AN ANALYSIS OF THE ENVIRONMENTAL LIABILITY FOR BREACH OF THE DUTY OF CARE FOR THE ENVIRONMENT IN SOUTH AFRICA

By

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Dissertation submitted in partial fulfilment of the requirements for the degree of

MASTERS OF LAWS IN DEVELOPMENT AND MANAGEMENT LAW

At the

UNIVERSITY OF LIMPOPO

SUPERVISOR: Prof K.O Odeku

2021

DECLARATION

By submitting this mini-dissertation for the degree of Masters in development and management law at the University of Limpopo, I declare that all work contained in this mini-dissertation is my own work (unless otherwise explicitly stated), and that this work has not been submitted to the University of Limpopo or any other university previously.

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Signature…….

ACKNOWLEDGEMENTS

First and foremost, I want to express my gratitude to God for His grace and favor in bringing me to this academic level without His involvement, I would not have progressed this far. I'd like to convey my heartfelt gratitude to my supervisor, Prof. K.O Odeku for his tolerance and direction without him, this effort would not have been possible. I'd also like to thank and appreciate my mother, Makamu Nhlekani Violet, for her unwavering support and unconditional love and without her, I would not have even considered being a student.

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CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The environment has become the core on which the existence of life has been anchored hence it is construed to be the home for different living species both human and animals as we are dependent on it for food, air, water, and other needs.[1] It is consequently self-evident that human life depends on a healthy environment, and that environmental degradation has a negative impact on the health and well-being of those who live in it. This necessitates the need to safeguard the environment in order to ensure that it is safe and harmless to people's health and well-being. In light of this, the Constitution of the Republic of South Africa guarantees the right to an environment that is safe for the people's health and well-being.[2] This means that environmental preservation or protection can be viewed as a means of ensuring a safe environment for people's good health and well-being.

The dependency of human life on a good state of the environment creates not only a moral obligation but also a legal obligation to protect the environment and this legal obligation is referred to as the "duty of care for the environment". The Constitution, as well as other environmental legislation such as the National Environmental Management Act (NEMA), safeguards the environment by enforcing a duty of care.[3]

This duty in simple terms entails an obligation to ensure for safety or wellness of the environment. It obliges everyone not to engage in activities that are likely to cause harm to the environment, without taking reasonable measures in order to prevent such environmental harm from "occurring, continuing or recurring".[4]

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1 Byju's (date unknown) https://byjus.com. Accessed 24 June 2020.
2 Section 24 of the Constitution of the Republic of South Africa, 1996.
3 Supra. See also section 28 of the National Environmental Management Act 107 of 1998.
4 Section 24 of the Constitution of the Republic of South Africa, 1996. See section 28 of National Environmental Management Act 107 of 1998.

In order to ensure that there is compliance with this duty, a liability exists which ensue in the event of breach of the duty to care for the environment. This liability is known as environmental liability and entails sanctions or penalties imposed or inflicted upon anyone who breaches the duty of care for the environment or the environmental law itself. These sanctions may include; fines, imprisonments, directives requiring perpetrators to take specified measures to remedy the damaged environmental or to pay for the costs of rehabilitating the damaged environment and to compensate the State and third parties for the loss which they might have suffered as a result of the breach.[5]

Despite the fact that South Africa has often been regarded as one of the countries having some of the greatest environmental laws in the world, there seems to be less conformity with these laws in particular the duty of care for the environment and this is due to the fact that environmental liability laws are either not enforced effectively or are not effective themselves in their conception. There is therefore, a need in South Africa to clarify the "duty of care for the environment" which creates an obligation not to cause environmental harm and this is to ensure for the fulfilment of the constitutional obligation to protect the environment.

There is also a need to clarify the environmental liability rules which impose liability or sanctions upon any person whose activities or conduct is in breach of the duty of care for the environment in order to deter further perpetrations of environmental harms such as pollution and degradation. The environmental laws and many policies on environmental protection also need to be reassessed so as to improve their effectiveness in holding accountable the perpetrators of environmental crimes.

In a country like South Africa, effective environmental liability regulations or law are very critical. The issue of liability pertaining to perpetration of environmental harms becomes a critical area in our law as the South African law has been criticised for not addressing environmental liability adequately. South Africa therefore needs to reassess its

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5 Nel Gunningham, 'Should a general "duty of care" for the environment become a centerpiece a "next generation environment protection statute?' (2012)*Cullinan and Associates* p1. See also section 28 of the National Environmental Management Act 107 of 1998.

environmental liability laws in order to ensure effective deterrence or prevention of the perpetration of environmental harms such as pollution and degradation.

By compelling compliance to the duty of care for the environment through imposing environmental liability upon those who are in breach, will be striving towards the constitutional environmental objective which is to secure for an environment that is safe and harmless to the health and wellbeing not only of the present generation but also the future generations.[6] This will definitely have a great impact in the decrease of the levels of environmental pollution and degradation in South Africa.

The principle of environmental liability has also been adopted by the international law and this adoption is aimed at holding accountable States that perpetrate environmental crimes. The States therefore, have the legal obligation in terms of the International environmental law to act in an environmentally friendly manner so as to protect the environment hence the environmental liability exists in the international law to punish States or international entities that are responsible for environmental crimes.

Example of international law principles imposing environmental liability include the principle of “good neighborliness” which obligates states to try to reconcile their interests with the interests of neighboring states and therefore to ensure that any actions carried out in their territories do not impair the environment in the territorial environment of other State. The international law also embodies a principle called the “duty to compensate for environment harm” to impose liability upon defaulting States. This principle obliges a States whose activities have harmed the environment of another State to make compensation to the latter for damages that the latter has suffered. The duty to compensate for environmental harm therefore, serves as the international environmental law liability principle that imposes direct liability upon defaulting States who have caused a harm to the environment of the territory of another State.

6 Section 24 of the Constitution of the Republic of South Africa, 1996.

1.2 RESEARCH PROBLEM

The duty to care for the environment in South Africa is not just a moral duty but a Constitutional obligation since it has been incorporated into the Constitution.[7] Section 24 of the Constitution makes provision for environmental rights that incorporate and impose the duty to care for the environment. The realisation of these environmental rights demands active compliance with the duty to care for the environment hence they are construed to be incorporating the 'duty of care for the environment'.

Regardless of the fact that, it is now a constitutional obligation to care for the environment, there seem to be less conformity to this obligation and this is evident in the increase levels of pollution and endless environmental degradation without sanctions being inflicted upon the perpetrators. According to the research known as *Air Pollution: Strengthening the Economic Case for Action* conducted by the World Bank, air pollution alone in South Africa kills about 20 000 people every year thereby costing the economy nearly R300-million.[8] The Department of Environmental Affairs in its Annual Report[9] agrees that pollution in South Africa is a huge problem and that, "air quality does not meet even South Africa's weak ambient air quality standards".[10]

Although the Republic of South Africa has recognised and incorporated environmental rights into national law, the increase in the levels of pollution and degradation is a clear indication that, environmental liability in South Africa is not being effectively imposed upon those who perpetrate pollution and degradation on the environment or violate environmental laws so as to deter the perpetration of environmental harms. These perpetrators are therefore able to walk away freely even though they should be held liable for transgressing the duty to care for the environment and therefore, to account for their perpetration of environmental harms.

The failure by South Africa to effectively enforce or impose environmental liability upon perpetrators of environmental crimes encourages even more perpetration of pollution and

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7 Supra.
8 World Bank, 'Air Pollution: Strengthening the Economic Case for Action' (2016)
9 Department of Environmental Affairs 14th Annual Air Quality (2019).
10 Center for environmental rights 2019 https://cer.org.za. Accessed 15 October 2020.

degradation which deteriorate the environment thereby causing it to be harmful and unsafe to the health and wellbeing of the people. This consequently undermines section 24 of the Constitution which demands that, the environment must be protected so as to ensure that it is safe and harmless to the health and the wellbeing of the people both present and future generations.[11]

1.3 LITERATURE REVIEW

1.3.1 Recognition and application of the duty of care for the environment in South Africa

The environment plays a significant role in ensuring for the good health and wellbeing of humans as well as for the existence of the flora and fauna that subsist within the environment itself. It has therefore become a home for different living species since we all depend on it for food, air, water, and other needs. This calls for a mitigation of the impact of human activities on the environment in order to ensure environmental protection and the safeguard of the biodiversity that subsists within the environment. The mechanisms utilised to achieve this objective include the enforcement of the duty of care for the environment and the imposition of environmental liability to compel compliance with the duty to care for the environment by punishing or holding accountable those who perpetrate environmental harms. In simple terms, environmental liability ensures that people comply with the duty to care for the environment by threatening to impose sanctions upon such persons if they breach the duty to care the environment.

The comprehension of the environmental liability that one incurs in the instance of a breach of the duty to care for the environment is dependent on a clear understanding of what the idea or concept of the “duty of care for the environment” includes thus, this duty must first be clarified. This duty entails a legal obligation to ensure for the wellness and safety of the environment hence it obliges every person not to engage in activities that causes or may cause harm to the environment such as; pollution or degradation, without

[11] Supra.

taking reasonable steps in order to prevent such environmental harm from "occurring, continuing or recurring".[12]

This finds its history in the Common law under the law of delict.[13] Under the Common law, the 'duty of care' was not owed to the environment per se.[14] The Common law duty of care was only aimed at protecting individual's interests hence the environment could only be protected indirectly as a consequence of the protection of such individuals' interests. It is against this backdrop that scholars such as Bates argue that:

> It is only harm to personal interests that is actionable at common law: common law does not recognize that a duty of care might be owed to the environment per se. Hence the common law can only protect the environment indirectly through legal liability for impact on persons and property arising out of activities that harm it.[15]

The disposition that the duty of care for the environment existed under Common Law to protect the interests of individuals has been concurred in the case of *Rainbow Chicken Farm (Pty) Ltd v Mediterranean D Woollen Mills (Pty) Ltd*[16] where the Court ruled that, the effluent producer owes a common law duty of care to others. This means that this obligation (duty of care) was owed to humans rather than the environment under Common Law.

