy. According to a 2015 report issued by the chamber of mines the mining industry contributed R286 billion towards the South African Gross Domestic Product (GDP) representing 7.1% of the overall GDP.

The South African mining industry is the fifth largest in the world and South Africa is still considered to be "the country with the world's largest mineral endowment"¹⁵ with the estimated remaining resource base in South Africa somewhere at US\$2.5 trillion¹⁶.

Harrisona P and Zack T *The power of mining: the fall of gold and rise of Johannesburg, Journal of Contemporary African Studies*, 2012 30:4, 551-570.

https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/ last visited on 24 April 2017.

¹² Strydom and King (eds) *Environmental management* 526.

¹³ Strydom and King (eds) Environmental management 527; Mine SA 2016 Facts and Figures 4.

Antin D The South African Mining Sector: An Industry at a Crossroads 1; Other benefits include its ability to generate tax and directly contributed R89.4 Billion to fixed investment, R3.7 Billion in royalties and R12.5 billion in taxes to the South African government in the 2015/2016 financial year. These funds form part of the government's budget, which in turn is used to improve the infrastructure and lives of South Africans. As a foreign exchange earner for the economy the Foreign Direct Investment (FDI) in the mining industry grew considerably, from R112 billion in 2004 to R377 billion in 2014. Gross sales of primary minerals appreciated from R125.3 billion in 2004 to R395 billion in 2014. The total income for the mining industry has increased by 2,2% per annum, from R393,4 billion in 2012 to R419,5 billion in 2015 Mining is a significant contributor to employment in the nation. Employment in the mining industry grew from 448 909 in 2004 to 495 592 in 2014 with 457 698 individuals directly employed by the sector in 2015. This represents just over 3% of all employed nationally. The Mining Indaba 2017, Chamber media briefing: State of the mining sector Comments made by the President of the Chamber of Mines, Mike Teke and of Mines CEO, Roger Baxter http://www.chamberofmines.org.za/industry-Chamber news/publications/presentations last visited on 24 April 2017.

Antin D The South African Mining Sector 1.; See also Carroll A.B Corporate Social Responsibility: Evolution of a Definitional construct Business and Society, 38 (3), 268-295.

Fedderke J and Pirouz F The Role of Mining in the South African Economy 1.



It is no wonder that the South African mining industry is viewed as the locomotive of South African economic development.¹⁷ The economic wealth generated by the mining industry highlights the enormous responsibility of mining companies and subsequently, the need for skilful and diligent directors.

Despite the economic benefit of mining,¹⁸ the industry and the companies who operate in it have experienced a rapid increase in politically induced challenges that impact directly on directors and their ability to manage in highly stressful conditions. A combination of factors is responsible for these growing challenges. The 2008 financial crisis caused a global economic slowdown that affected the global demand for minerals and reduced the value created by the industry.¹⁹ For example, a recent financial performance review saw the South African mining industry "cash flow" at its poorest.²⁰

In addition to the financial crisis mining companies are faced with endless labour unrests.²¹ The South African mining industry is the most unionised sector in the South African economy.²² Mine worker strikes result in a drastic drop in production across the mining industry and can cause an overall production drop beyond levels of maintainable profitability.²³ One of the consequences of the 2015 mine worker unrest was a R12 Billion fall in mine production and a half a per cent decline in gross domestic product ("GDP").²⁴

Escalating labour unrest and mine worker strikes, amplified by the 2012 fatal shooting of mineworkers by police at the Marikana Lonmin mine, has resulted into growing calls

Johannes Fedderke J and Pirouz F The Role of Mining in the South African Economy 1.

Some might argue that the challenges the industry face are actually as a result of the economic benefits the industry enjoyed in the past, leaving South Africa with a mining legacy. Harrison P and Zack T *The power of mining: the fall of gold and rise of Johannesburg* 2 – 4.

See https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/ last viewed on 24 April 2017.

See https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/ last viewed on 24 April 2017.

Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last viewed on 24 April 2017;Baxter R Mining in South Africa: Challenges and opportunities 2016 3.

Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last viewed on 24 April 2017.

Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last viewed on 24 April 2017.

²⁴ Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last viewed on 24 April 2017.



for the nationalization of mines.²⁵ The rise of "resource nationalism"²⁶ in the industry has scared off many international investors and long-term investing.²⁷ The rise of resource nationalism may result in the loss of ownership and this in turn creates operational uncertainty.²⁸

Probably the most vital challenge from an executive management perspective is that of regulatory and legislative uncertainty.²⁹ Each of the mining life cycle phases consist of several authorisation processes, each with its own set of requirements that pertain to the mining method and the specific phase of that cycle.³⁰ Until recently, the authorisation process was hampered by legislative fragmentation of the mining authorisation process.³¹ In the mining industry, time really is money and the duplication of authorisations, lack of capacity in government sectors and unnecessary shut downs and time delays result in severe financial losses.³² These challenges place extreme pressure on a mining company and its directors. To navigate through these recurring obstacles a director needs the ability to interact and engage with labourers and communities and provide leadership from the "bottom up".³³

A director also needs to understand the physical extraction aspect of the mining industry and especially the specific mining company's method of mining and the mining life cycle.

Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last visited on 24 April 2017.

Leon P http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana last viewed on 24 April 2017.

²⁷ Baxter R Mining in South Africa: Challenges and opportunities 2016 3 - 6.

Beech W *Mining Review* 2014 1. Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 7 -14.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 7 – 14.

³⁰ Strydom and King (eds) *Environmental management*.

Le Roux N *Environmental Governance, Fragmentation and Sustainability in the Mining Industry* 6 – 8. Leon P http://www.politicsweb.co.za/documents/mining-in-sa-then-now-and-into-the-future-irr last viewed on 24 April 2017.

A solid mining and environmental regulatory and authorisations framework is critical to lawful mining. Without a stable legislative framework within which mining companies can obtain mining rights as well as the associated environmental authorisations, and exercise those rights investors will remain cautious when making investment decisions. Le Roux *N Environmental Governance, Fragmentation and Sustainability in the Mining Industry* 12.

Schultz C and Bezuidenhout A A leadership initiative to enhance employee engagement amongst engineers at a gold mining plant in South Africa 2013.



2.3. Mining and the environment

The underlining aspect of this study is environmental damage. Mining remains the single most destructive activity on the environment and may include the physical destruction of landscapes to the total annihilation of biodiversity through waste and pollution.³⁴ Therefore, it is necessary for the directors of mining companies to understand the process of extraction and the different cycles of the 'life of mine'.³⁵ This will enable them to avoid unnecessary degradation to the environment. This section will briefly examine the various mining methods and the phases of the life of mine and the impact it has on the environment.

2.3.1. Mining methods and the environment

There are generally four distinct methods of mining in South Africa.³⁶ They are surface mining, shallow underground mining, deep underground mining and offshore mining.³⁷

Surface Mining occurs when minerals are fairly close to the surface in a massive body, or where the mineral itself is part of the surface soil or rock.³⁸ Surface mining is in a general sense a more economic method to mine.³⁹ The most common surface mining methods are strip mining, open-pit, opencast mining and quarrying.⁴⁰ There has recently been a shift towards dump reclamation which involves the extraction of 'leftover' minerals from old mine tailings.⁴¹ These activities involve a complete disruption of the surface and effects the soil, fauna, flora and surface and underground water systems.⁴²

Glazewski *Environmental law 17 – 3;* There are various mining methods practised by mines that are hazardous to the environment. This study does not allow for a comprehensive analysis of all of these activities.

See Glazewski Environmental law 17 – 3 for a descripton of 'life of mine'.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 18; Glazewski Environmental law 17 – 3.

W.J. Alignment of various environmental authorisation processes for the mining industry 19.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 19.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 19.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 19.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 19.

⁴² Glazewski Environmental law 17 – 3.



Shallow underground mining is known as the "board-and-pillar method"⁴³ and prevalent in coalmining and consists of sinking a shaft into the mining seam and extracting the ore below the surface.⁴⁴ Shallow undermined areas are prone to unplanned surface subsidence and has led to spontaneous combustion of coal remains.⁴⁵

Deep underground mining is prevalent in the gold mining industry.⁴⁶ It consists of sinking deep and broad vertical shafts.⁴⁷ The most serious environmental effect of deep underground mining is the impact of dewatering process on groundwater.⁴⁸ The dewatered water usually comes into contact with sulphate-rich minerals, which results in the water becoming acidic and thereby dissolves the salt and heavy metals. The underground water is then usually pumped to huge evaporation ponds.⁴⁹ In heavy rainfall conditions these evaporation dams may overflow and cause the pollution of nearby river systems.⁵⁰

The dewatering operation also contributes to subsidence of surface areas and the formation of sinkholes.⁵¹ This has given rise to the recent controversial acid mine drainage debacle.⁵² Acid Mine Drainage (AMD) is responsible for the costliest environmental and socioeconomic impacts in South Africa.⁵³

The South African coastal and marine environment provides a rich source of liquid fuels and has led to a rise in in offshore mining.⁵⁴ Offshore mining involves a drilling

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 18.

Strydom and King (eds) *Environmental management* 555

⁴⁵ Strydom and King (eds) *Environmental management* 555.

South Africa is renowned for its deep underground mining and for having the deepest underground mine in the world at the Mponeng mine of AngloGold Ashanti, where depth of 3860 meters was reached in April 2009. See http://www.mining-technology.com/features/feature-top-ten-deepest-mines-world-south-africa/ last viewed on 24 April 2017.

⁴⁷ Strydom and King (eds) *Environmental management* 555

⁴⁸ Glazewski Environmental law 7 – 9

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 19. Glazewski Environmental law 17 – 5.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 20.

⁵¹ Glazewski *Environmental law 7* – 9

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 20.

⁵³ Glazewski *Environmental law* 7 – 9;

⁵⁴ Strydom and King (eds) *Environmental management* 556.



process where the greatest environmental concern is the possibility of an uncontrolled release of hydrocarbons (called a blowout) or oil spills.⁵⁵

The impact of these mining methods on the environment is severe and a clear and a thorough understanding of the mining method that is used is required to prevent unnecessary environmental damage.⁵⁶

2.3.2. Mining life cycle and the environment

All forms of mining practices follow the same basic mining life cycle which can be divided into four phases; prospecting and exploration, development, extraction and closure.⁵⁷ Each of these phases of mining are associated with different forms of environmental impacts.

The Prospecting and exploration phase: Depending on the proposed mining activity, the recognisance and prospecting phase generally causes the least impact on the environment in the mining process. This process may involve the clearing of vegetation to allow heavy vehicles mounted with drilling rigs to conduct the exploration through drilling 'test' boreholes.⁵⁸

The development phase; This phase consists of the actual construction of a mineral deposit for exploitation. It includes the construction of access roads, power sources, mineral transportation systems, mineral processing facilities, waste disposal areas, offices, and other support facilities.⁵⁹ It also involves site preparation and clearing, and can have substantial environmental impacts, especially if the site is accessed through, or located near ecologically sensitive areas. ⁶⁰

The extraction phase; All types of (active) mining involves the extraction and beneficiation of minerals (or petroleum) from the earth. The mining method selected for exploitation is determined mainly by the characteristics of the mineral deposit.