The Republic of South Africa's Constitution recognizes and incorporates the duty of care for the environment. This duty is enshrined in Section 24 of the Constitution, generally known as the environmental clause. It guarantees that everyone has the right to live in an environment that is safe for their health and well-being.[17] This provision further provides for the right to have the environment protected:

> For the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable

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12 Section 28 (1) of the National Environmental Management Act 107 of 1998.
13 Oversea "Nabileyo 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p2.
14 Gerry Bates, 'A Duty of care for the Protection of biodiversity on Land' (2001) *ANU* p vii.
15 Supra.
16 *Rainbow Chicken Farm (pty) Ltd v Mediterranean D Woollen Miffs (Pty) Ltd* 1997 4 SA 578 (W).
17 Section 24 (a) of the Constitution of the Republic of South Africa, 1996.

> development and use of natural resources while promoting justifiable economic and social development.[18]

Unlike under the Common law where the "duty of care" existed to protect the interests of individuals as opposed to the environment, the duty of care under the Constitutional dispensation is also owed to the environment and for the direct protection of the environment. The constitutional incorporation of environmental rights that recognise the 'duty of care for the environment' in section 24 of the Constitution has led to the enactment of the NEMA in 1998. This Act is the principal legislation in South Africa regulating environmental matters and was enacted to give effect to Section 24 of the Constitution which demands for the protection of the environment through the taking of inter alia; legislative measures. Section 28 of NEMA imposes the general legislative duty of care for the environment and obliges:

> 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 minimise and rectify such pollution or degradation of the environment.[19]

The NEMA is not the only legislation that imposes or has incorporated the duty of care for the environment. There are other legislation that have been enacted under the NEMA and which impose the duty of care for the environment. However unlike the NEMA which imposes the general duty to care for the environment, these legislation impose the duty to care in respect of certain specific aspects of the environment and not the environment generally. They are also known as the specialised environmental management Acts (SEMAs). These SEMAs include; the National Environmental Management: Biodiversity Act[20], National Environment Management: Air Quality Act[21], National Environmental Management: Protected Areas Act[22] and National Environmental Management: Waste

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18 Section 24 (b) of the Constitution of the Republic of South Africa, 1996.
19 Section 28 (1) of the National Environmental Management Act.107 of 1998.
20 Act 10 of 2004.
21 Act 39 of 2004.
22 Act 57 of 2003.

Act[23]. Another legislation embodying the duty of care for the environment is the National Water Act[24].

1.3.2 Liability incurred for breach of the duty of care for the environment

A breach of the duty to care for the environment comes with liability and this is referred to as environmental liability. Environmental liability exists in South African law, both in common law and in statute.[25] According to Oversea, environmental liability in South Africa has primarily been addressed through common law.[26] Oversea argues that under the Common law, environmental liability is based on delict hence all elements of delict must be satisfied before environmental liability can arise. He further submits that:

> The essential requirement for delictual liability is that the wrongdoer must have committed a delict against the victim who must have sustained harm as a result thereof [and that] in the context of environmental pollution the spillage of harmful substances would be a compliance with this requirement.[27]

This has been attested by authors such as Kidd who argue that under Common law, there is duty to care for the environment.[28] This submission by Kidd implies that if under Common law one had an obligation to act with environmental care by not harming the environment, it means that liability also ensued in the event of breach of such duty in order to hold accountable the person responsible for breach who failed to act with environmental care thereby causing harm to the environmental, and this is called environmental liability.

Once the above requirements are satisfied environmental liability arises under the Common law. The existence of environmental liability under common law was acknowledged in the case of *Rainbow Chicken Farm (Pty) Ltd v Mediterranean D Woollen Mills (Pty) Ltd*[29] where it was held that, the effluent producer owes a common law duty of care to others. This means that under common law, environmental liability existed in order

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23 Act 59 of 2008.
24 Act 36 of 1998.
25 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p2.
26 Supra
27 Supra.
28 Michael Kidd *Environmental Law* 2nd ed (2011) p126.
29 *Rainbow Chicken Farm (pty) Ltd v Mediterranean D Woollen Miffs (Pty) Ltd* 1997 4 SA 578 (W).

to hold individuals who violated the common law duty of care accountable. In *Colonial Government v Mowbray Municipality and Others*, the common law duty of care was also applied to protect these interests.[30]

According to Oosthuizen, imposing environmental liability for the transgression of the Common law duty of care on a delictual basis is difficult, especially where the offender is charged with environmental pollution, because it is difficult to prove pecuniary loss in relation to compensation for environmental violations, due to the inherent difficulty of putting a monetary value on the environment.[31]

Glendyr Nel, an Associate at Cullinan and Associates, also acknowledges the existence of environmental liability under the South African environmental law for breach of environmental law or obligation such as the duty of care for the environment when he stated that:

> South African law regards the environment as a public trust to be conserved and protected for the benefit of all. Consequently if the environment is harmed, the law makes provision for holding a range of people responsible through imposing criminal liability (fines and imprisonment) as well as by requiring them to take specified measures (e.g. to remedy the damage) and to compensate the state and third parties for expenses which they have incurred as a consequence of the offence.[32]

It is apparent from the above submission by Glendyr Nel that environmental liability manifests in two ways namely; criminal liability whereby liability is imposed in the form of fines or imprisonment and delictual liability whereby the offender is compelled to compensate for the costs of rehabilitating the environmental damage he or she has perpetrated.[33] Section 12 of the National Environmental Laws Amendment Act[34] which commenced in September 2009 imposes environmental liability upon the perpetrators of the breach of "duty of care for the environment" by making it an offence for anyone to:

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30 *Colonial Government v Mowbray Municipality and others* (1901)18 SC 453.

31 Oosthuizen F 'The Polluter Pays Principle: Just A Buzzword of Environmental Policy' (1998) *SAJELP* p 360-361.

32 Glendyr Nel, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p1.

33 Supra.

34 Act 14 of 2009.

> Unlawfully and intentionally or negligently commit any act or omission which causes, or is likely to cause, significant pollution or degradation of the environment, or detrimentally affects, or is likely to affect, the environment in a significant manner.[35]

Section 2(4)(p) of the NEMA embodies the 'polluter-pays principle' which is the most common environmental liability principle under the South African law. It provides that "the costs of remedying pollution, environmental degradation and consequent health effects must be paid for by those responsible for harming the environment". Environmental liability will therefore be imposed upon those who breach the duty of care by harming the environment either by polluting or degrading the environment without taking reasonable measures to prevent such pollution or degradation.

It is now obvious that imposing environmental liability is critical for environmental protection, since it aims to ensure that the environment is safe and harmless to the health and well-being of those who live in it. It therefore compels compliance to the environmental law or duties which include inter alia; the duty of care for the environment by imposing sanctions upon those who are defiant. Kidd has asserted a very important point which calls for effective imposition of environmental liability in South Africa when he stated that:

> There are numerous instances of non-compliance with environmental legislation leading to environmental damage that are coming to light almost daily, whether it is yet another instance of water being contaminated by sewage or mining authorisations being granted in the face of unacceptable environmental impacts. It is in everybody's interest that such illegalities be exposed and corrected, and people need to be encouraged to bring about that result, not made to circumvent procedural obstacles that might have made sense twenty years ago but are completely inappropriate today. This is a challenge for the profession but the legal tools are available. They just need to be used![36]

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35 Section 12 (d) of the National Environmental Laws Amendment Act 14 of 2009. See also Glendyr Nel, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p1

36 Micheal Kidd, 'Public Interest environmental Litigation: Recent Cases Raise Possible Obstacles' (2010) *PELJ* p44.

1.3.3 International law

Environmental liability does not only exist in the national law but also finds recognition under the 'International law'. The International law is defined to mean the body of rules established or created by treaties and customs which have been recognised and accepted by States as binding in their relations with one another.[37] The International law does not only bind the relations between States, it extends also to the relations between States and international organisations as well as relations between international organisations themselves.

The recognition of environmental law in the international arena has given birth to the incorporation of the principle of environmental liability by the International law. The States are obliged by International environmental law to act in an environmentally friendly manner so as to protect the environment. The environmental liability therefore exists under International law to punish States or international entities that are responsible for environmental crimes. It is against this backdrop Sandrine has argued that:

> When breaching its international obligations, a State risks to be held liable for it. It must respond to the grievances of the subject to whom it caused prejudice when violating the latter's rights.[38]

Every State therefore, has a legal obligation to ensure that its the activities conducted within its territory do not result in causing harm to the territorial environment of another State and this was acknowledged in the "*1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*" by the International Court of Justice (ICJ) when it stated that:

> The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[39]

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37 Malcolm Shaw (date unknown) https://www.britannica.com.

38 Sandrine Maljean-Dubois, 'International Litigation and State Liability for Environmental Damages: Recent Evolutions And Perspectives' (2017) *TUP* p3.

39 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports p225.

The responsibility of a State not to harm a neighboring state's territorial environment is linked to the notion of good neighborliness, which is defined as a principle that "obliges states to try to reconcile their interests with the interests of neighboring states" by the Yale Law Journal in its publication called "*The New Perspectives on International Law*.".[40] This was further emphasized in the Trial *Smelter case* (United States v. Canada), when the Court found that, a State cannot allow its territory to be used in a way that harms another State's territory.[41]

It is self-evident that all States have a legal obligation to protect the environment of their neighbors under international law hence any State that fails to do so with the result that harm is caused to the territorial environment of other States, is liable for such harm and this was the case in the *Smelter case.*

In the *Trail Smelter Case* a mining company in Canada operated a smelter which emitted lead and zinc. The smoke from the smelter resulted in the destruction of crops and forest of the United States. Canada was found to have failed to carry out its responsibility to ensure that operations undertaken within its borders do not hurt neighboring territories, in this case the United States. Consequently Canada was held liable for harm incurred by United States and the Arbitral Tribunal decided the following;

a) Canada has been ordered to take steps to decrease air pollution caused by emissions from the smelter's zinc and lead processing.
b) For the destruction of US agriculture and forestry, Canada was held accountable in damages.

It is now apparent that environmental liability exists under International law to punish States that fail to act with environmental sensitivity or ensure that their actions do not impair the territorial environment of other countries. The ‘De Janeiro Declaration on Environment and Development’ also called the “Rio declaration” has not been silent about the environmental liability of States. It makes provisions for the imposition of

40 The Yale Law Journal, ‘The New perspectives on International Law’ (1973) JSTOR p165.
41 *United States v Canada* (1949) 2 RIAA 829.

environmental liability in the international level where environmental harm has been perpetrated by States.

Principle 2 of the 'Rio declaration' reaffirms the disposition that, although the States are entitled in terms of the International law, in particular the principle of sovereignty, to do as they wish within their territories without accounting to anyone, they have the duty to:

> To ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[42]

This provision therefore imposes liability upon any State whose activities have caused environmental harm to the territory of another State as a result of the failure by the former State to take steps in order ensure that environmental activities conducted within its territory do not cause harm to the environment of other States. This means that the expenses of repairing environmental harm in the victim-territorial State's environment will be borne by that acting State at fault.

1.4 SIGNIFICANCE OF STUDY

It is a constitutional right to live in an environment that is both safe and beneficial to one's health and well-being.[43] This is supported by the premise that human life is dependent on a healthy environment, and that environmental degradation has a negative impact on people's health and well-being. The increase in the levels of pollution across South African is evidence that there is less conformity with environmental laws and that the perpetration of pollution and degradation is being left unpunished.

This study therefore stresses that there is an environmental duty to care for the environment which binds all persons including the State to act in an environmentally friendly manner so as to ensure that, the environment is safe and harmless to the health and wellbeing of the people as envisaged by the section 24 of the Constitution. This study further promotes and demands the use of environmental liability by all spheres of

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42 Principle 2 of the Rio Declaration.
43 Section 24 of the Constitution of the Republic of South Africa, 1996.

government and all international institutions such as the International Courts to sanction perpetrators of pollution and degradation.

This study also calls upon the amelioration of certain aspect of environmental liability law in South Africa so as to render it more effective in holding liable those who breach the duty to care for the environment by polluting and degradation the environment. Environmental liability is known to be inadequately addressed in terms of the South African law hence this study advises on how environmental liability can fruitfully be used to protect the environment in South Africa.

1.5 AIMS AND OBJECTIVES OF THE RESEARCH

1.5.1 Aim

The aim of this study is to examine the effectiveness of the 'duty of care for the environment' and 'environmental liability' principles in holding perpetrators of environmental harm accountable for their acts.

1.5.2 Objectives

The objectives of this study are;

1. to use Environmental liability to hold perpetrators of pollution and degradation to account for the breach of the duty to care for the environment;
2. to decrease the increasing levels of pollution and degradation by imposing environmental liability upon perpetrators of such pollutions and degradation and
3. to improve the effectiveness of the South African environmental liability law.

1.6 RESEARCH METHODOLOGY

The research methodology will be qualitative and non-empirical. Textbooks, reports, legislations, regulations, case laws, amendments to legislation, journals, academic journals, the Constitution, and international and national instruments will all be used in this study.

1.7 OUTLINE OF CHAPTERS

(a) CHAPTER 1: INTRODUCTION

This chapter introduces the study and covers the following topics: the study's subject matter, the problem statement, the research questions, the study's goals and objectives, the literature review, research methods, and the chapter framework.

(b) CHAPTER 2: THE CONCEPT OF THE DUTY OF CARE FOR THE ENVIRONMENT

This chapter explains what the notion of environmental "duty of care" entails, how it has existed and been applied in common law, and how it has been incorporated into the Constitution of the Republic of South Africa and legislation to assure environmental protection..

(c) CHAPTER 3: ENVIRONMENTAL LIABILITY FOR BREACH OF THE DUTY TO CARE FOR THE ENVIRONMENT

This Chapter will outline the liability that is imposed upon the perpetrators of environmental harm. It will provide a discussion about the liability that one incurs for causing environmental harm. In other words, this chapter outlines the legal ramifications of failing to comply with the legal duty to protect the environment.

(d) CHAPTER 4: INTERNATIONAL LAW ON ENVIRONMENTAL LIABILITY FOR BREACH OF THE DUTY OF CARE FOR THE ENVIRONMENT

This chapter outlines the International environmental law and principles that impose environmental liability upon states (in particular South Africa) for breach of the ‘duty of care for the environment’.

(e) CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This chapter will address possible reforms, make recommendations and conclusions.

CHAPTER 2

THE CONCEPT OF THE DUTY OF CARE FOR THE ENVIRONMENT

2.1 Duty of care for the environment

The environment has become the core on which the existence of life has been anchored hence it is construed to be the home for different living species both human and animals since they are dependent on it for food, air, water, and other needs.[44] A good state of the environment therefore has a significant role to play in securing a healthy human life hence the deterioration of the environment will negatively impacts the health and wellbeing of the people who live in it. It is against this backdrop that there is both moral and legal obligation to care for the environment and this obligation is called the 'duty of care for the environment'. In order to understand what this duty entails it is very important to define first, what an "environment" is. The NEMA defines the environment as:

> The surroundings within which humans exist and that are made up of (i) the land, water land atmosphere of the earth (ii) micro-organisms, plant and animal life (iii) any part or combination of (i) and (ii) and the interrelationships among and between them and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.[45]

The 'duty of care' generally entails the legal obligation to take reasonable care to avoid causing damage.[46] In the environmental context, this duty refers to the legal obligation vested upon a person or State not to cause harm to the environment. It is therefore an obligation to protect or ensure for the safety or wellness of the environment. The duty of care for the environment is vested upon both individuals and the State and obliges them not to cause harm to the environment and in certain circumstances, to take reasonable measures in order to prevent environmental harm from "occurring, continuing, recurring or to rehabilitate the damaged environment".[47]

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44 Supra.
45 Section 1 (1) (Xi) of the National Environmental Management Act 107 of 1998.
46 Etheringtons Solicitors 2020 https://etheringtons.com. Accessed 01 May 2021.
47 Section 28 (1) of the National Environmental Management Act 107 of 1998.

The duty of care for the environment has both positive and negative meanings. In the positive sense, it entails an obligation to take reasonable steps in order to protect the environment or to prevent environmental harm from occurring and where the environmental harm has already occurred, to take measures that are reasonable to curb the harm from continuing or recurring or to rehabilitate the damaged environment. In the negative sense, the duty of care for the environment entails an obligation to refrain from causing harm to the environment.

The positive duty of care for the environmental is usually vested upon the perpetrator who causes or has caused an environmental harm and obliges him to take measures which must be reasonable in order to remove the pollution that he has caused on the environment or to prevent the environmental damage from continuing or recurring.[48] This requirement necessitates some affirmative action on the part of the polluter in order to prevent or mitigate environmental harm.

The negative duty of care for the environment simply obliges a person not cause harm to the environment. No positive action is required from the duty-holder, he or she is only obliged to act with care when engaging in activities that are likely to harm the environment so that such environmental harm does not materialise. However there is a doubt as to whether the negative duty of care strictly does not require a positive action because in certain instances, the negative duty of care may overlap with the positive duty of care. For example; a mining company has an obligation not to pollute the environment (negative duty of care for environment) however the compliance with this obligation undoubtedly requires the company to take some preventative measures (positive actions) in order to ensure that no pollution is caused.

This duty therefore exists to protect the environment since the environment has significant role to play in ensuring for the good health and well-being of the people who live in it. The protection of the environment is also crucial for the existence and preservation of flora and fauna that subsist within the environment. This protection is effected through the enforcement of the duty of care for the environment which basically demands the

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[48] Supra.

mitigation of the impact of human activities such as pollution and degradation on the environment and its biodiversity.

2.2 The duty of care for the environment under Common law

The environmental duty of care has its origins in common law and is founded on the law of delict. The Nuisance law and the Neighbour's law were two branches of delict law that governed the duty to care for the environment. These laws entail that no one may use their property in a manner that interferes with the rights of others (neighbors) to utilize their properties or land.

The Common Law does not recognise the duty of care as a duty which is owed to the environment *per se*.[49] The Common law recognition of the duty of care is aimed at protecting the interests of individuals however, this protection has an indirect contribution to the protection of the environment. This has been acknowledged and concurred by Bates when he said that:

> It is only harm to personal interests that is actionable at common law: common law does not recognize that a duty of care might be owed to the environment per se. Hence the common law can only protect the environment indirectly through legal liability for impact on persons and property arising out of activities that harm it.[50]

The Common law-duty of care protects the interests of individual hence the environment gets to be protected indirectly as a consequence of the protection of such interests for example; under nuisance law one may be compelled to compensate “a landholder for damage to the environment, but because the common law views this as an infringement of the landholder’s property rights, not because it perceives a breach of a duty to protect the environment”.[51] It is therefore the “harm to personal interests that is actionable under common law, not the harm to the environment *per se”*.[52]

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49 Nel Gunningham, ‘Should a general "duty of care" for the environment become a centerpiece a "next generation environment protection statute?’ (2012)*Cullinan and Associates* p2.

50 Gerry Bates, ‘A Duty of care for the Protection of biodiversity on Land’ (2001) *ANU* p vii.

51 Supra at p15.

52 Supra, at p16.

The indirect protection of the environment by the Common law-duty of care is based on the fear of delictual liability in that, a person who engages in environmental activities must do so with care so as ensure that the environment does not cause harm to others as the failure to do so will result in liability for any loss or damage that any person may suffer as a consequence of such failure. In this way, the Common law indirectly protects the environment because the people are likely to act with care when dealing with the environment for fear of delictual liability in event of harm. Bates further argues that:

> By defining the duty as one owed to individuals, the focus is on the financial penalties of breaching the duty, rather than encouraging individuals to consider their impacts on the environment.[53]

It is very important to clarify as to what it means to act with care on the environment under Common law or what does the Common law duty of care for environment actually requires one to do in order to comply with it. As already outlined above the Common law-duty of care is based on delict, it therefore embodies the principles of "reasonableness" and "practicability". These principles in the context of environmental protection entail that, the duty-holder must take reasonable steps or measures in order to prevent a reasonable foreseeable harm to the environment which is likely to be caused by his or her act or activity, and when is practically possible to do so.