Oosthuizen W.J. *Alignment of various environmental authorisation processes for the mining industry* 18. See http://ocean.si.edu/gulf-oil-spill for an example.

⁵⁶ Strydom and King (eds) *Environmental management* 556.

⁵⁷ Strydom and King (eds) *Environmental management* 557.

⁵⁸ Glazewski *Environmental law 7* – 13.

⁵⁹ Glazewski *Environmental law 7* – 13.

⁶⁰ Glazewski Environmental law 7 – 13.



Proposed mining projects differ considerably in the proposed method for extraction and beneficiation. ⁶¹

The reclamation phase: The final stage in the operation When active mining ceases, mine facilities and the site are reclaimed and closed. Over the last decade mining companies caused irreparable damage to the environment by first implementing irresponsible mining methods and thereafter abandoning mining operations without any consideration for the environment in which they once operated. The goal of mine site reclamation and closure should always be to return the site to a condition that most resembles the pre-mining condition.

Mining companies require capable and responsible executives who can insure that the methods used and each mining phase. and so that the proper precautionary methods are implemented in each of the phases.

2.4. Mining and sustainable development

The destructive social and environmental legacy of mining was highlighted at the Earth Summit in Brazil in 1992. The summit emphasised the need for mining companies to move towards a sustainable development approach in their operations and throughout their mining life cycle. Especially in South Africa, before the advent of democracy, mining companies adopted an 'island approach' to the social impact of mining.⁶³

Sustainable development in the mining industry, means, that investments in mining projects should first be financially profitable and then environmentally compliant and socially responsible.⁶⁴ The objective is to generate the profit in a responsible or sustainable manner and for as long as possible.⁶⁵ The bottom line is that unless a mine is profitable, it cannot be sustainable.⁶⁶

⁶¹ Glazewski *Environmental law 7* – 13.

⁶² Glazewski *Environmental law 7* – 13.

⁶³ Glazewski Environmental law 7 – 4.

⁶⁴ Glazewski *Environmental law 7* – 13.

Reinhardt FL and Robert NS Corporate social responsibility, business strategy, and the environment 1 – 2.

Reinhardt FL and Robert NS Corporate social responsibility, business strategy, and the environment 3.



Secondly, directors should adopt leading environmental management practices in their operations. Unless steps are taken in the planning and operational stages to protect environmental values, they may very well face long-term liabilities such as acid mine drainage. Planning should include ways to reduce water and energy consumption, minimizing waste production, preventing soil, water, and air pollution at mine sites, and conduct successful mine rehabilitation procedures.⁶⁷

Finally, the director of a mining company must develop the company's Corporate Social Responsibility (CSR) portfolio.⁶⁸ The concept is a voluntary initiative that attempts to improve the living conditions (economic, social, environmental) of local communities and to reduce the negative impact of a mining project.⁶⁹ In many instances mining companies provide communities with jobs and economic growth to gain support from the community. Unless the community is engaged and supportive of a mining operation, opposition and confrontation may ensue.⁷⁰

To manage economic development in an environmentally and socially responsible manner demands integrated thinking from directors.⁷¹ Mining companies and their directors need to be focused on the broader impact of the company's operations and on incorporating sustainable development principles into their decision making.

2.5. Conclusion

The objective of this chapter was to provide a necessary background of the industry in which directors of mining companies (mining directors) operate. The high monetary value of the industry and the associated challenges dictates that a director should

Reinhardt FL and Robert NS Corporate social responsibility, business strategy, and the environment 2.

International public financial institutions are currently leading the drive toward sustainable development and CSR in the mining industry with their lending practices. The IFC Performance Standards on Social & Environmental Sustainability (the IFC) is the de facto benchmark in development financing for responsible mining projects. The Equator Principles emerged as a derivative of the IFC Performance Standards and is a set of ten voluntary social and environmental principles which must be met to satisfy the conditions of lending. More than 90 financial institutions in 37 countries have adopted the "Equator Principles," committing them to following International Finance Corporation standards in their lending practices for project loans above \$100 million. See http://www.nortonrosefulbright.com/files/equator-principles-iii-pdf-17mb-111048.pdf last viewed on 24 April 2017.

This involves engagement with the community and a 'social licence to operate'.

Reinhardt FL and Robert N S Corporate social responsibility, business strategy, and the environment 4.

⁷¹ Kidd Environmental Law 34.



have a certain level of skill and be a competent decision maker. Furthermore, the intricate and severely destructive mining methods and life cycles requires understanding and sustainable development considerations to avoid unnecessary damage to the environment. Sustainable decision making forms part of a company's corporate performance and should become part of a mining company's strategy.⁷²

3. ENVIRONMENTAL LIABILITY FRAMEWORK

Mining is like a search-and-destroy mission.

- Stewart Udall

3.1. Introduction

The environmental liability framework is a key aspect in determining the liability of mining companies and their directors. The focus of this chapter is to determine whether it is possible to afford personal civil liability to directors of mining companies in terms of the current environmental legal framework., to afford personal civil liability to a director of a mining company, for damage caused to the environment. Due to the nature of this study this chapter will only focus on the key liability concepts, procedures and principles contained in the South African Constitution 1996, The National Environmental Management Act, No. 107 of 1998 and The Mineral and Petroleum Resources Development Act, No. 28 of 2002.

3.2. The Constitution of South Africa, 1996

The *Constitution* is the supreme law in South Africa that binds all organs of state, the legislature, the executive and the judiciary.⁷³The *Constitution* contains two key provisions relevant to this study. The first is section 24, the embodiment of South Africa's environmental right and the second is section 8, the "application provision."⁷⁴

Glazewski Environmental law 7 – 13. See also Carroll A.B Corporate Social Responsibility: Evolution of a Definitional Construct Business and Society, 38 (3), 268-295.

Section 2 and section 8 of the South African Constitution, 1996;

⁷⁴ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 7.



Section 24 is the basis for a claim based on environmental damage and liability.⁷⁵ It is therefore the first consideration when mining companies, and by implication their directors, are held liable for environmental damage.⁷⁶

Section 24 states that 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;
 - secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.⁷⁷

As shown in the previous chapter, the impact of mining is the severe degradation of the environment⁷⁸ The physical mining process is inherently an unsustainable process and an unmaintainable utilisation of natural resources.⁷⁹ The constitutional environmental right emphasise the principals of sustainable development. Section 24 (a) states that "everyone has the right to an environment that is not harmful to their health and well-being". Section 24(b) states that everyone has the right:

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

The landmark decision in *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment*⁸⁰ confirms the importance of this right and that proper environmental considerations should be recognised. The Court indicated that:

⁷⁵ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 7.

⁷⁶ Glazewski *Environmental Law* 5 – 10;

⁷⁷ Section 24 of the Constitution.

⁷⁸ See chapter 2.3 above.

⁷⁹ Kidd *Environmental Law* 21 – 22.

^{1999 2} SA 709 (SCA) 719. Hereafter referred to as the Save the Vaal case.



Our Constitution, by including environmental rights as fundamental justifiable human right, by necessary implication requires that environmental considerations be accorded appropriate recognition.⁸¹

The Constitutional Court case, *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs*,⁸² has similar relevance to the mining industry. The Court emphasised the importance of weighing the economic benefit against that of sustainable development and acknowledged the importance of the environmental right. The Court stated that:

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. ⁸³

The consequence of section 24 in the mining industry is broadened by the application provision of the Bill of Rights set out in section 8.84

Section 8 (1) and (2) of the *Constitution* stipulates that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state as well as natural and juristic persons, but only to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.⁸⁵

Therefore, when section 24 is read with section 8 it has horizontal application and binds natural and juristic persons who affirm their constitutional environmental right against other individuals.⁸⁶ Mining companies therefore have an obligation to adhere to constitutional, legislative, and other measures to prevent pollution and ecological degradation, and to promote conservation and help develop in a sustainable manner.⁸⁷

⁸¹ Glazewski Environmental Law 5 – 10; Kidd Environmental Law 21 – 22

⁸² 2004 (5) SA 124 (W). Hereafter the BP Southern Africa case.

At 143 C – D. Glazewski Environmental Law 5 – 10; Kidd Environmental Law 21 – 22.

Vorster L The Liability of Mines for the Prevention. Minimisation and Remediation of Pollution 27.

Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 25.

⁸⁶ Glazewski Environmental Law 5 – 10; Kidd Environmental Law 21 – 22

Glazewski Environmental Law 5 – 10.



The extraction of minerals results in massive waste and pollution which in turn may impact on the rights of other.⁸⁸ Directors of mining companies must recognise the impact their mining company has on the environment and realise that irresponsible management from their part will result in the breach of the constitutional environmental right.

3.3. The National Environmental Management Act 107 of 1998

The *National Environmental Management Act* 107 of 1998 (the *NEMA*) is entrenched in section 24 of the *Constitution*.⁸⁹ The *NEMA* contains mechanisms, procedures and principles to facilitate a comprehensive liability regime and compensation procedure for environmental damage which is why it is a key legislative 'tool' in addressing the research question. This section will only examine the statutory duty of care, the environmental principles and a few other pieces of relevant liability legislation.

3.3.1. Statutory duty of care

The *NEMA* expands on the common law principles of delictual liability by introducing section 28, the statutory 'duty of care' to take 'reasonable measurers' in the following circumstances:

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

The effect of the provision is that liability is extended to the mining company where it "caused significant pollution or degradation of the environment and should have taken

⁸⁸ Be that communities or other landowners.

The NEMA serves as enabling legislation for the constitutional right and is regarded as a vehicle to realise the constitutional protection afforded to the environment. Glazewski *Environmental law* 7 – 19.

Section 28(3) provides an indicative range of measurers that can be considered reasonable measurers. Vorster L *The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution* 6. Kidd *Environmental Law* 18.



reasonable measurers to prevent such pollution (or degradation) from occurring, continuing or recurring."91

Section 28 of *NEMA* is a general provision and applies to all forms of pollution including mining pollution and extends the duty of care to a wide range of persons. ⁹²This includes owners or people in control of land and who have a right to use it. Where a mining company does not (yet) own the land, but is in control of it, or has the right to use it, in for example the exploration phase of its life cycle, it falls within the imposed duty of care provision.

As a result of the *Bareki NO and Another v Gencor Ltd and Others*⁹³ section 28 now has retrospective effect as indicated by the court's expression of "causes, has caused or may cause". ⁹⁴ The liability for historical pollution by mining companies are therefore also included in the provision. ⁹⁵

3.3.2. Environmental principles

The national environmental management principles contained in section 2 of *NEMA* is the corner stone of environmental governance and liability in South Africa.⁹⁶ These principles are based on the precautionary, the polluter pays, prevention and the cradle to grave principles.