This means that under Common law the duty to care for the environment applies only when two requirements are met namely that, the harm must be reasonably foreseeable and the prevention of such harm must be practically possible. This means that, if the defendant is in breach for example; by polluting the environment with the result that the plaintiff suffers damage by getting infected with disease caused by such pollution, the plaintiff must in order to hold the defendant delictually liable for such harm, prove that the harm was reasonably foreseeable and the prevention thereof was practically possible.

Despite the fact that the common law-duty of care was not owed to the environment per se, but rather to defend the interests of persons, there has always been a need for the duty of care to be developed in order to ensure that the environment is explicitly and

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[53] Supra, at p vii.

directly protected.[54] This need has been acknowledged by Neil when he stated that this duty must require the individuals who:

> Influence the risk of harm to the environment to take "reasonable and practical" measures to prevent such harm and that this duty should be owed to the environment and not confined to persons.[55]

The coming into force of the Constitution and the promulgation of various environmental legislation such as the NEMA have become a shift from the Common law position where the duty of care only existed to protect the interests of individuals and not the environment, to a new dispensation whereby the duty of care for the environment is also owed to the environment and exists for a direct protection of the environment.

2.3 Constitutional recognition of the duty of care for the environment

The duty to care for the environment has earned a constitutional recognition. The Constitution recognizes the importance of environmental protection in order to maintain the health and well-being of all who live in it.

The duty of care for the environment is incorporated into Section 24 of the Constitution. Unlike under the common law, the duty of care under the Constitution is owed also to the environment. Section 24 provides that everyone has the right:

> (a) "to an environment that is not harmful to their health or wellbeing; and
>
> (b) 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".[56]

Section 24 of the Constitution provides for environmental rights that incorporate the duty of care for the environment although it does not refer to it explicitly. The provisions of

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54 Nel Gunningham, 'Should a general "duty of care" for the environment become a centerpiece a "next generation environment protection statute?' (2012) *Cullinan and Associates* p2.

55 Supra.

56 Section 24 of the Constitution of the Republic of South Africa, 1996.

paragraph (a) of this section may be interpreted to entail that, everyone is imposed with an obligation not to cause the environment to be unsafe or harmful to health and wellbeing of the people and this is implies a negative duty of care for the environment which entails the obligation not to harm the environment.

The provisions of section 24(b) impose positive duty of care for the environment as they require some positive steps to be taken in order to protect the environment. They compel the government to adopt legislation and other actions that prevent pollution and environmental deterioration.[57]

Since the Bill of Rights does not only bind the State but also individuals and juristic persons,[58] this obligation requires any person or legal entity involved in activities that create or may cause pollution or deterioration of the environment to take steps to prevent such pollution or degradation.

Section 24 (b) further links the duty to care for the environment to the principle of intergenerational equity by imposing it to protect the environment for "the benefit of present and future generations".[59] The principle of 'intergenerational equity' obliges the present generation to use the environment with care to ensure that its resources and benefits are not depleted or enjoyed only by them, but continue to exist so that even the future generations can enjoy such resources and benefits.[60]

It appears that the Constitutional enforcement of the duty of care for the environment goes beyond ensuring for an environment that is safe and harmless to the health and well-being of the present generation, to include also the protection of the environment in order to ensure that it continues to exist for the benefit of the future generations.[61] The core of the principle of 'intergenerational equity' may be found in the assertions made by philosopher Galen Pletcher when he said that:

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57 Supra.
58 Supra, in section 7.
59 Section 24 (b) of the Constitution of the Republic of South Africa, 1996.
60 Youk-Hyun *Sung* 2006 United Nations / Nippon Foundation Fellow 22.
61 Section 24 (a) & (b) of the Constitution of the Republic of South Africa, 1996.

> It is common to say that [we] have an obligation to clean up the [camping] site-to leave it at least as clean as [we] found it-for the next person who camps there.[62]

The inter-relationship between the duty to care for the environment and the principle of intergenerational equity has always been recognised based on the notion that, The environment must be safeguarded not just for the sake of current generations, but also for future generations hence it has been submitted that, duty of care for the environment does not only apply "to harm that might be caused to those who are living at the moment, but also to those who are yet to be born".[63]

Section 24 (b) of the Constitution also links the duty to care for the environment with the principle of sustainable development. It provides that, the measures that State must take to protect the environment must "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development" and these are attributes of sustainable development. Sustainable development has been defined in the NEMA to mean:

> The integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.[64]

The provisions of section 24 (b) makes the duty of care a means to achieve sustainable development hence sustainable development under the South African law, cannot be isolated or viewed independently from the duty to care for the environment.

2.4 Legislative framework on the duty of care for the environment

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62 McCullough E, 'Through the Eye of a Needle: The Earth's Hard Passage Back to Health' (1995) *UOJELL* p289-398.

63 Nel Gunningham, 'Should a general "duty of care" for the environment become a centerpiece a "next generation environment protection statute?' (2012) *Cullinan and Associates* p2.

64 Section 1 (1) (xxix) of the National Environmental Management Act 107 of 1998.

2.4.1 General duty of care for the environment under NEMA

The general legislative duty of care for the environment in South Africa is found in the NEMA, which is the principal legislation that regulates environmental matters in South Africa. The NEMA was enacted as legislative measure to give effect to section 24 of the Constitution which demands that, the environment must be protected through among other things, the taking of legislative measures.[65]

The duty of care for the environment under NEMA has been incorporated into section 28. However, it is important to keep in mind that, section 28 does not only impose the duty to care for the environment but also imposes liability for transgressions of this duty. The liability for breach of the duty of care for the environment under NEMA is dealt with in chapter 3 of this study. Section 28 of NEMA provides that:

> 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 minimise and rectify such pollution or degradation of the environment.[66]

The duty to care for the environment under section 28 applies to all activities that cause, have caused or may cause a significant pollution or degradation of the environment. Any person who therefore engages in or conducts these activities is obliged to take measures that are reasonable in order to prevent the potential pollution or degradation from "occurring, continuing or recurring".[67]

The determination of whether or not the above obligation imposed by section 28 (1) applies in a particular case entails an enquiry into the nature of the activity undertaken. The enquiry is therefore not whether the activity in question will actually cause pollution or degradation, but whether the activity is of such nature that it causes or may cause the pollution and if so, the obligation applies.

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65 Section 24 of the Constitution of the Republic of South Africa, 1996.
66 Section 28 (1) of the National Environmental Management Act 107 of 1998.
67 Supra.

In a situation where the pollution or degradation which has been caused or which may be caused is permitted by law or cannot feasibly or reasonably be prevented from occurring or continuing or cannot be stopped, section 28 only compells the person concerned to take reasonable measures in order to "minimise and rectify such pollution or degradation of the environment".[68] This means that the fact that the pollution or degradation caused for example; by mining company is authorised or cannot be stopped or could not be prevented reasonably does not amount to an exception to the application of duty of care imposed by section 28 NEMA.

2.4.1.1 Reasonable measures

Although section 28 requires reasonable measures to be taken, the NEMA does not define what these reasonable measures are. The reasonableness of the measures therefore depends on the circumstances of each case. In order to determine whether measures taken are reasonable, one needs to weigh the impact or effects of such measures against the pollution or degradation in question. This means that, the measures will be construed to be reasonable if they have the impact or effect of preventing the pollution or environmental degradation as the case may be, from "occurring, continuing or recurring".[69]

Despite the fact that, the NEMA does not define what reasonable measures are, it provides for a list of measures that may be construed as the reasonable measures required in order to prevent pollution or environmental degradation from "occurring, continuing or recurring".[70] These measures are set out in section 28 (3) of NEMA and include the measures to:

> (a) "Investigate, assess and evaluate the impact on the environment;
>
> (b) Inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;

68 Supra.
69 Supra.
70 Supra.

(c) Cease, modify or control any act, activity or process causing the pollution or degradation;

(d) Contain or prevent the movement of pollutants or the causant of degradation.

(e) Eliminate any source of the pollution or degradation or

(f) Remedy the effects of the pollution or degradation".[71]

Once it is proved that the above measures have been taken in connection with the causing of particular pollution or degradation, the duty of care for the environment under section 28 will be taken to have been complied with. However these measures are not the only reasonable measures required by section 28. Where measures other than the above listed measures have been taken, their reasonableness will depends on whether these measures have the impact or effect of preventing the pollution or degradation in question from "occurring, continuing or recurring" as already expounded above.[72]

The NEMA has also attempted to clarify as to what persons are obliged to take the above reasonable measures listed in subsection (3) which are required in terms of subsection (1) to prevent the pollution or degradation from occurring, continuing or recurring. Section 28 (2) of NEMA provides that:

> Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which (a) any activity or process is or was performed or undertaken; or (b) any other situation exists, which causes or has caused or is likely to cause significant pollution or degradation of the environment.[73]

The words "Without limiting the generality of the duty in subsection (1)" entail that, the duty of care for the environment imposed under section 28 is not confined to the above categories of persons stipulated in subsection (2) but remains general in a sense that, even when a person does not fall within any of the stipulated categories, he or she

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71 Supra at section 28 (3).

72 Supra.

73 Section 28 (2) of the National Environmental Management Act 107 of 1998.

remains bound by this duty hence they must take reasonable measures in order to prevent the pollution or degradation from "occurring, continuing or recurring". [74]

2.4.1.2 Retrospective application of the duty of care for the environment under NEMA

Many of the perpetrated environmental harms such as pollution normally are of such nature that, they "do not readily break down and disappear naturally in the environment" hence they continue existing for a long period until they are removed or remediated.[75] Some of these pollutants "arose as a result of activities that took place 10, 20 or even 50 years ago".[76] The question one may then ask is whether the duty to remove these pollutants applies retrospectively and if so, to what extent?