The first principle is the *precautionary principle* which is described as a 'risk-averse and cautious approach and when applied should take into account the limits of the current (scientific) knowledge about the consequences of the decisions and actions.⁹⁷

Glazewski Environmental Law 7 – 22. Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution

⁹¹ Glazewski Environmental Law 7 – 22, 23; See Section 28(1) of NEMA.

⁹² Glazewski Environmental Law 7 – 22; See Section 28(1) and (2) of NEMA.

⁹³ 2006 (1) SA 432.

⁹⁵ However, the study could find no current judicial implementation of this retrospective provision.

Strydom and King (eds) Environmental management 1069. Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 14.

It is interesting to note that that the precautionary principle as it applies in international environmental law has been specifically adopted in South African environmental law.



In the Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga, 98 it was held that the precautionary approach is:

Especially important in the light of section 24(7) (b) of *NEMA* which specifically requires the investigation of the potential impact, including cumulative effects, of the proposed development on the environment and socio-economic conditions, and the assessment of the significance of that potential impact.⁹⁹

Mining companies and their decision makers are required to take 'adequate' precautionary measures to safeguard against pollution or the degradation of the environment. They should consider the information available on the consequences of their decisions and where there is uncertainty, the action taken should be a risk averse approach in favour of the environment.¹⁰⁰

On the other hand, the second principle, the *'polluter pays' principle*, ¹⁰¹ is more of a 'reactive' and mitigating principle. Never the less, according to this principle, the polluter should bear the burden of the costs of pollution that causes damage to the environment, or that exceeds an acceptable level. ¹⁰² The mining company will therefore be required to take responsibility for the environmental degradation that they cause. ¹⁰³ This requirement also applies to accidental pollution, where the polluter bears strict liability and is responsible for the safe handling and environmentally sound disposal of any material that is produced.

The 'polluter pays' principle is reflected in the directive which states that:

[t]he cost 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.¹⁰⁴

⁹⁸ 2007 10 BCLR 1059 (CC).

⁹⁹ Fuel Retailers Association of SA para 81.

Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution. This approach is also acknowledged in the White Paper on a Minerals and Mining Policy for South Africa. It stipulates that during decision-making a risk averse and cautious approach that recognises the limits of current environmental management expertise will be adopted and where there is uncertainty, action is required to limit the risk.

Section 2(4)(p) of *NEMA* reflects the polluter pays principle.

¹⁰² Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution

¹⁰³ State liability will be discussed in para 6 below.

¹⁰⁴ Section 2(4)(p) of *NEMA*.



The principle is described as an economic principle that requires the polluter to be held liable to compensate or pay for pollution prevention, minimisation and remediation. Therefore, where the mining company is involved in projects that cause environmental degradation or damage, it might be responsible for remedying the situation and for the damages.¹⁰⁵

The third principle is the *preventive principle* and is reflected in the concept of 'avoidance'. The principle stipulates that the disturbance of ecosystems, landscapes and loss of biological diversity are to be "...avoided, where it cannot be avoided, must be minimised and remedied." This principle requires action at an early stage before the damage occurs. This is especially relevant to mining companies who operate in relatively predictable mining phases. In a wide interpretation, the principle prohibits activities that causes or may cause damage to the environment in violation of the duty of care established under environmental law. ¹⁰⁷

Mining companies should therefore anticipate certain negative impacts on the environment and they should prevent it. Where there is no way to prevent the damage, it should be minimised and remedied.

The fourth principle, the *cradle to grave principal*, is a shift to a wide approach to pollution and waste control. The cradle to grave approach recognises that environmental impacts, pollution or degradation that may be associated with the entire mining life cycle and its various operations. That is, from the identification, exploration phase through project planning, implementation, operations and post-operational closure, decommissioning and rehabilitation. The same principal is a shift to a wide approach to pollution and waste control. The cradle to grave approach recognises that environmental impacts, pollution or degradation that may be associated with the entire mining life cycle and its various operations. That is, from the identification, exploration phase through project planning, implementation, operations and post-operational closure, decommissioning and rehabilitation.

Thus, this legal principle will result in the mining company remaining liable for the damage or degradation caused by its activities throughout the life cycle of the mining

¹⁰⁵ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 16.

¹⁰⁶ Glazewski Environmental law 7 – 13.

¹⁰⁷ Glazewski Environmental law 7 – 13

¹⁰⁸ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 16.

¹⁰⁹ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 17.



operations until decommissioning and rehabilitation.¹¹⁰ This is an integrated approach to consider all the environmental impacts of the mining life cycle.¹¹¹

3.3.3. Other important statutory provisions

The scope of the dissertation does not allow for a thorough exposition of these pieces of legislation but they do need to be mentioned:¹¹²

The recent promulgation of the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 had an immense impact on the environmental legislation framework in South Africa. One of the consequences of the amendment is that a large extent of director and company liability provisions, applicable to mining, are now dealt with under *NEMA*.¹¹³

Of those provisions Section 24N of *NEMA* needs specific devotion. Section 24N of *NEMA* deals with environmental management and the planning thereof.

Section 24N (7) of *NEMA* introduces and extends concepts previously contained in the repealed sections of the MPRDA. A "holder" and "any person" issued with an environmental authorisation:

must manage all environmental impacts as an integral part of the prospecting or mining, exploration or production operation... and....is responsible for any environmental damage, pollution, pumping and treatment of polluted or extraneous water or ecological degradation as a result of his or her operations to which such right, permit or environmental authorisation relates.¹¹⁴

¹¹⁰ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 17.

¹¹¹ Vorster L The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution 18.

Schedule 3 of *NEMA* lists various pieces of national and provincial legislation, an offence under which would trigger the provisions of section 34(7) of *NEMA*. It is noteworthy that Schedule 3 does not only refer to mining legislation, but includes, inter alia, the *Animals Protection Act*, 71 of 1962, the *Dumping at Sea Control Act*, 73 of 1980 and the *National Forests Act*, 84 of 1998. Accordingly, non-mining companies could also be caught by the provisions of section 34(7) of *NEMA*, read with Schedule 3, depending on the activities of such companies. Frost J *Liability of Directors in terms of Environmental Legislation*.

The amendment of the MPRDA will be discussed in more detail in par. 3.3.

¹¹⁴ Section 24N(7).



Section 24N (8) have taken over the responsibility of the repealed section 38(2) of the MPRDA, which dealt with the, jointly and severally, liability of directors of companies for damage to the environment.¹¹⁵ Section 24N (8) of *NEMA* stipulates that:

despite the provisions contained in the Companies Act,¹¹⁶ the directors of a company are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company which they represent. This includes damage, degradation or pollution.

The result is that the holder of a permit is responsible for any environmental damage, pollution or ecological degradation that occurred as a result of the holder's operations.¹¹⁷ This will be applicable to the boundaries of the area to which the right, permit or permission relates.

The *NEMA* has led to the promulgation of various pieces of environmental legislation. Each of these are focused on the mining industry and its activities. The fact is that the *MPRDA*, the *NWA* and the *NEMA* could all be applicable to a mining activity. In addition, one specific mining activity such as the establishment of a tailings facility could involve a series of authorisations that must be obtained from a wide spectrum of government institutions. ¹¹⁸

The National Environmental Waste Act 59 of 2008 (NEMWA),¹¹⁹ The National Water Act, 36 of 1998 (the NWA)¹²⁰ and the National Environmental Management: Air Quality Act, 39 of 2004 (the Air Quality Act) also provides for liability provisions as well as strict liability.¹²¹

See section 38(2) of the MPRDA (now repealed).

Or the Close Corporations Act, 69 of 1984.

Section 24N deals with environmental management plan There is a debate on whether the provision of Section 24N(8) is a standalone provision or whether it relates to the liabilities arising from compliance / non-compliance with an EMPr. It is submitted that section 24N(8) does not reference the EMPr and can be seen as a standalone provision.

¹¹⁸ Le Roux N Environmental Governance, Fragmentation and Sustainability in the Mining Industry 34.

¹¹⁹ See section 16 of NEMWA.

See section 19 of NWA (Statutory duty of care).

The criminal liability of directors fall outside the scope of this dissertation but the following provision is noteworthy: Section 34(7) of *NEMA* relates to criminal proceedings and stipulates that any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3, shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence. Frost J *Liability of Directors in terms of Environmental Legislation* 1.



Other acts include the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) and the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA).

3.4. The Mineral and Petroleum Resources Development Act 28 of 2002

The preamble of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) upholds the ideology of sustainable development in the mining industry and is accompanied by a comprehensive set of environmental provisions. 122

Section 37(2) of the MPRDA describes sustainable development as:

Any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations. 123

In Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others 124 the Constitutional Court stated that:

One of the objectives of the MPRDA is to give effect to the environmental rights in the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. 125

Despite the excellent intentions of the MPRDA, it highlights the current regulatory and legislative uncertainty mining directors have to contend with in South Africa. In June 2013, the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 was finally brought into effect and brought with it an array of controversy and insecurity. 126

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 12 - 13.

Glazewski; See also Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (CCT 55/00) [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC).

Glazewski Environmental Law 17 - 13.

¹²⁵ At 56.

Werksmans Attorneys Environmental Law Bulletin Thursday July 10th, 2014. The Bill itself has been amended four times since its original version was published for public comment in December



Prior to the amendment, section 38 of the *MPRDA* stipulated that the assessment of environmental impacts of prospecting or mining activities must be conducted in terms of the minimum standards for environmental authorisations as set out in section 24 of *NEMA*.¹²⁷ Section 38 was entirely repealed.¹²⁸

The regulation and environmental management of mining activities in South Africa was centred around sections 39 to 42 of the *MPRDA* and laid out the requirements for potential mining entrepreneurs. The mining environmental regulation process runs parallel with the mining life cycle with three pertinent phases of the regulation process being the prospecting and reconnaissance phase, the mining right phase and the rehabilitation phase. The following is brief overview of the regulation process:

In terms of section 39 of the *MPRDA* an applicant was required to submit an Environmental Management Plan (EMP)¹³⁰ or an environmental management programme (EMPr)¹³¹ specifying how the mining company intends to mitigate the effects it has on the natural environment.¹³²

Sections 39 to 42 of the MPRDA, which regulated the environmental management programme and plan development, preparation and financial provision for

^{2012.} To further complicate matters the revised *Mineral and Petroleum Resources Development Amendment Bill* 15D - 2013 was passed by the National Assembly on 1 November 2016. Oosthuizen W.J. *Alignment of various environmental authorisation processes for the mining industry* 12 - 13.

See section 38 of the MPRDA. Le Roux N Environmental Governance, Fragmentation and Sustainability in the Mining Industry Oosthuizen W.J

It was replaced by sections 38A and B of the MPRDAA. Section 38A states that the DMR is the responsible authority for implementing the provisions of NEMA in respect to mining and that an environmental authorisation is a pre-condition to the granting of a mining right or permit. Werksmans Attorneys *Environmental Law Bulletin* Thursday July 10th, 2014

See section 39 of the MPRDA. Oosthuizen W.J. *Alignment of various environmental authorisation processes for the mining industry*

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 6. Werksmans Attorneys Environmental Law Bulletin Thursday July 10th, 2014

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 7.