Prior to the promulgation of the September 2009 Amendment of the NEMA the obligation to take reasonable measures in order to remove pollutants on the environment or to remediate the environmental damage, applied retrospectively only to those polluting activities that took place not before the year 1999 when the NEMA came into force and this has been decided in the *Chief Pule Shadrack VII Bareki NO and Another v Gencor Limited and others* (*Bareki case*).[77]

The *Bareki case* concerned the residents of the Heuningvlei village in the North West province, as well as a group concerned about the environment. The Bareki claimed that asbestos mining activities done by the defendants over a number of years in North West Province had harmed their environment.[78] Despite the fact that these mining operations were shut down in the mid-1980s, the plaintiffs "claimed that the defendant mining company had failed to take the reasonable measures envisaged by Section 28(1) of NEMA to rectify the contamination, and that it was their obligation to do so,

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75 Lan Sampson, 'Environmental Liability' (2008) *Shepstone & Wylie Attorneys* p1.

76 Supra.

77 *Chief Pule Shadrack VII Bareki NO and Another v Gencor Limited and others* [2006] 2 ALL SA 392 (T).

78 Supra at p3.

notwithstanding that the activities took place and the contamination arose, substantially prior to 1999".[79]

In delivering the judgment in the above case the Court relied on the principal of retrospectivity in our South African law and held that, the obligation imposed by section 28 (1) of NEMA is retrospective and that this retrospectivity applies only up to year 1999 when the NEMA came into operation.[80] In other words the Court meant that, the retrospective application of the duty of care for the environment as imposed by section 28 of NEMA "does not extend to activities that took place, or contamination that arose, prior to this date".[81]

The promulgation of September 2009 Amendment of NEMA changed the retrospective application of section 28 obligation to take reasonable measures in order to remove pollutants on the environment or to remediate the environmental damage. In terms of this Amendment the section 28 obligation applies retrospectively to all polluting or degrading activities regardless of whether such activities took place before or after the year 1999 when the NEMA came into operation. Section 12 of the 2009 National Environmental Laws Amendment Act which makes provisions for the amendment of section 28 of NEMA provides that, the obligation imposed by section 28 (1) of NEMA applies to a significant pollution or degradation that:

> (a) occurred before the commencement of this Act; (b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or (c) arises through an act or activity of a person that results in a change to pre-existing contamination.[82]

The effect of this amendment on the duty to care for environment under NEMA is that, it demands the taking of reasonable measures "not only where [the polluting] activities are currently causing pollution or where they may in future cause pollution, but also where past activities have caused contamination, which contamination remains evident in the

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79 Lan Sampson, 'Environmental Liability' (2008) *Shepstone & Wylie Attorneys* p3.

80 *Chief Pule Shadrack VII Bareki NO and Another v Gencor Limited and others* [2006] 2 ALL SA 392 (T) p5 & 31.

81 Lan Sampson, 'Environmental Liability' (2008) *Shepstone & Wylie Attorneys* p3.

82 Section 12 of the National environmental laws Amendment Act 14 of 2009.

environment" hence everyone is obliged to rectify the environmental harm they have perpetrated regardless of the date of the perpetration.[83]

2.5 Specialised legislation enacted under the NEMA imposing the duty of care for the environment

The NEMA is not the only legislation that imposes or has incorporated the duty to care for the environment. There are other legislation that have been enacted under the NEMA or rather inspired by NEMA and which impose the duty to care for the environment. However unlike the NEMA which imposes the general duty to care for the environment, these legislation impose the duty to care for specific aspects of the environment and not the environment generally. They are also known as the specialised environmental Management Acts (SEMAs). These SEMAs include; the National Environmental Management: Biodiversity Act[84], National Environment Management: Air Quality Act[85], National Environmental Management: Protected Areas Act[86] and National Environmental Management: Waste Act[87]. Another legislation embodying the duty of care for the environment is the National Water Act[88].

Section 57 of the National Environmental Management: Biodiversity Act imposes the duty to care for environment with the aim of protecting the biodiversity by prohibiting activities that are listed as "restricted activities"[89] in terms of this Act any animal or plant which falls under the species declared to be a protected or threatened species.[90] Section 3 of the National Environment Management: Air Quality Act imposes the duty of care for the environment in order to protect the air as part of the environment by compelling the State

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83 Diana Wylie 2010 https://www.dingleymarshall.co.za
84 The National Environmental Management: Biodiversity Act 10 of 2004.
85 The National Environment Management: Air Quality Act 39 of 2004.
86 The National Environmental Management: Protected Areas Act 57 of 2003.
87 The National Environmental Management: Waste Act 59 of 2008.
88 The National Water Act 36 of 1998.
89 A restricted activity is any activity as defined in terms of section 1(1) of the National Environmental Management: Biodiversity Act No. 10 of 2004.
90 Section 57 of the National Environmental Management: Biodiversity Act No. 10 of 2004.

to protect and improve the quality of air in the Republic, and to administer this Act in such a way that the environmental rights enshrined in section 24 of the Constitution are realised progressively.[91]

Section 17, 18, 23, and 24 of the National Environmental Management: Protected Areas Act impose the duty to care for the environment by requiring certain areas to be declared protected areas.[92] The aim of this Act is to protect and conserve among other things, "the ecological integrity of those areas, biodiversity in those areas, threatened or rare species in those areas, or area which is vulnerable or ecologically sensitive".[93]

The National Environmental Management: Waste Act imposes the duty to care for the environment by requiring a proper waste management. Section 16 of this Act obliges the 'holder of waste'[94] to take reasonable measures to ensure that, the waste generated, stored, accumulated, transported, processed, treated, exported or disposed by him do not harm the environment since this may cause the environment to be harmful to health and wellbeing of the people thereby transgressing section 24 of the Constitution.[95]

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91 Section 3 of the National Environment Management: Air Quality Act No. 39 of 2004.

92 A protected area is defined to mean "any area referred to in section 9 of the National Environmental Management: Protected Areas Act No. 57 of 2003. In terms of section 9 the protected areas may include;
(a) special nature reserves, nature reserves (including wilderness areas) and protected environment
(b) Heritage sites
(c) specially protected forest areas, forest nature reserves and forest wilderness areas declared in terms of the National Forests Act, 1998 (Act No. 84 of 1998); and
(d) Mountain catchment areas declared in terms of the Mountain Catchment Areas Act, 1970 (Act No. 63 of 1970)."

93 Section 17, 18, 23 and 28 of the National Environmental Management: Protected Areas Act 57 of 2003.

94 Section 1 of the National Environmental Management: Waste Act 59 of 2008 defines the holder of waste to mean "any person who imports, generates, stores, accumulates, transports, processes, treats, or exports waste or disposes of waste".

95 Section 16 of the National Environmental Management: Waste Act 59 of 2008. See also section 24 of the Constitution of the Republic of South Africa, 1996.

CHAPTER 3

ENVIRONMENTAL LIABILITY

3.1 The Concept of environmental liability

The concept of environmental liability simply entails a liability that the wrongdoer incurs for the costs of rehabilitating the environment that he or she has damaged or for the delictual damages that another person has suffered as a result of the harm done to the environment by the wrongdoer.[96] Environmental liability also extends to acts or conducts that are in transgression or violation of any environmental law.[97] What this definition entails is that, environmental liability is imposed upon a person who has either damaged the environment or harmed others through damaging the environment or failed to comply with an environmental law.

It must be emphasised that liability cannot arise unless there is an obligation or duty or responsibility that one must fulfil and which has not been complied with. One of these obligations under environmental law is the duty to care for the environment. Any person who therefore fails to comply with duty to care incurs liability (environmental liability) for such failure. The actual liability that one must incur for his breach of duty to care for the environment, is determined by the principle of environmental liability which is the essence of this chapter.

The environmental liability is divided into two forms namely; the civil liability and criminal liability.[98] Civil liability is derived from the Common law and occurs when the wrongdoer

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96 Lawinsider (date unknown) https://www.lawinsider.com.

97 Supra.

98 Glendyr Nel, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p1.

incurs the costs for rehabilitating the environment that he has damaged or when he liable in damages for harm the third party has suffered due to the environmental damage that the former has perpetrated.[99]

Criminal liability is imposed by a Statute and occurs usually when a person has transgressed an environmental law and may take the form of imprisonment or fine. Glendyr Nel clearly expounds this by stating that the:

> South African law regards the environment as a public trust to be conserved and protected for the benefit of all. Consequently if the environment is harmed, the law makes provision for holding a range of people responsible through imposing criminal liability (fines and imprisonment) as well as [civil liability] by requiring them to take specified measures (e.g. to remedy the damage) and to compensate the state and third parties for expenses which they have incurred as a consequence of the offence.[100]

The objectives of environmental liability are thus; to prevent pollution and environmental degradation.[101] These objectives are achievable by imposing sanctions in the form fines, imprisonments, costs for rehabilitation of the damaged environment and directives to take specified measures to remedy the environment.[102] In other words, environmental liability and the obligation to care for the environment work together to deter the pollution and degradation of the environment in that, sanctions or penalties are inflicted upon persons who breach this obligation to care for the environment by unlawfully polluting and degrading the environment.

In South Africa, the laws relating environmental liability are very crucial especially when it comes to the issue relating to environmental harms such as pollution and degradation as these are the main issues sought to be dispensed by the duty of care for the environment.[103] This has become a critical issue in our law mainly because of the fact that, South African law does not address environmental liability adequately.[104] Under the

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99 Supra.
100 Supra .
101 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p1.
102 Glendyr Nel, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p1.
103 Supra.
104 Supra. See Soltau Friedrich, 'The National Environmental Management Act and Liability for Environmental Damage' (1999) *SAJELP* p48.

South African law, environmental liability exists both under the common law and statutory law as discussed hereunder.

3.2 The Common law environmental liability

In South Africa the principle environmental liability has largely been addressed within Common law framework.[105] The existence of environmental liability under Common law is to sanction any noncompliance with the Common law environmental obligations such as the duty to care for the environment. This means that even under Common law the failure to adhere to environmental obligations cannot go unpunished. Any person who therefore, causes harm to the environment is liable to rectify such environmental harm.