The EMP and the EMPs would contain the following vital information: The potential impact the mining activity will have on the environment; the significance of the impacts and the control measures to minimise the impacts; monitoring and performance assessment of the EMP and EMPr; the closure procedure with its environmental objectives, including the cost determination for closure and the details of the method for financial provision for closure; and a record of the public participation process and the outcomes thereof. The scope of the dissertation does not allow for an in-depth discussion on the environmental management regulations and procedures that are applicable to the mining industry. Oosthuizen W.J; See regulation 52 of the MPRDA.



rehabilitation have been deleted without any replacement. As a result, there are currently no regulatory provisions regarding the preparation of environmental management programmes or plans under the *MPRDA*. It is submitted that in practice prospective applicants are continuing to make application for environmental management plans and programmes as if the repealed sections are still in existence.¹³³

Section 43 of the *MPRDA* stipulated that the holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental liability, pollution, ecological degradation and the management and sustainable closure thereof until the Minister of Minerals and Energy has issued a closure certificate in terms of this act to the holder concerned.¹³⁴ The amendment to section 43 now provides that, notwithstanding the issue of a closure certificate, the holder of a mining right remains liable (forever) and must retain its monetary provision for rehabilitation for a period of 20 years after issue of a closure certificate.¹³⁵

The amendments and growing uncertainty on the legal position have added to the frustration of mining directors and have added to their responsibility to keep abreast of the various environmental legislative provisions.¹³⁶

3.5. Conclusion

The South African environmental law framework provides for robust liability provisions. The recognition given by the *Constitution* to the environment and the provision for its horizontal application places a duty of care on directors of mining companies to consider the environment as well as to uphold the environmental right. The *NEMA* gives effect to the *Constitution* and provides for a whole suit of liability provisions including that of strict liability. The environmental principles contained in the *NEMA* provides for boundless liability provisions to force mining companies to adhere to the generally accepted environmental management practices. Despite the ongoing

Werksmans Attorneys *Environmental Law Bulletin* Thursday July 10th, 2014.

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry 14.

¹³⁵ Stevens C The Impact Of The MPRDA Amendment Bill 3.

MPRDA Amendment Bill Saturday February 23rd, 2013 http://www.werksmans.com/legal-briefs-view/the-impact-of-the-mprda-amendment-bill/ last visited on 20 April 2017.



confusion that surrounds the *MPRDA* it remains the leading legislation in setting out the boundaries within which mining companies have to operate. Any contraventions of the *MPRDA* by mining companies will lead to the enforcement of the provisions contained in *NEMA*.

4. THE DIRECTOR AND THE DUTY OF CARE

A director is bound to take such precautions and show such diligence in their office as a prudent man of business would exercise in the management of his own affairs. - Trustees of the Orange River Land & Asbestos Company v King (1892) 6 HCG 260 285.

4.1. Introduction

Directors are the central operatives who have to steer, direct, and plot the company's course and are responsible for the overall governance of the company. When directors accept the appointment to their position they agree that they will perform their duties to a certain standard of care and they are liable for any negligence in the performance of their duties. The role and duties of directors of companies have, at times, been an uncertain area of South African company law. This was in a large part due to the fact that this area of the company law has, until recently, been dealt with in terms of the South African common law. The *Companies Act*, 71 of 2008 (partially) codified the standard of directors' care into South African company law and has brought with it a more established form of personal liability for directors.

4.2. The director and corporate governance

The director owes two distinct duties to a company, the fiduciary-type duty and the negligence-type duty of care, skill and diligence.¹⁴¹ These duties are crucial as they

Corporate governance relates to the principles and practices that are regarded as appropriate conduct by directors and managers. Practicing sound corporate governance in essential for the well being of the company. Cassim 473.

See Section 77 of the *Companies Act*. Liability of directors and prescribed officers; Cassim *Contemporary company law* 565.

¹³⁹ CDH Corporate governance in South Africa 4.

¹⁴⁰ CDH Corporate governance in South Africa 4.

M Havenga 'Directors in Competition with Their Companies'. The cause of action for the breach of a fiduciary duty is not found in delict or in that of contract and is viewed as sui generis in nature. The focus of this study is specifically on the negligence duty of care a director owes to a company.



promote corporate governance in a company. In return, corporate governance expands on these duties through principles and practices, and has become invaluable in enabling directors to fulfil their legal responsibilities. To fully understand the duty of care of directors it is first necessary to examine what is a director and secondly, what role does good corporate governance paly in directors performing their duties. 143

4.2.1. The Director

A company is recognised in law as having separate legal personality.¹⁴⁴ However, it relies on the conduct of its directors who must apply the appropriate leadership to steer the company towards its objectives.¹⁴⁵ A director is an appointed or elected member of a company who has the responsibility of determining and implementing the company policies and who is responsible for the management of the business activities.¹⁴⁶ This principle is echoed in various South African case law including the Appeal Court decision, *Howard v Herrigel* 1991 2 SA 660 (A) 678

At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf.

The *Companies Act, 2008* has drastically added to the role of a director and provides for a wide definition and stipulate that a director is:

A member of the board of a company as contemplated in section 66 or an alternate director of a company and includes any person occupying the position of director or alternate director, by whatever name designated. 147

The effect of this wide definition is that the requirements will apply not only to members of the board, but also to "de facto" directors. This underlines the importance of the position of a director. The definition further stipulates "as contemplated in section 66".

¹⁴² CDH Corporate governance in South Africa 6.

These are duties which directors are required to fulfil under the common law as well as under the new codified standard of directors in the Companies Act, 2008. This being the fiduciary duties, duty of care, skill and diligence.

Section 77 of the Companies Act, 2008.

¹⁴⁵ Eisenberg M *The Duty of Care of Corporate Directors and officers*

Read more: http://www.businessdictionary.com/definition/company-director.html

¹⁴⁷ CDH Corporate governance in South Africa 3.

De facto directors are persons who assume or carry on the role of a director of a company without being duly appointed.



of the *Companies Act*". Section 66 of the *Companies Act* stipulates that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company. The fundamental principle of directorship is that directors are appointed by the shareholders of the company and entrusted with the ultimate responsibility to apply the appropriate care, skill and leadership to govern the company in an effective and responsible manner. The state of the companies and the state of the company and entrusted with the ultimate responsibility to apply the appropriate care, skill and leadership to govern the company in an effective and responsible manner.

4.2.2. Corporate governance

Corporate governance was institutionalised in South Africa through the *King Reports* on *Corporate Governance* ('the King Codes'). ¹⁵¹ Corporate governance refers to the way the business and affairs the company is managed by its board of directors. ¹⁵²

Good governance is therefore essentially about effective leadership. For directors of mining companies adopting a good corporate governance practice will be especially important. ¹⁵³ As portrayed in chapter 2, the duties of directors in mining companies are becoming more and more challenging. Directors, as stewards, need to implement

¹⁴⁹ CDH Corporate governance in South Africa 3.

While some of the day-to-day running of the company is generally delegated to some level of management, the responsibility for the acts committed in the name of the company rests with the directors. According to Section 69 of the *Companies Act* any person is eligible for appointment as director, however it specifically disqualifies someone from being a director if: the person has been prohibited to be a director by the court; has been declared by the court to be delinquent in terms of this Act or the *Close Corporations* Act; is an unrehabilitated insolvent; is prohibited in terms of any public regulation to be a director of the company; has been removed from an office of trust, on the grounds of misconduct involving dishonesty, or has been convicted and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence.

King IV was launched on 1 November 2016.
Powers And Remuneration Of Executive Directors 2010

Institute of directors in Southern Africa KIN IV: Report on corporate governance for South Africa 2016. Sir Adrian Cadbury explained corporate governance as "the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting. See the Cadbury Report.

The latest report, King IV places special emphasis on good corporate citizenship and directors are under an ethical obligation to ensure that the company is managed in a social, economic and environmental sustainable manner. See Institute of directors in Southern Africa KING IV. Report on corporate governance for South Africa 2016



a good corporate governance strategy, give direction and establish the ethics and values that will influence and guide the company. 154

To achieve this a company needs to invest in a strong and qualified board of directors. The board of directors should comprise of directors who are knowledgeable and have expertise relevant to the business they are involved in. They should be qualified and competent, and have strong ethics and integrity, and possess, as a steward of the company, a certain moral character. The King III report determined five vital moral duties that make up the character of a director:

- 1. *Conscience:* A director should always act with intellectual honesty and independence of mind and in the best interests of the company;¹⁵⁸
- 2. *Inclusivity of stakeholders*: The best interest of the company should include all relevant stakeholders. A director should therefore have an inclusive stakeholder approach to corporate governance;¹⁵⁹
- 3. *Competence:* A director should have the necessary knowledge and the required skills for governing a company effectively;¹⁶⁰
- 4. *Commitment:* A director should always be diligent in performing his or her duties and devote sufficient time to the affairs of the company through unwavering dedication and the appropriate effort;¹⁶¹

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa
 Muswaka, L Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance 2.

Muswaka, L Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance 3.

Muswaka, L Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance 3.

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa
 8.

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa
 Muswaka, L Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance 3.

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa 8.

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa
 8.

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa
 8.



5. Courage. A director should have the courage to take on the associated risks of directing and controlling a company. A director should also have the courage to act with integrity in the decisions and activities of the company. 162

It is submitted that in the absence of directors with the above moral fabric and who have not implemented a strong corporate governance strategy, it will be near impossible for directors to show that they acted with the necessary duty of care required.¹⁶³

4.3. Duty of care, skill and diligence

4.3.1. The South African common law

The common-law duty of care is based on the belief that directors are required to manage the operations of a company as a reasonable prudent person would manage their own affairs.¹⁶⁴ When directors accept the appointment to their position they agree that they will perform their duties to a certain standard of care. In return, directors may be held liable for the negligent non-performance of their duties of care and skill.¹⁶⁵ Director liability, based on duty of care and skill is entrenched in the *Aquilian* liability for negligence.¹⁶⁶ The question therefore arise to what extent will directors be liable for loss to the company as a result of their carelessness.¹⁶⁷

Directors are not required to have any special education, qualification, expertise or business acumen to be appointed. The result is that, in common law, an

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa 8.

Although the King reports are regarded as 'soft law' it is submitted that good governance does not exist separate from the law, and corporate governance codes that apply on a voluntary basis may trigger legal consequences. A court considers all relevant circumstances including what the general accepting standard and practices were for a specific situation. This type of trend may in future result in the indirect incorporation of a King Report into 'hard law', especially in the context of directors' duties and liability. Cliffe Dekker Hofmeyr *Corporate Governance: A Guide For Directors*

Directors owe two common law duties to a company: The first is a fiduciary duty of good faith, honesty and loyalty. The second is a duty of care and skill. The focus of this dissertation is on the duty of a director to exercise a level of care and skill More rigorously enforced by courts. Cassim

¹⁶⁵ Cassim Contemporary company law 565.

¹⁶⁶ Cassim Contemporary company law 565.

¹⁶⁷ Cassim Contemporary company law 565.

Jones E Directors duties: negligence and the business judgment rule



unreasonably low standard of care was required of directors.¹⁶⁹ According to the common law a director was required to perform his / her duties to that level of care and skill that may be expected of a person with his or her knowledge and experience.¹⁷⁰ The test for negligence is therefore subjective and based on the ability of the director in question.¹⁷¹ Accordingly, a director will escape liability based on the fact that he or she is inexperienced or ill equipped to perform to a higher standard.¹⁷² Therefore the opposite is similarly true; the more experienced the director is, the higher the risk of the director's liability.¹⁷³

This subjective test was confirmed in a number of judgments¹⁷⁴ and was accepted in the *locus classicus* of South African corporate law, *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W). The court determined that the extent of a director's duty of care and skill is subject to three propositions. The first proposition depends considerably on the nature of the company's business and the obligations that are assigned to the director. The second is that there is no requirement for a director to have special business acumen, experience or expertise, or give continuous attention to the affairs of the company. The third proposition is that directors may assume that officials will perform their duties honestly.¹⁷⁵

The judgment was met with severe criticism and it was said that the court gave no consideration of the role of "contemporary directors" operating in the modern commercial era. This is especially true in the mining industry, as depicted in chapter 2 of this study, which saw directors of a mining companies burdened by a wide range challenges. The modern director is a different 'specie' than those in the past who were merely appointed as a result of their status or title. The modern director is a different 'specie' than those in the past who were

¹⁶⁹ Smith DG The Modern Business Judgment Rule 3.

Cassim Contemporary company law 565. Von Dürckheim L Does South Africa need a statutory business judgment rule 13.

¹⁷¹ Deloitte *Directors duties* 3.

¹⁷² Cassim Contemporary company law 568.

¹⁷³ Cassim Contemporary company law 568.

¹⁷⁴ Cassim Contemporary company law 569.

Deloitte The Companies Act Australian 'Centro-case' confirms duties of all directors. 6.

Von Dürckheim L. Does South Africa need a statutory business judgment rule 14.

¹⁷⁷ Cassim Contemporary company law 565; Grové AP Company directors: Fiduciary duties and the duty of care and skill 4.



The common law approach by the courts require "gross negligence" before a director would be found liable for the breach of duty of care. *Cassim* described the common law approach as "manifestly inadequate" in protecting the company from "careless directors".¹⁷⁸¹⁷⁹

The courts outdated attitude, grounded in century old precedents, and some overly excessive subjective tests for the breach of a director's duty of care, emphasise the much needed stricter and burdensome objective determination of the duty of care. 180

4.3.2. The Statutory duty of care

The standards of directors' conduct have now been partially codified in section 76 of the *Companies Act* 71 of 2008. Section 76 (3) is a "tightened reaffirmation of the common law"¹⁸¹ and stipulates that subject to subsections (4) and (5) of the Act, 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:
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director.

Cassim Contemporary company law 569. However, the courts lenient approach to the standard of care required from directors is based on the view that shareholders were ultimately responsible for the people they appoint to manage the company. See Leach J The Correct Understanding of the Business Judgment Rule in Section 76(4) of the Companies Act 71 of 2008: Avoiding the American Mistakes 12.

Von Dürckheim L *Does South Africa need a statutory business judgment rule* 8. There is only one South African decision where a director was held liable for brach of the duty of care and skill *Niagra LTD (In Liquidation) v Langerman and Others.*

The Companies Act itself has visibly strengthened the accountability of directors. Section 77(2)(b), stipulates that a director of a company may be held liable in accordance with the principles of the common law relating for any loss, damages or costs sustained by the company as a consequence of any breach by the director of the duties contemplated in section 76(3)(c).

Leach J *The Correct Understanding of the Business Judgment Rule* 15. The duty has been partially codified in line with the proposition that directors' duties must be accessible in order for directors to easily become aware of the duties that apply to them.



The act, through section 76(3) (c), provides an elevation from the director's common law duty of care and skill and introduces a "hybrid" standard of care that is partly objective and partly subjective. This provides a more rigorous and demanding approach and requires a director to act with the reasonable care, skill and diligence that would be expected by a person carrying out the functions of the director and with the same general knowledge, skill and diligence that the specific director in question has. Cassim describes this as a "hybrid" duty of care. This hybrid statutory duty of care is found in the objective nature of subsection 76(3)(c)(i) and the subjective component in subsection (ii).

The first part of the test is section 76(3)(c)(i) and it requires a director to exercise:

the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions of that director.

This test is objective and the standard is that of the reasonable person and not that of the reasonable director. The second part of the test, in section 76(3)(c)(ii), and requires that:

the general knowledge, skill and experience of the director in question to be considered.

This subjective element ensures that if the director has more experience or is more knowledgeable, his conduct will be measured against this, or his, higher standard.¹⁸⁴

Cassim argues that directors are not expected to take all possible care, and that reasonable care is sufficient to avoid incurring liability for negligence. 185 It is therefore clear that directors are allowed to make mistakes, provided that they exercise a reasonable degree of care and skill. 186 The duty of diligence implies further that a

Cassim Contemporary company law 565. Von Dürckheim L Does South Africa need a statutory business judgment rule 44.

Cassim Contemporary company law 565. Leach J The Correct Understanding of the Business Judgment Rule 14.

¹⁸⁴ Cassim Contemporary company law 565.

Cassim Contemporary company law 565; Von Dürckheim L Does South Africa need a statutory business judgment rule 45.

Leach J The Correct Understanding of the Business Judgment Rule 15.



director must properly attend to his duties, be well informed when making decisions that may impact on the company, be informed about the issues that the company face and have studied and understood the information availed to him.¹⁸⁷

The statutory modifications to the common law approach is therefore welcomed as a more commercially sound approach that highlights the reality that a modern day director is most likely a highly skilled and experienced business person. This is especially true in the case of mining companies.

However, the Companies Act, through the incorporation of the business judgment rule, has incorporated a level of protection for its directors. Especially those who are measured according to a subjective standard and a high level of duty of care. The business judgment rule will be discussed below.

4.4. Conclusion

Directors are appointed by the shareholders of a company and entrusted to make decisions on behalf of the company in its best interest. To do this they need to promote corporate governance in a company and be of a specific moral character. Good corporate governance plays a vital role when directors' conduct is justified for exoneration from liability. When directors are appointed they accept that they will perform their duties according to a certain level of care. The Act codifies the standard of directors' conduct in section 76. In terms of this standard a director must exercise his or her duties, in good faith and for a proper purpose, in the best interest of the company, and, with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that director. The test to measure a director's duty of care, skill and diligence is first an objective assessment to determine what a reasonable director would have done in the circumstances. The second assessment contains subjective elements in that it considers the, skill and experience of that particular director.

¹⁸⁷ Cassim Contemporary company law 568. Section 76(4)(b) permits a director to rely on the advice of a professional person, expert, employee or a board committee, provided that the director reasonably believes such a person to be reliable and competent.

¹⁸⁸ Cassim Contemporary company law 568.



5. THE BUSINESS JUDGMENT RULE AND DIRECTOR LIABILITY

5.1. Introduction

The focus of the research question is to examine to what extent the business judgment rule can be used to protect a director against liability for environmental damage. This chapter will examine the doctrine of the business judgement rule and its application in the South African company law. The question of director liability must then be considered in the context of all the elements of a delict. The duty of care of directors and the application of the business judgment rule forms part of the element of fault and the negligent conduct of the director.

5.2. The South African statutory business judgment rule

5.2.1. Business judgment rule doctrine

The success of a modern day company depends largely on the ability of a director to make calculated and sometimes risky business decisions.¹⁸⁹ Even more so in the South African mining industry. The business judgment rule is a judicially created legal principle that was developed to protect directors of companies against personal liability for the business decisions they make in good faith and on a rational basis.¹⁹⁰

Business decisions, especially in mining, usually take place in conditions of uncertainty, under extreme pressure and involve a great deal of risk.¹⁹¹ Directors of companies are the individuals who are tasked with making these decisions. The business judgment rule argues that it would not be fair to assign liability to a director, where a company suffered damage, if the director followed the proper steps in his or

In modern business this would most probably be a board of directors appointed by the shareholders. Cassim *Contemporary company law* 572.

Branson D *The Rule that isn't a Rule: The Business Judgment Rule* 631.Contemporary company Law; business judgment rule is a legal principle that has been applied in the United States of America for more than some 160 years, where it is regarded as a cornerstone of corporate law The rule was later exported to Canada and Australia and then into South Africa. It has been adopted by Australia and Canada but rejected by New Zealand and the United Kingdom. Smith DG *The Modern Business Judgment Rule* 10.

The outcome of these decisions is largely influenced by numerous external variables, as set out above in chapter 2.



her decision making process.¹⁹² It further provides against the risk of an 'in hindsight' review by courts of a director's failed decisions, which may stifle a director's capacity to manage the company.¹⁹³

The reason and requirements of the business judgment rule have not yet been tested by South African courts However, it has developed through a judicial process in various foreign jurisdictions. The reason for the application of the rule was articulated in the Canadian Supreme Court in the matter *Peoples Department Store Inc. (Trustee of) v. Wise* 195. The court stated:

Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*.

This judgment highlights the reason for the business judgment rule and that the in common law there is a clear presumption in favour of director's actions. ¹⁹⁶ It further highlights the fact that the judiciary is not willing to act with the "power of hindsight" and rule on a decision which, at the time of making the decision, seemed correct or reasonable. ¹⁹⁷ However, the rule does not provide for blatant 'immunity'. ¹⁹⁸ A director has to meet some requirements to be 'eligible' for the protection of the business

The Delaware state in the United States of America played a massive role in the development of the business judgment rule. Under Delaware law, codified in 8 Del. C. § 141(a), the business judgment rule exists "to protect and promote the full and free exercise of the managerial power granted to Delaware directors". *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1975).

Branson D The Rule that isn't a Rule: The Business Judgment Rule 3.

The *locus classicus* matter is In re *Walt Disney Derivative Litigation*, Case No. 411, 2005 Del. June 8, 2006 (the Disney case). The court determined that: As for the plaintiff's contention that the directors failed to exercise 'substantive due care', we should note that such a concept is foreign to the business judgment rule. Courts do not measure or qualify directors' judgements. We do not even decide if they are reasonable in this context. In *Brant Investments Ltd v Keep Rite Inc 1991 3 OR 3rd 289 CA*. Here, the court found that: "Directors and officers will not be held to be in breach of a duty of care...if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable decisions in light of all the circumstances about which directors or officers knew or ought to have known. In determining whether directors acted in a manner that breaches the duty of care, it is worth repeating that perfection is not demanded.