The Common law-environmental liability is based on the law of delict (delictual liability).[106] Generally, liability in term of the law of delict is predicated on the fault or negligence of the wrongdoer. This means that the Common law-environmental liability will only arise when all elements of delict are satisfied.[107] The Common law was usually applicable to pollution cases particularly to water pollution.[108] All elements of delict must therefore, be satisfied before any compensation can be claimed successfully from the polluter hence it has been submitted that, "the essential character of the law of delict is that it compensates for unlawfully inflicted pollution".[109] According to Emanuela,[110] the Common law environmental liability is "best positioned to protect the rights and interests of individuals" because it:

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105 Glendyr Nel, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p2.
106 Supra.
107 Michael Kidd *Environmental Law* 126.
108 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p1.
109 Boberg *The law of Delict* 16.
110 Orlando Emanuela, 'The Evolution of EU Policy and Law in the Environmental Field' (2014) *Hart Publishing* p2.

> Provides victims of environmental harm with an important avenue to seek redress for damage to private property, personal damage and, to some extent, also recover consequential economic losses.[111]

3.2.1 Delictual requirements for environmental liability under common law

The delictual requirements or the elements of delict that must be satisfied from the conduct of the polluter for environmental liability to arise under Common law are as follows;

The First element of delict is that there must have been an act on the part of the wrongdoer either by doing something or failing to do something which he or she was obliged to do. In an environmental context it means that, the wrongdoer must have damaged or harmed the environment for example; by polluting the environment or causing the environment to be polluted. It is submitted that this requirement may be satisfied for example; when it is proven that there was spillage of harmful substances.[112] The person's failure to perform any duty which he is obliged to perform and which results in an environmental harm is taken to be an "act"' for the purpose of this requirement.[113]

The Second element is wrongfulness of the act. The mere fact that a person has polluted the environment is not sufficient for environmental liability to be imposed under Common law of delict.[114] It must be further established that such polluter has unlawfully or wrongfully polluted the environment since lawful pollutions are not prohibited.[115] The

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111 Supra.

112 Boberg *The Law of Delict* 3rd ed (1984) p16-18.

113 An act can take the form of an omission and this is usually the case where a person has failed to do what he or she is obliged by law to do. Such failure is regarded as an act although in form of omission as opposed to comision.

114 Supra.

115 Supra.

plaintiff may establish wrongfulness for example; by showing that the pollution caused by the defendant has impaired her health.

The Third element is that there must be loss or damage. This means that the wronged party must have suffered or incurred loss or harm as a result of the wrongful pollution caused by the wrongdoer.[116] The loss suffered may constitute what is called a "pure economic loss".[117] The recognition of pure economic loss in the environmental liability based on delict will be discussed latter in this study. However some have argued that it is not all harms that are susceptible Common law liability as liability for the commission of delict is imposable where the complainant has suffered pecuniary loss.

The Forth element is causation which entails that there must be a nexus between the wrongful pollution and the loss or harm which has been suffered. This means that, the loss or harm must be the result of the wrongful conduct or the pollution in question and not of any other intervening factors.[118] A person will therefore not be liable if he or she has not caused the damage in question. Causation may either be factual causation or legal causation.

Legal causation simply entails that the harm or loss must not be too remote from the conduct of the wrongdoer hence the polluter may not under the Common law be held liable for environmental harm that is too remote from his or her conduct. In case of factual causation harm is factually caused by the conduct if it would not have ensued but for the conduct in question. Factually causation has been expounded in the case of *International Shipping Co (Pty) Ltd v Bentley* as follows:

> The enquiry as to factual causation is generally conducted by applying the so-called "but for "test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for this enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any

116 Supra.
117 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p3.
118 Supra.

> event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued if the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise.[119]

The Last element is fault which can either be negligence or intention. The polluter must have caused the pollution either intentionally or negligently. The test of negligence entails two inquires which are "whether the harm was reasonably foreseeable and if so, whether reasonable measures were taken to prevent such harm".[120] This means that environmental liability will be imposed under common law if it is proven that, the pollution was "reasonably foreseeable" and the polluter failed to take reasonable precautions in order to prevent such foreseeable pollution from occurring.

In City Council of Pretoria v De Jager, the Court outlined four aspects to consider when determining whether reasonable efforts were taken to avoid a reasonably foreseeable harm from occurring and they include:

> (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materializes; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.[121]

Once all the above elements of delict are satisfied from the conduct of the polluter, environmental liability is established under Common law and shall therefore be imposed on the polluter. In simple terms the Common law demands that, for environmental liability to arise the polluter's conduct must constitutes a delict in respect of which the plaintiff has suffered harm or loss.

3.2.2 Further requirements for environmental liability under common law

In addition to the elements of delict, the Common law sets out two further requirements that must be satisfied before environmental liability is imposed upon a person who

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119 *International Shipping Co (Pty) Ltd v Bentley* [1990] 1 AII SA498 (A) p65.
120 Havenga 'Liability for Environmental Damage' (1995) *SAMLJ* p200.
121 *City Council of Pretoria v De Jager* [1997] 1 All SA 635 (A) para 26.

perpetrated or inflicted environmental harm. These further requirements must be satisfied or proved by the party instituting legal action.[122]

The party who institutes legal proceeding must prove *locus standi.*[123] In order to have a *locus standi* the party must prove that he or she has direct interest in the proceedings or in the environmental issues placed before the court.[124] The Courts have held that, to have a *locus standi* the applicant must have an enforceable right, and that this right must have been infringed.[125] In other words, for environmental liability under Common law to be imposed, the party who institutes legal action against the perpetrator of environmental harm must be directly affected by such violation.[126] Once all the elements of delict are satisfied and these two further requirements are met, the environmental liability under common law will be imposed on the perpetrators.

3.2.3 The recognition of "pure economic loss" in common law environmental liability based on delict

As it has already been mentioned above one of the requirements for environmental liability under Common law based on delict is that, there must be a loss or harm incurred in consequence as of the perpetration of environmental harm. This loss may take the form of "pure economic loss".[127] A pure economic loss is one that a person suffers as a result of another person's negligence but does not involve personal injury or property damage.[128]

In an environmental context, pure economic loss may be caused by environmental incidents such as oil spillage for example; an oil spill that runs into a river may cause the fisherman to lose revenue or profit due to the destruction of the fish stock by such oil spill.

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122 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009.

123 *Verstappen v Port Edward Town Board* [1994] 3 SA 569 (D).

124 Lain Currie & Johan De Waal *The Bill of Rights* 6th ed (2013) p522.

125 FuggJe and Rabie (eds) *Environmental Management* 3rd (2013) p134.

126 supra

127 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p3.

128 Lawteacher 2018 https://www.lawteacher.net.

The loss of such revenue by the fishermen constitutes pure economic loss hence the one responsible for the oil spill will be liable to the fisherman for his loss of revenue or profit.[129]

There is a vast debate as to what constitutes pure economic loss. Pure economic loss generally comprises of a loss other than one emanating from personal injury or to property damage although some argue that, pure economic loss may also emanates from damage to property or personal harm. In an attempt to clarify this confusion Soltau provides the following categories of pure economic loss;

> (1) loss suffered by a plaintiff where he does not suffer any physical injury to person or property, (2) pure financial loss, such as clean-up expenses are recoverable if they are consequential to actual physical damage to property, and (3) Preventative measures.[130]

The preventative measures referred to above are simply actions or steps which must be taken at an earlier stage to stop or prevent harm from happening or continuing. In other words, the person held liable is compelled to use his own means in order to put in place these preventative measures.[131] In simple terms Solitau classifies for convenience, the claim in form of 'preventative measures' as a claim for "pure economic loss" incurred.

Any person who has incurred a pure economic loss on any of the above mentioned categories can therefore, recover such loss on delictual grounds in terms of the Common law. Unlike in other jurisdictions where there is a habit of leaving pure economic losses uncompensated, the South African law does provide for the compensation of pure economic losses although this is not without challenges.

The pure economic losses incurred as a result of the intentional act of the wrongdoer do not present much problems when it comes to indeterminate liability which can be defined as "a liability without certainty or limitation".[132] The problems presented by pure economic

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129 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p6.

130 Soltau Friedrich, 'The National Environmental Management Act and Liability for Environmental Damage' (1999) *SAJELP* p36-37.

131 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p6.

132 Supra, at *p*7.

loss are present when a claim is to be awarded within the confines of reasonable bounds.[133]

The Common law recognition of pure economic loss is based is founded on the disposition that, a person is entitled to sue where another person has acted in breach of the duty to act carefully with the result that the former suffers a loss.[134] This means that anyone who fails to uphold a duty of care for the environment and causes another person to suffer loss, in this instance pure economic loss, may be held accountable in delict under common law to compensate for such loss. This has been concurred in the case of *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* where the Court ordered the defendant to reimburse the plaintiff who suffered a loss as a result of the defendant's breach of the "duty to act carefully".[135]

3.2.4 The law of Nuisance

The law of nuisance is a section of common law that aids in the imposition of environmental obligations under common law. This law entails that no one may utilise their property in a manner that interferes with or violates the rights of their neighbours. In other words, liability under nuisance law arises when it has been proven that, the wrongdoer has unreasonably used his property to the detriment of the neighbours.[136]

The nuisance law is similar to the neighbours law and these two laws are sub-branches of the broader Common law. The nuisance law and the neighbour law together with the law of delict are used to protect Common law environmental rights that relate to noise, air and water pollution.[137] For example; a landowner in terms of nuisance law and the neighbour law has the right to utilise their land without any unreasonable disruption or interference. In the event of unreasonable disturbance or interference to the owner's use of his land, liability is imposed upon the wrongdoer.

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133 Supra, at p34-35.
134 Supra.
135 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 [7] (D) p377.
136 Havenga P, 'Liability for Environmental Damage' (1995) *SAMLJ* p196.
137 Neethling et al *Law of Delict* 7th ed (2017) p371.