¹⁹⁵ [2004] 3 SCR 461, 2004 SCC 68 (CanLII).

¹⁹⁶ Cassim Contemporary company law 565.

¹⁹⁷ Institute of directors in Southern Africa *The Business Judgment Rule* 3.

¹⁹⁸ McMillan L *The Business Judgment Rule as an Immunity Doctrine* 5.



judgment rule.¹⁹⁹ The requirements of the business judgment were set out in *Grobow v. Perot*, *539 A.2d 180.* The court held that:

The business judgment rule will apply where the defendant(s) acted in good faith; acted in the company's best interests; were informed when they acted; were not wasteful; and were not acting out of self-interest or self-dealing.

Therefore, to escape personal liability directors must exercise diligence and good faith in their 'decision making'. When making decisions they have a duty of care to inform themselves with regards to the subject of their decision, and be informed to such an extent that they reasonably believed that the decision was in the best interests of the company.²⁰⁰

These requirements have been incorporated into the standard of conduct for directors through the South African statutory business judgment rule. ²⁰¹

5.2.2. The South African statutory business judgment rule

The argument for the statutory incorporation of the business judgment rule into the South African company law framework stem back to the recommendation made by King Report on Corporate Governance.²⁰² The King Report recommended that directors should not be held liable for breach of the duty of care and skill if they exercised a business judgment in good faith, the decision was an informed one, and the decision was a rational one not based on self interest.²⁰³

The business judgment rule was incorporated into the South African company law through section 76 (4) of the *Companies Act* 71 of 2008. The King Report was the

Nethavhani K The business judgment rule: Undue erosion of director's duty of care, skill and diligence 13. Institute of directors in Southern Africa The Business Judgment Rule 3.

¹⁹⁹ McMillan L *The Business Judgment Rule as an Immunity Doctrine* 2.

A director's duty to exercise an informed business judgment is a form of duty of care. See *Smith v. Van Gorkom*, 488 A.2d 858 (1985) at 872-73.

²⁰¹ See chapter 4 above.

It would seem that the reasoning behind the South African business judgment rule is modelled on the American (and Canadian) business judgment rule doctrine with the objective to provide directors with a high level of freedom to manage the company. Leach J *The Correct Understanding* of the Business Judgment Rule 17.



biggest proponent for this form of statutory limitation on a director's duty of care.²⁰⁴ The recommendation of the King Report was based on a need to encourage business development, not to scare off individuals with the necessary expertise to accept appointments in enterprises, and contribute to the innovation of business in general.²⁰⁵

Section 76(4) of the Companies Act stipulates:

In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company —

- a) will have satisfied the obligations of subsection (3)(b) and (c) if
 - i) the director has taken reasonably diligent steps to become informed about the matter;
 - ii) either-
 - the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
 - bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
 - iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and
- b) is entitled to rely on
 - i) the performance by any of the persons
 - aa) referred to in subsection (5); or
 - bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

The incorporation of the rule is said to further the objective of the new Companies Ac Act, 2008, as concisely explained by, *Davis et al*: Read as a whole, the 2008 Act promotes the objective that there should not be an over-regulation of company business. The Act grants directors the legal authority to run companies as they deem fit, provided that they act within the legislative framework. In other words, the Act tries to ensure that it is the board of directors, duly appointed, who run the business rather than regulators and judges, who are never best placed to balance the interests of shareholders, the firm and the larger society within the context of running a business. Von Dürckheim L *Does South Africa Need a Statutory Business Judgment Rule?* 43.

See Chapter 5.2.1. These arguments are in principal parallel to those made by the various foreign judiciaries who have adopted and developed the business judgment rule for more than a century. See Ponta A and Catană RN *The business judgement rule and its reception in European countries* 1.



ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

Section 76(4) is quite clear in its requirements: Where a director has no personal financial interest in a matter and who has taken reasonable diligent steps to become informed about the matter or relied on a relevant person, continues to make a decision in good faith, for a proper purpose and in the best interest of the company, cannot be held liable for the result.²⁰⁶

Where the director complies with these requirements, the merits and the insight of the business decision falls outside the ambit of judicial review.²⁰⁷ The business judgment rule subsequently becomes a protective measure, a "safe harbour", for directors against liability claims for their business decisions.

However, the practical implication of the rule is unconditional and is no sense all-encompassing immunity or a "get out of jail free card". Directors, in relying on the business judgment rule, must pass the "test" before they will be eligible for any form of protection.²⁰⁸

5.2.3. The business judgment rule test.

The south African statutory business judgement rule was codified through section 76(4) of the Companies Act 2008. The test highlights the core responsibility of a director which is to act in the best interests of the company and with care, skill and diligence.

Before examining the business judgment rule test, it is important to notice the cross reference of section 76(4)(a) to section 76(3) (b) and (c) of the companies act.²⁰⁹

Leach J *The Correct Understanding of the Business Judgment Rule* 17; See section 76(4) of the companies Act.

Cassim 565 Ubelaker MH Director Liability under the Business Judgement Rule: Fact or Fiction
 Institute of directors in Southern Africa The Business Judgment Rule 6. Leach J The Correct Understanding of the Business Judgment Rule 17.

²⁰⁹ Institute of directors in Southern Africa *The Business Judgment Rule* 6.



The first part of section 76(4)(a) stipulates:

...a particular director of a company will have satisfied the obligations of subsection (3)(b) and (c) if... 210

Therefore, the statutory business judgment rule only applies to the contravention of the statutory duty of care as set out in section 76(3). More specifically section 76 (3) (b) "in the best interest of the company" and section 76(3) (c) "with the degree of care, skill and diligence that may reasonably be expected of a person".²¹¹

For the directors to satisfy the provisions set out in section 76(3)(b) and (c) and be eligible for protection in terms of the rule, directors must pass the test set out in section 76(4)(a)(i) and (iii) of the *Companies Act*: ²¹²

The first leg of the test is section 76(4)(a)(i): This provision requires the director to take "reasonable diligent steps" to become informed.²¹³ The stipulation is objective and requires the directors to "reasonably" know what they are deciding on.

The Companies Act defines "knowing", "knowingly" or "knows", when used with respect to a person, and in relation to a matter, to mean that the person either:

- a) had actual knowledge of the matter; or
- b) was in a position in which the person reasonably ought to have had actual knowledge; or investigated the matter to an extent that would have provided the person with actual knowledge; or taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.²¹⁴

²¹⁰ Institute of directors in Southern Africa *The Business Judgment Rule* 7.

See section 76(4)(a) and Section 76(3)(b) - (c) and chapter 4.3 above.

The central question to this dissertation is to what extent the statutory business judgment rule provides protection from liability for directors. Liability is more concerned with the duty of care. Section 76(4)(a)(ii) stipulates that the director must have no financial interest, or, must have no reasonable basis for knowing that any related person has a financial interest in the matter that led to the decision. It is submitted that this section leans more towards a fiduciary duty and therefore falls outside the scope of this study.

²¹³ Institute of directors in Southern Africa *The Business Judgment Rule* 7.

²¹⁴ Deloitte *Duties of directors* 4.



To know, they should take reasonable diligent steps to become informed about the decision they are about to make.²¹⁵ This concept of being informed about the decision is broad and includes what ought to have been considered. However, this does not imply that the directors are expected to be experts on all subject matters, but rather that they should be sufficiently informed to "interrogate the matter".²¹⁶ It is submitted that to be "reasonably informed" the director of the company must have a clear understanding about the business of the company and the environment in which the company operates.

The second test (for the purpose of this study) is that in making the decision the directors must believe, or reasonably believe, that the decision was in the best interest of the company. This test is one of rationality and is again an objective test. ²¹⁷ The Oxford dictionary defines rational as being "based on or in accordance with reason or logic". ²¹⁸ In evaluating whether directors made a decision that is considered to be logical, there must be a link between the decision that the directors made and the information and circumstances that were available to them at the time. ²¹⁹ *Cassim* describes the requirement of rationality as "pivotal" in the business judgement rule. ²²⁰ He states that where a decision of a director is reasonable the courts will not intervene by substituting its own decision for that of the director. ²²¹ However, if it is not a reasonable decision the business judgement rule cannot apply to protect the director. ²²²

It is interesting to note that the consequence of the decision is excluded in the statutory business judgment rule provisions. The focus and emphasis is therefore not in the result of the decision, but only in the effort in taking it.²²³ This underlines the importance

²¹⁵ Institute of directors in Southern Africa *The Business Judgment Rule* 4.

²¹⁶ Scrutton LJ in Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd 1927 2 KB 9 (CA) at 23-24.

²¹⁷ Institute of directors in Southern Africa *The Business Judgment Rule* 4

²¹⁸ Institute of directors in Southern Africa The Business Judgment Rule 4

This was confirmed in the matter *Visser Sitrus v Goede Hoop Sitrus* 2014 (5) SA 179 where the court found that directors should have believed that their decision was in the best interest of the company and that this belief was rational.

Nethavhani K The business judgment rule: Undue erosion of Director's duty of care, skill and diligence 6.

²²¹ Institute of directors in Southern Africa *The Business Judgment Rule* 4.

²²² Cassim 564. See also *Shuttleworth v Crox Brothers & co* 1927 2 KB 9 CA 23 where the court found that irrational decisions are indicative of bad faith.

Nethavhani K The business judgment rule: Undue erosion of Director's duty of care, skill and diligence 4.



of the duty of care owed by directors. The duty of care requires directors to "look before they leap."²²⁴ A director who encroach upon the duty of care by acting negligently, may be held liable for damages.²²⁵

5.3. Delictual Liability

The South African law of delict is founded on the general principles of liability. The purpose of the law of delict is to provide compensation²²⁶ for harm wrongfully caused.²²⁷ For the purpose of this study a delict can be defined as conduct that results in the breach of a person's duty of care.²²⁸ The fundamental rule in South African law of delict is that damage, or harm, rests where it falls.²²⁹ For a plaintiff to hold a director responsible for damage in the law of delict, the plaintiff must prove the five elements of a delict, namely an act or omission; wrongfulness; fault, causation, and harm.

5.3.1. Conduct

The first requirement for delictual liability involves that of conduct. Conduct can either be in the form of a commission (positive act) or an omission (the failure to act). ²³⁰ In the context of mining and environmental damage the emission or disposal of a harmful substance would *prima facia* comply with the conduct requirement. Another example of a possible act, or omission, that might, depending on the circumstances, underpin delictual liability are decisions of directors to proceed with mining activities without the proper environmental authorisations which later result in destructive activities. ²³¹

Nethavhani K The business judgment rule: Undue erosion of Director's duty of care, skill and diligence 7.

Nethavhani K The business judgment rule: Undue erosion of Director's duty of care, skill and diligence 8.

Compensation based on patrimonial loss. Patrimonial loss does not mean damage to a 'material thing or object, but actual monetary loss to the plaintiff. In Roman law the liability was extended from damage to corporeal property to include bodily injuries to a freeman and in Roman-Dutch law to every kind of patrimonial loss.

Neethling, Potgieter and Visser *Law of Delict* states that the principal function of the law of delict is to impose liability for a wrongful act, 3.

Boberg The Law of Delict: Aguilian liability 1.

Neethling, Potgieter and Visser Law of Delict 3.

Loubser and Midgley (eds) The law of delict 63.

See for example *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC); 2001 3 SA 1151 (CC).



For example, would failure to adequately plan and prepare for the disposal of 'mining waste'²³² and the consequential damage as a result, constitute an act? The failure of the director to take the necessary positive steps to prevent the environmental damage could therefore be an example of such an omission. However, assigning liability for an omission is generally more restricted than liability for an actual act. An omission is only wrongful where there is a legal duty to act.²³³

5.3.2. Wrongfulness

The next step in establishing delictual liability is that of the essential element of 'wrongfulness'. The conduct (or *omission*) of a director must have been wrongful in order for the director to be held liable.²³⁴ This is an essential element in the process of assigning liability against a director for environmental damage.²³⁵

An act is legally wrongful if it encroaches upon a person's legal duty to take care and as a result caused an unjustified violation of the rights of another.²³⁶ The test for whether the conduct of a director is 'wrongful' is steered by the notion of 'public policy'²³⁷ and the 'legal convictions of the community' (the *boni mores*).²³⁸

The fundamental question is therefore whether, according to the legal convictions of the community, public policy, and in the light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner.²³⁹

²³² Richard Summers *Environmental compliance and enforcement in South Africa* 360.

Neethling et al 33.

Loubser and Midgley (eds) *The law of delict* 141.

See *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1075; In other words, there must be a legal duty on the director to act or to refrain from acting in a certain manner. An example of a wrongful conduct is where the director deliberately performs an act which causes harm, or, where it fails to exercise a specific function.

²³⁶ Richard Summers *Environmental compliance and enforcement in South Africa* 361.

Richard Summers *Environmental compliance and enforcement in South Africa* 359. Public policy is informed by the spirit, purport and objects of the Bill of Rights. In the context of environmental damage the constitutional rights most likely to be raised include rights relating to social, socioeconomic and the environment.

²³⁸ Richard Summers *Environmental compliance and enforcement in South Africa* 362.

²³⁹ Richard Summers Environmental compliance and enforcement in South Africa 363.



Where either common law or statute requires a person to act in a specific way, any failure to act in accordance with such a rule or law is *prima facie* wrongful.²⁴⁰ In terms of the mining context one has to keep in mind that the environmental damage caused might be a necessity of a legitimate mining activity.²⁴¹ In such an event the conduct will not be deemed wrongful.

Where the director's conduct consists of an *omission* one must determine whether the *omission* was wrongful or not. The question is whether there was a legal duty to act exists.²⁴² It is submitted that this question runs parallel with the first leg of the Business Judgment Rule test; whether the directors have taken reasonably diligent steps to become informed about the matter they are deciding on? This question will be answered by asking what the legal duty would demand in each individual case. The existence of a legal duty can stem from the common law, a statutory provision or even from public policy.²⁴³ It is submitted that the environmental rights outlined above in chapter 3 has raised the level of wrongfulness and placed various legal duties on mining companies and their directors.²⁴⁴

Once it is established that a legal duty exists, the enquiry into the possible breach of that duty follows.

5.3.3. Fault

After it has been established that the conduct of the state was indeed wrongful, the question of fault arises. It is not enough to claim that the damage was caused

²⁴⁰ Glazewski *Environmental law* 8 – 8.

In some instances *prima facia* 'wrongfulness' will not always be sufficient to establish liability. In the context of mining, the director might act pursuant to, and in compliance with, a statutory authority, for example a mining licence. The damage caused by the company is therefore justified and rendered lawful. Neethling et al states that, in order for the statutory authority to be raised as a defence, two key principals must apply. The first is that the statutory authority must authorise the infringement and the second is that the conduct must not exceed the limits of authority granted in the statute. Despite the fact that the mining company's conduct is excused by way of a statutory authorisation, the director must still ensure that the mining company does not conduct its condoned operations in a negligent manner. Glazewski Environmental law 7 – 13

²⁴² Richard Summers Environmental compliance and enforcement in South Africa 360.

²⁴³ Vorster L The Liability of Mines for the Prevention. Minimisation and Remediation of Pollution

See para 4 above. This duty is further emphasised through the various international and national corporate governance policies and principles that relate to the protection of the environment and sustainable development



wrongfully; the plaintiff must show that the defendant was at fault.²⁴⁵ Fault is the subjective element of a delict. The defendant either caused the damage through intent (dolus) or through negligence (culpa). Fault in the form of intent is excluded from this study.246

Conduct is negligent where the defendant acts in a manner that falls short of the 'objective standard' of care required by the law of delict and expected from the reasonable person.²⁴⁷ Negligence is a partly objective and partly a subjective concept as formulated in the test for negligence in Kruger v Coetzee 1966 (2) SA 428 (A). The court stipulated that negligence is when:

- a diligens paterfamilias in the position of the defendant, would (b) foresee the (1) reasonable possibility of his conduct injuring another in his person (or property) and causing him patrimonial loss; and (c) would take reasonable steps to guard against such occurrence; and
- (2) the defendant failed to take such steps.²⁴⁸

In the context of this study the following example can be provided: The director of a mining company decides to proceed with a certain mining activity before adequately preparing a designated retention area for the waste and pollution. As a result of the decision the neighbouring property is overrun with pollution and the company is held liable for the damage.

For a director to escape negligent conduct in terms of the Business Judgment Rule the director's conduct should be based on his or her rational belief, and must in fact have believed, that the decision was in the best interest of the company.²⁴⁹ The directors' decision will be measured against the rationality test in chapter 5.3.2 above.

²⁴⁵ Loubser and Midgley (eds) The law of delict 103.

Fault in the form of intent implies that a director acted with a mala fide intention which falls under a director's fiduciary duty, and therefore outside of the scope of this study.

²⁴⁷ See Kruger v Coetzee 1966 2 SA 428 (A.

Kruger v Coetzee at 430.

See section 76(4)(a)(iii) and chapter 5.2. above. The first leg of the test is dealt with under the chapter 5.3.2, wrongfulness.



Furthermore, the overall question must also be asked; what level of duty of care can be expected in these circumstances from a diligent director?²⁵⁰ Section 76(3) expressly states that directors, when acting on behalf of the company, should perform all their functions and powers in the best interests of the company, and with the requisite degree of care, skill and diligence that may reasonably be expected of a person holding such office, with the same level of knowledge and skill as that director.²⁵¹

As explained in chapter 4.3.2, *Cassim* argues that section 76(3)(c)(i) imposes a standard of care for directors that is "fair and equitable" and must be considered against what may reasonably be expected to be exercised by a "person in like position under like circumstances."²⁵² On the other hand section 76(3)(c)(ii) stipulates that the more skilled the director, the higher the standard of level of care that must be afforded to that director.²⁵³

In terms of the degree of care and skill and diligence that may reasonably be expected from a director the courts will most probably evaluate the nature of the business of the company, the nature of the decision and the nature of the responsibilities undertaken by the director in question.²⁵⁴

Given the example above, where a director of a mining company has to make a decision on proceeding with a mining activity it can reasonably be expected from the director to consider the environmental impact of the activity and take the necessary steps to prevent it.

In terms of the environmental liability framework it needs to be stated that the normal fault requirement may be dispensed with where statute allows for strict liability. ²⁵⁵ A good example is section 28 of the *NEMA* which creates a statutory duty of care. ²⁵⁶

²⁵⁰ Glazewski *Environmental law* 8 – 6.

²⁵¹ Cassim Contemporary company law 559

²⁵² Cassim Contemporary company law 559.

²⁵³ Cassim Contemporary company law 559.

²⁵⁴ Cassim Contemporary company law 560.

²⁵⁵ See chapter 3 above.

²⁵⁶ Glazewski *Environmental law* 8 – 5.



The provision requires a mining company to take "reasonable measurers" to prevent or minimize the environmental damage.²⁵⁷

Glazewski argues that the reasonable measure provision imposes 'strict liability' on the person who caused the environmental damage.²⁵⁸ The implication of this strict liability is that where the mining company acted without negligence in terms of the common law, it will still be held liable for having failed to have taken 'reasonable' measures.²⁵⁹

5.3.4. Causation

The law of delict requires the existence of a causal *nexus* between the defendant's conduct and the detrimental consequences sustained by the plaintiff. The wrongful and negligent conduct of the director must have caused the environmental damage. The law of delict requires a sufficient link between the conduct of the defendant and the harm suffered by the plaintiff.²⁶⁰ The director must have caused the harm for which redress is sought. In general, both 'factual'²⁶¹ and 'legal'²⁶² causation are required in order to establish liability.²⁶³

The method for determining factual causation is the *conditio sine qua non test* (the 'but for' test).²⁶⁴ This involves a process of eliminating the wrongful conduct (which supposedly caused the harm) and questioning the probability of the harm occurring if a lawful conduct is substituted for the wrongful conduct. Therefore, the conduct of the defendant must be a *sine qua non* for the result.²⁶⁵

²⁵⁷ Richard Summers *Environmental compliance and enforcement in South Africa* 360.

²⁵⁸ Glazewski *Environmental law* 8 – 8.

²⁵⁹ Glazewski *Environmental law* 8 – 6.

²⁶⁰ Richard Summers Environmental compliance and enforcement in South Africa 361.

Factual causation refers to the question of whether there is any factual link between the defendant's conduct and the harm suffered by the plaintiff In International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A) the court stated: "The first inquiry is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss."

²⁶² Richard Summers *Environmental compliance and enforcement in South Africa* 361.

²⁶³ Richard Summers Environmental compliance and enforcement in South Africa 361 – 362.

Loubser and Midgley (eds) The law of delict 71; See Minister of Safety and Security v Van Duivenboden (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) at 449.

To prove environmental damage on a balance of probabilities has been described as 'notoriously problematic'. In many instances the environmental damage that is caused as a result of mining will manifest immediately. In other circumstances the harm will only occur years later which makes it extremely difficult to reconstruct a factual nexus between the event and the harm caused.



Factual causation between the defendant's conduct and the harm suffered by the plaintiff is not enough to establish the existence of a legally relevant causal connection. ²⁶⁶ The various mining activities that impact on the environment may cause an infinite chain of possible harmful consequences. As a result, the court's use a further test to determine whether the defendant's conduct was a legal cause of the plaintiff's harm. The legal causation test is a flexible test which considers all relevant factors including policy considerations. ²⁶⁷ This test is essential to establish whether or not the defendant's conduct was a legal cause of the plaintiff's harm. Legal causation is a 'moral reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant'. ²⁶⁸

It is submitted that, as with the test for wrongfulness, the norms and values encapsulated in the Bill of Rights and other environmental legislation will be critical in determining the bounds of legal causation.²⁶⁹

Kuschke argues the normal burden of causation could in fact be dispensed with through a statutory provision. ²⁷⁰ An example is section 24N (8) of NEMA. The section is dealt with in chapter 3.3 and states that the directors of a company are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company which they represent. This includes damage, degradation or pollution.