One of the examples of nuisances relating to pollution includes; the negligent waste disposal which pollutes the stream water thereby causing such water to be unsafe to human health and the environment itself.[138] In this case the polluter is therefore, liable to compensate anyone who has incurred a loss or harm as a result of such pollution. As it has already been expounded above, this loss may also be in the form of "pure economic loss". Under nuisance law, liability is often incurred by the owner or occupier of land from which the nuisance emanates.[139]

3.3 Environmental liability under Legislation

The principle of environmental liability in South Africa has also been incorporated into legislation. Various legislation have been enacted to impose environmental liability upon anyone who perpetrates environmental crimes or unlawfully harms the environment. These legislation were enacted as legislative measures to give effect to the constitutional environmental rights embodied in section 24 of the Constitution. Section 24 (b) of the Constitution stipulates that, everyone has the right to have the environment protected through inter alia; reasonable legislative measures that among other things prevent pollution, degradation, or promote conservation.[140]

This study will be focused on the general legislative environmental liability as contained in NEMA and discussed hereunder. However it must be mentioned here that, there are other numerous legislation imposing environmental liability but for specific environmental harms and these legislation have already been mention above and will discussed in chapter 2 of this study and they are also known as the SEMAs.

3.3.1 Environmental liability under the NEMA

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138 Soltau Friedrich, 'The National Environmental Management Act and Liability for Environmental Damage' (1999) *SAJELP* p44-45.

139 *Regal v African Superslate (pty) Ltd* 1963 1 SA 102 (A).

140 Section 24 (b) of the Constitution of the Republic of South Africa, 1996.

3.3.1.1 General environmental liability under Section 28 of NEMA

The NEMA was adopted as South Africa's primary and general environmental management legislation. It was enacted as the principal legislative measure to give effect to or bring about the realisation of the environmental rights enshrined in section 24 of the Constitution. This section stipulates that, everyone has the right:

> (a) to an environment that is not harmful to their health or wellbeing; and (b) 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.[141]

It was as a result of the above constitutional provisions that the NEMA had been enacted as a legislative means to protect the environment by preventing pollution and degradation, promoting conservation, and securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".[142]

(a) Grounds for Section 28 environmental liability

Apart from the fact that the NEMA imposes a general obligation to care for the environment as outlined in chapter 2 of this study, it also imposes a general environmental liability for perpetration environmental harms or rather breach of environmental obligations or duties among which includes; the obligation to care for the environment. The environmental liability under NEMA is provided for under section 28. Section 28 (1) stipulates that:

> 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 minimise and rectify such pollution or degradation of the environment.[143]

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141 Section 24 of the Constitution of the Republic of South Africa, 1996.
142 Section 24 (b) of the Constitution of the Republic of South Africa, 1996.
143 Section 28 (1) of the National Environmental Management Act 107 of 1998.

Section 28 simply requires that, if a person engages in an activity that causes or may cause or has already caused a significant pollution or degradation on the environment, he or she must take reasonable measures to "prevent such pollution or degradation from occurring, continuing or recurring".[144] Where such "pollution or degradation is permitted by law or cannot be stopped or avoided reasonably", the person responsible is obliged by section 28 to take reasonable steps to minimise or rectify such pollution or degradation.[145]

Environmental liability under section 28 will therefore, be imposed under the following three circumstances;

a) In the First circumstance liability will be imposed upon a person who causes or has caused or engages in an activity that may cause significant pollution or degradation on the environment, without taking "reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring".[146]
b) The Second circumstance relates to the causing of significant pollution or degradation which cannot be stopped or avoided reasonably. In terms of subsection (1) environmental liability will arises in this case if the person responsible has failed to take "reasonable measures *to* rectify or minimise such pollution or degradation".[147]
c) The Third circumstance under which liability may be imposed is where the pollution or degradation caused or which may be caused is permitted by law. In this case liability will ensue if the person has also failed to take reasonable measures aimed at rectifying or minimising such pollution or degradation.

(b) The requirement of 'significant pollution and degradation'

The NEMA adds another requirement that needs to be met before the environmental liability under section 28 can be imposed. This requirement relates to the nature of environmental harm which must be inflicted or perpetrated before liability under section

144 Supra.
145 Supra.
146 Supra.
147 Supra.

28 can ensue. In terms of subsection (1), liability is imposed in respect of a pollution or degradation which is "significant". This means that the liability under section 28 will be imposed where a "significant pollution or degradation" has been caused.[148]

The NEMA however does not provide a definition of what a "significant pollution or degradation" is. This means that, the words "significant pollution and degradation" must be accorded their ordinary meanings. The significance of the perpetrated pollution or degradation will depends on the given circumstance. The seriousness of the effect of the pollution or degradation becomes an important factor in the determination of whether a significant pollution or degradation has been perpetrated for example; a mere smoking of a cigarette wont constitutes significant air pollution but an uncontrolled dumping of excessive wastes by municipalities will qualify as a significant pollution.

(c) Reasonable measures as means to escape section 28 liability

In order for one to escape liability under section 28 of NEMA, he or she must prove that reasonable measures as required by subsection (1) were taken in order to prevent the pollution or degradation from taking place, continuing or recurring or to "rectify or minimise such pollution or degradation".[149]Once these measures are shown to have been taken in relation to pollution or degradation in question, no liability under section 28 may arise in respect such pollution or degradation.

The NEMA does not define what these reasonable measures are however, it provides a list of the reasonable measures that one needs to take in order to avoid the environmental liability under section 28. These reasonable measures are set out in subsection (3) which stipulates that, the measures required in terms of subsection (1) may include measures to:

(a) "investigate, assess and evaluate the impact on the environment:

148 Section 28 (1) of the National Environmental Management Act 107 of 1998.
149 Section 28 (1) of the National Environmental Management Act 107 of 1998.

(b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment:

(c) cease, modify or control any act, activity or process causing the pollution or degradation;

(d) contain or prevent the movement of pollutants or the causant of degradation:

(e) eliminate any source of the pollution or degradation: or

(f) remedy the effects of the pollution or degradation".[150]

The failure to prove that reasonable steps were taken in relation to the cause of significant pollution or degradation in question, will result in environmental liability being imposed upon the person responsible. Subsection (2) further sets out the categories of persons who are required to take these "reasonable measures" so as to prevent the "pollution or degradation from occurring, continuing or recurring".[151] These categories of persons are therefore, the categories of persons upon whom the environmental liability under section 28 may be imposed and include:

> An owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—(a) any activity or process is or was performed or undertaken; or (b) any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.[152]

Although the NEMA provides for the above categories of persons, it does not limit the generality of the environmental liability under section 28. This means that, environmental liability under section 28 may be imposed upon person even when he or she does not fall within the above categories of persons. The NEMA uses the word "everyone" to impose the obligation of taking reasonable measures to prevent pollution or degradation from taking place, or continuing.[153] This means that, the environmental liability under section 28 is general and goes beyond the categories of persons set out under subsection (2) to

150 Supra at section 28 (3).
151 Supra.
152 Section 28 (2) of the National Environmental Management Act 107 of 1998.
153 Section 28 (1) of the National Environmental Management Act 107 of 1998.

include everyone who falls outside these categories. The unrestrictedness of Section 28 environmental liability is also evident in the following wording of subsection (2):

> Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures include…[154]

(d) Liability directives by Director-General or the provincial head of department

Once it is proven that the reasonable measures required by subsection (1) to prevent pollution or degradation have not been taken, liability must be imposed upon the perpetrator. In terms of subsection (4) where the reasonable measures required by subsection (1) have not been taken in order to prevent pollution or degradation, the Director-General (DG) or the provincial head of department (PHD) may give directives against the person who has failed to take such reasonable measures.[155] These directives are aimed at directing the responsible person to:

> (a) investigate, evaluate and assess the impact of specific activities and report thereon, (b) commence taking specific reasonable measures before a given date, (c) diligently continue with those measures; and (d) complete them before a specified reasonable date.[156]

The NEMA defines the Director-General to mean "the Director-General of Environmental Affairs and Tourism".[157] The NEMA does not define what a head of department is but however defines a department to mean "the Department of Environmental Affairs and Tourism".[158] This means that a head of department in the context of NEMA would mean the minister of Environmental Affairs and Tourism.

The NEMA also provides a guideline to the DG or the PHD when determining the measures or time period as far as the above directives are concerned. When determining the measures or time period relating to the above directives outlined under subsection (4), the DG or PHD must take into account the following:

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154 Section 28 (2) of the National Environmental Management Act 107 of 1998.
155 Section 28 (4) of the National Environmental Management Act 107 of 1998.
156 Supra.
157 Section 1 (1) (ix) of the National Environmental Management Act 107 of 1998.
158 Section 1 (1) (viii) of the National Environmental Management Act 107 of 1998.

> (a) the principles set out in section 2, (b) the provisions of any adopted environmental management plan or environmental implementation plan, (c) the severity of any impact on the environment and the costs of the measures being considered, (d) any measures proposed by the person on whom measures are to be imposed, (e) the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people and (j) any other relevant factors.[159]

When the DG or the PHD issues the instructions indicated in subsection (4) against a person who has failed to take reasonable steps to prevent pollution or degradation, the person against whom the directives are issued is obliged adhere to them.