²⁶⁶ Kuschke *Insurance against damage caused by pollution* 167 – 168.

This approach was confirmed in *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A): [D]demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is called 'legal causation', see Midgley and Van Der *Walt Law of Delict* 132.

Midgley and Van Der *Walt Law of Delict* 132. Scholars state there are a number of useful methods to determine legal causation: the direct consequence test, *novus actus interveniens*, adequate causation, reasonable foreseeability and the *talem qualem* rule.

²⁶⁹ Glazewski *Environmental law* 8 – 4.

Kuschke argues that section 38(2) of the MPRDA is an example of statutory regulation in South Africa that removes the burden of proving causation. The directors of a company are to be held jointly and severally liable for 'any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company which they represent or represented. See Kuschke *Insurance against damage caused by pollution* 282.



5.3.5. Damage

The purpose of a claim based in delict is to compensate the party prejudiced as a result of damage caused by the wrongdoer.²⁷¹ Damage can be defined as

the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.²⁷²

In order to hold the director liable for the damages suffered by the company, the company must in fact prove that it sustained actual damage and that the damage is regarded by the law as recoverable.²⁷³ Furthermore, the plaintiff may not claim for harm that could reasonably have prevented.²⁷⁴

The damages a mining company suffers will more than likely impact directly²⁷⁵ on the company as a result of a fine or remediation clean up.

5.4. Conclusion

The Business Judgment Rule is a judicially created legal principle that was developed to protect directors of companies against personal liability for the business decisions they make in good faith and on a rational basis. To rely on the Business Judgment Rule, a director has to comply with the requirements as set out in the test. Firstly, they should take reasonable diligent steps to become informed about the decision they are about to make. Secondly, (for the purpose of this study) is that in making the decision the directors must believe, or reasonably believe, that the decision was in the best interest of the company. In evaluating the elements of delict, the Business Judgment Rule finds application in the test for wrongfulness and negligence. In both instances the aspect of 'reasonableness' is central to the application. Given the nature and of

Loubser and Midgley (eds) *The law of delict* 45.

Neethling, Potgieter and Visser Law of Delict 226.

²⁷³ Glazewski *Environmental Law* 8 – 6.

Where the plaintiff has contributed to the loss suffered such contributory negligence is governed by the *Apportionment of Damages Act*, section 117 1(1)(a) which states that where any person suffers damages that are partly his own fault and partly the fault of another person, the damages claim shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

²⁷⁵ Glazewski *Environmental Law* 8 – 6.



the mining industry and the level of duty of care expected from directors it is unlikely that a director would pass the Business Judgment Rule test. Depending on the given facts of the matter it seems unlikely that a director would be protected by the Business Judgment Rule.

6. CONCLUSIONARY REMARKS

The research question that underpinned this study was to what extent does the business judgment rule provide protection to directors of mining companies from liability for damage caused to the environment.

To address this question, the first part of the study provided the necessary background to the research question. The second part of the study briefly analysed the South African mining industry and its challenges and the role that directors play in these challenges. The second part of the study focused on the South African environmental liability framework and its liability provisions. The third part focused on the definition of a director and directors' duty of care. In light of the context created in the preceding paragraphs, the fifth part of the study focused on the Business Judgment Rule and director liability.

The following was found after the research was concluded:

The research highlighted the economic benefit of the mining industry and its challenges. It also emphasised the potential and sometimes unavoidable impact of mining methods and mining life cycles on the environment. This in turn highlighted the importance of skilful directors and the need for sustainable development strategies in their decision making process.

A brief examination of the applicable environmental liability framework showed that South Africa, under the helm of the *Constitution* has a robust environmental liability framework that can be implemented and utilised to hold mining companies and their directors liable of damage caused to the environment.



The study found that directors need to have a certain morale character and that good corporate governance will be essential in avoiding a claim for liability. It further showed that a director must exercise his or her duties, in good faith and for a proper purpose, in the best interest of the company, and, with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions and having the general knowledge, skill and experience of that director.

In an attempt to encapsulate the research question, the last chapter examined the Business Judgment Rule and assessed the elements of a delict in the context of director liability for environmental damage. The research showed that given the nature of the mining industry, the legal duty on mining directors, and the standard of duty of care assigned to director, the Business Judgment Rule will offer little protection to a director. However, the level of protection will depend on each individual case and the conduct of the directors.



BIBLIOGRAPHY

Primary sources

Legislation

Companies Act 71 of 2008

Constitution of the Republic of South Africa 1996

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Waste Act 59 of 2008

National Water Act 36 of 1998

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral and Petroleum Resources Development Amendment Bill 15D - 2013

Case law

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC)

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

Brant Investments Ltd. v. KeepRite Inc., 1991 CanLII 2705 (ON CA)

Coronation Brick (Pty) Ltd v Strachan Construction Co Ltd 1982 4 SA 371 (D)



Director: Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment 1999 8 BCLR 845 (SCA); 1999 2 SA 709 (SCA)

Fisheries Development Corporation of South Africa Ltd v Jorgensen 1980 4 SA 156 Fose v Minister of Safety and Security 1997 3 SA 786 (CC)

Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga 2007 10 BCLR 1059 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR

Grobow v. Perot, 539 A.2d 180 (Del. 1988)

Gxebeka v MEC for Health, Eastern Cape Province & another (2005) JOL 13458 (Tk)

Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products, and Others 2004 2 SA 393 (E)

Holland v Revenue and Customs (HMRC) [2010]

In Re Brazilian Rubber Plantations and Estates, Limited 1911 1 Ch 425

In Re City Equitable Fire Insurance Company Limited 1925 Ch 407

In Re The Walt Disney Co. Derivative Litigation, 906 A.2d 27 (Del. June 8, 2006)

Jayiya v MEC for Welfare 2004 (2) SA 611 (SCA)

Khumalo v Holomisa 2002 8 BCLR 771 (CC)

Kruger v Coetzee 1966 2 SA 428 (A)

Maple Leaf Foods Inc. v. Schneider Corp., 1998 CanLII 5121 (ON CA)



MEC Department of Welfare, Eastern Cape v Kate 2006 4 SA 478 (SCA)

Minister of Education v Harris (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC)

Minister of Public Works v Kyalami Ridge Environmental Association 2001 7 BCLR 652 (CC); 2001 3 SA 1151 (CC);

Minister van Veiligheid en Sekuriteit v Kyriacou 2000 4 SA 337 (O) 341-342

Motsepe v Commissioner for Inland Revenue (CCT35/96) [1997] ZACC 3; 1997 (6) BCLR 692; 1997 (2) SA 897 (CC);

Mukheiber v Raath 1999 3 SA 1065 (SCA) 1075

Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 SCR 461, 2004 SCC 68 (CanLII)

Scrutton LJ in Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd 1927 2 KB 9 (CA) at 23-24

Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA)

Secondary sources

Journals

Branson D The Rule that isn't a Rule: The Business Judgment Rule (2002) 36 Val U L Rev. 631

Calkoen WJL *The Corporate Governance Review Law Business Research* (3RD Edition)



Frost J Liability of Directors in terms of Environmental Legislation

Havenga P "Liability for Environmental Damage" 1995 SA Merc LJ (7) 187

Kotzé L "Improving Unsustainable Environmental Governance in South Africa: The Case for Holistic Governance" 2006 *Potchefstroom Electronic Law Journal*

Kuschke B *Insurance against damage caused by pollution* (LLD Thesis University of South Africa 2009)

Langdon C *The impact of the Equator Principles on mining and metals finance in emerging markets* London Financing Global Mining: The Complete Picture, Project Finance International Market Intelligence Report White & Case LLP March 2007

Leach J The Correct Understanding of the Business Judgment Rule in Section 76(4) of the Companies Act 71 of 2008: Avoiding the American Mistakes (LLM University of Cape Town)

Le Roux N *Environmental Governance, Fragmentation and Sustainability in the Mining Industry* (LLM University of the North West)

Fedderke J and Pirouz F *The Role of Mining in the South African Economy* ERSA, University of the Witwatersrand

McMillan L The Business Judgment Rule as an Immunity Doctrine

Mojo NJ South African Principles of Corporate Governance: Legal and Regulatory Restraints On Powers And Remuneration Of Executive Directors 2010

Ponta A and Catană RN *The business judgement rule and its reception in European countries* The Macrotheme Review 4(7) Winter 2015 1.

Saxe, Diane. "The Fiduciary Duty of Corporate Directors to Protect the Environment for Future Generations," Environmental Values 1, no. 3, (1992): 243–52



Von Dürckheim L Does South Africa Need A Statutory Business Judgment Rule? (LLM University of Pretoria 2012)

Vorster L *The Liability of Mines for the Prevention, Minimisation and Remediation of Pollution* (LLM University of the North West)

Oosthuizen W.J. Alignment of various environmental authorisation processes for the mining industry.

Books

Boberg P Q R The Law of Delict: Volume I Aquilian Liability (Juta 1984)

Cassim et al Contemporary Company Law 2nd ed (Juta 2012)

Currie I De Waal J *The Bill of Rights Handbook 5th ed* (Juta 2005)

Glazewski J Environmental Law in South Africa (LexisNexis Durban 2013)

Kidd M *Environmental Law* 2nd ed (Juta Cape Town 2011)

Midgley J and Van Der Walt JC *Law of Delict in South Africa* 2nd ed (Oxford University Press 2012)

Neethling J,PotgieterJM and Visser PJ *The Law of Delict* 4th ed (Butterworths Durban 2002)

Paterson A and Kotze J (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta 2010)

Strydom and King (eds) Fuggle and Rabie's Environmental Management in South Africa 2nd ed (Juta Cape Town 2009)



Online resources

http://www.politicsweb.co.za/news-and-analysis/the-mining-industry-after-marikana

http://www.austlii.edu.au/au/journals/UWSLawRw/2008/7.html

http://www.mccarthy.ca/article_detail.aspx?id=3635

http://www.mondaq.com/canada/x/42880/Directors+Officers/The+Canadian+Courts+Perspective+On+The+Business+Judgment+Rule

http://www.mondaq.com/southafrica/x/214918/Directors+Officers/The+Standard+of+ Directors+Conduct

https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/

http://www.chamberofmines.org.za/industry-news/publications/presentations

http://www.fbds.org.br/IMG/pdf/doc-295.pdf

https://industry.gov.au/resource/Documents/LPSDP/guideLPSD.pdf

Reports

Deloitte Strategic Considerations for the MPRDA Amendment Bill Preparing for impact

Department of Industry, Innovation and Science Australia Leading Practice
Sustainable Development Program for the Mining Industry 2011

Institute of directors in Southern Africa The Business Judgment Rule May 2013

Institute of directors in Southern Africa KING IV: Report on corporate governance for South Africa 2016