In terms of subsection (7) where the directives given under subsection (4) have not been complied with, the DG or PHD may on its own take reasonable steps to remedy the situation meaning, to prevent or stop the pollution or to rehabilitate the degraded environment.[160] When the DG or PHD has on its own taken reasonable measures to remedy the situation, it is entitled to recover all the costs that it has incurred in taking such measures.[161] In terms of subsection (8) these costs may be recovered from any of the following persons:

> (a) any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation, (b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title, (c) the person in control of the land or any person who has or had a right to use the land at the time when—(i) the activity or the process is or was performed or undertaken: or (ii) the situation came about, or (d) any person who negligently failed to prevent—(i) the activity or the process being performed or undertaken: or (ii) the situation from coming about.[162]

The above costs may also be claimed from any other person who has benefited from taking of measures under subsection (7) by the DG or PHD.[163] In terms of subsection (10) the above costs recovered by the DG or PHD must be reasonable and may include but not limited to for example; "labour, administrative and overhead costs".[164] Where there

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159 Section 28 (5) of the National Environmental Management Act 107 of 1998.
160 Section 28 (7) of the National Environmental Management Act 107 of 1998.
161 Section 28 (9) of the National Environmental Management Act 107 of 1998.
162 Section 28 (8) of the National Environmental Management Act 107 of 1998.
163 Section 28 (9) of the National Environmental Management Act 107 of 1998.
164 Section 28 (10) of the National Environmental Management Act 107 of 1998.

are more than one person liable for the costs incurred by DG or PHD in taking the measures under subsection (7) on its own to remedy the perpetrated pollution or degradation, the liability must be:

> Apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required under subsections (1) and (4).[165]

(e) The need for locus standi

A person who institute legal proceedings to hold accountable (meaning to impose environmental liability) the perpetrator of pollution or degradation under section 28 must have a locus standi. The locus standi that one needs to have in order to enforce any right under NEMA is provided for by section 32 of NEMA. In order to have a locus standi in terms of section 32 the applicant needs to show that there is a:

> Breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources—(a) in that person's or group of persons own interest (b) in the interest of, or on behalf of, a person who is for practical reasons, unable to institute such proceedings: (c) in the interest of or on behalf of a group or class of persons whose interests are affected; (d) in the public interest; and (e) in the interest of protecting the environment.[166]

3.3.2 Criminal liability

As it has already been outlined above, environmental liability manifests in two ways namely; the civil liability and criminal liability.[167] Section 34 of the NEMA makes provisions for the Court to impose criminal liability upon any person who has perpetrated environmental harm and in certain instances, the directors of a firm which has caused environmental harm provided certain stipulated requirements have been met.[168]

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165 Section 28 (11) of the National Environmental Management Act 107 of 1998.
166 Section 32 (1) of the National Environmental Management Act 107 of 1998.
167 Glendyr N, 'Environmental Law and Liability' (2012) *Cullinan and Associates* p1.
168 Section 34 (1-8) of the National Environmental Management Act 107 of 1998.

It must be mentioned here that, the provisions of section 34 of the NEMA only apply where a person has been convicted or found guilty of any offence listed in schedule 3 of the NEMA. It is convenient for the purpose of the discussion of section 34 that these offences set out in schedule 3 of the NEMA be outlined first. The NEMA has classified schedule 3 offences into two groups namely; offences under national legislation and offences under provincial legislation as discussed hereunder.

Offences under National Legislation

The first group of schedule 3 offences has been titled 'offences under national legislation' and comprises of the following offences;

OFFENCES	ACT
"An offence in terms of Section 18 (1) in so far as it relates to contraventions of sections 7 and 7*bis.*	"The Fertilizers, Farm Feeds, Seeds and Remedies Act 36 of 1947.
An offence committed in terms of Sections 2 (1) and 2A.	The Animals Protection Act 71 of 1972.
An offence committed in terms of Sections 19 (1) (a) and (b) of in so far as it relates to contraventions of sections 3 and 3A.	The Atmospheric Pollution Prevention Act 45 of 1965.
An offence committed in terms of Section 24(1) (b)	The National Parks Act 57 of 1976.
An offence committed in terms of Section 14 in so far as it relates to contraventions of section 3.	The Mountain Catchment Areas Act 63 of 1970.

An offence committed in terms of Section 27	The Health Act 61 of 2003.
An offence committed in terms of Sections 2 (1) (a) and 2 (1) (b).	The Dumping at Sea Control Act 73 of 1980.
An offence committed in terms of Section 2 (1).	The Marine Pollution (Control and Civil Liability) Act 6 of 1981.
An offence committed in terms of Section 6 and 7.	The Conservation of Agricultural Resources Act 43 of 1983.
An offence committed in terms of Section 9.	The Atmospheric Pollution Prevention Act 45 of 1965.
An offence committed in terms of Section 29 (2) (a) and (4).	The Environmental Conservation Act 73 of 1989.
An offence committed in terms of Section 58 (1) in so far as it relates to contraventions of sections 43 (2), 45, and 47 and section 58 (2) in so far as it relates to contraventions of international conservation and management measures.	The Marine Living Resources Act 18 of 1998.
An offence committed in terms of Section 151(i) and (j)".	The National Water Act 36 of 1998.

Offences under Provincial Legislation

The second group of schedule 3 offences under the NEMA has been titled ‘offences under Provincial legislation’ and comprises of the following offences;

OFFENCES	ACT
An offence committed in terms of Section “40 (1) (a) in so far as it relates to contraventions of sections 2 (3), 14 (2), 15 (a), 16 (a) and 33.	The “Orange Free State Conservation ordinance 8 of 1969
An offence committed in terms of Section 40 (1) (a) (ii).	The Orange Free State Townships Ordinance 9 of 1969.
An offence committed in terms of Section 55 in so far as it relates to section 37 (1), to section 49 in respect of specially protected game and to section 51 in respect of specially protected game. Section 109 in so far as it relates to section 101, to section 102 and to section 104. Section 154 in so far as it relates to section 152. Section 185 in so far as it relates to section 183 and section 208 in so far as it relates to section 194 and to section 200	The Natal Nature Conservation Ordinance 15 of 1974.
An offence committed in terms of Section 86 (1) in so far as it relates to contraventions of sections 26, 41 (l) (b) (ii) and (c-e), 52 (a), 57 (a), 58 (b) and 62 (l).	Cape Nature and Environmental Conservation Ordinance 19 of 1974.
An offence committed in terms of Sections 16A. 42.84.96 and 98.	The Transvaal Nature Conservation Ordinance 12 of 1983.

An offence committed in terms of Section 46 (I) in so far as it relates to sections 23 (I) and 39 (2)	The Cape Land Use Planning Ordinance 15 of 1985.
An offence committed in terms of Sections 42, 93 and 115.	The Transvaal Town Planning and Townships Ordinance 15 of 1986.
An offence committed in terms of Section 67 in so far as it relates to sections 59 (1), 59 (2), 60 (1) and 62 (1). Section 86 in so far as it relates to sections 76, 77 and 82 and section 110 in so far as it relates to section 109".	The KwaZulu Nature Conservation Act 29 of 1992".

The NEMA regards contraventions of the provisions set out in schedule 3 as criminal offences hence any person who engages in environmental activities or any other activity in contravention of any provision stipulated in schedule 3 is guilty of criminal offence under the provision concerned and is liable for the punishment set out by law for such offence. In terms of section 276 of the Criminal Procedure Act, the punishments that the Court may impose upon a person convicted of an offence include inter alia; imprisonment and a fine.[169]

Section 34 (1) of the NEMA provides that, when a person is convicted of any of the offences stipulated in schedule 3 of the NEMA and it appears to the Court in the same criminal proceedings that such person in committing the offence in question has caused harm or loss to an organ of State or any other person, "including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment", the Court may at the request of such organ of State or the person

[169] Section 276 (1) of the Criminal Procedure Act 51 of 1977.

concerned direct that an inquiry be made "summarily into the amount of loss or damage suffered".[170]

Once the Court has determined the amount of loss it may give judgment in favour of the State or the person who has suffered loss or damage and such judgment "shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted before a competent court".[171] Although this form of liability may be construed as a civil liability, it does not exist in isolation from the criminal liability in that it can only be imposed if the perpetrator has been found guilty or convicted of the criminal offences (environmental crimes) outlined in schedule 3 of the NEMA.

The person convicted of schedule 3 offence may apart from being ordered to pay for the above loss or damage, be compelled to pay for the costs incurred by the State in investigating the offence he or she has be found guilty of.[172] In terms of section 34 (4) when the Court convicts a person of schedule 3 offence it may on the application by either the public prosecutor or another organ of State order that such person to "pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence".[173]

The most interesting aspect of section 34 of the NEMA is that it also allows for criminal sanctions to be imposed in those instances where the perpetrator of environmental harm which constitutes a schedule 3 offence is not a natural person but a juristic entity such as a company or a firm. It allows for criminal conviction of the directors of a firm or a company responsible for the perpetration of environmental harms classified as schedule 3 offences under the NEMA.

According to section 34 (7), any person who is or was a director of a firm at the time when the firm committed a schedule 3 offence is guilty of the offence and liable to the penalty provided in the relevant law upon conviction provided that the offence has been committed as a result of the failure by such director to take reasonable measures

170 Section 34 (1) of the National Environmental Management Act 107 of 1998.
171 Section 34 (2) of the National Environmental Management Act 107 of 1998.
172 Section 34 (4) of the National Environmental Management Act 107 of 1998.
173 Supra.

"necessary under the circumstances to prevent the commission of the offence".[174] A firm has been defined to mean "a body incorporated by or in terms of any law as well as a Partnership".[175] A director has been defined to mean:

> a member of the board, executive committee, or other managing body of a corporate body and in the case of a close corporation; a member of that close corporation or in the case of a partnership, a member of that partnership.[176]

This means that when a firm or company engages in environmental activities its directors have the obligation to ensure that reasonable steps are taken in order to ensure that the conduct of such activities does not contravene the provisions outlined in schedule 3 of NEMA. If the directors therefore fail to take such measures with the result that a schedule 3 offence is committed by the firm, they will be personally convicted and sentenced for the offence perpetrated by the firm.

Section 34 of the NEMA also makes provisions for criminal liability to be imposed upon the employer where a schedule 3 offence has been perpetrated by the acts of his employees or managers or agents.[177] Section 34 (5) provides that if an offence under schedule 3 has been committed by a manager or employee or agent of the employer by doing or omitting to do that which "he is obliged to do or to refrain from doing on behalf of the employer" and which is an offence under schedule 3 for the employer to do or refrain from doing, the employer shall be criminally liable for the offence concerned provided that such offence has been committed as a result of the failure on his part "to take all reasonable steps to prevent the act or omission in question".[178]

It appears that what qualifies the criminal liability of the employer for the acts of his employees or managers or agents under schedule 3 offences, is his failure to take measures to prevent such criminal acts. In the absence of proof of the failure of the employer to take these measures no criminal liability or conviction may arise on the employer. This means that in order to escape criminal liability the employer must show

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174 Section 34 (7) of the National Environmental Management Act 107 of 1998.
175 Section 34 (9) (a) of the National Environmental Management Act 107 of 1998.
176 Section 34 (9) (b) of the National Environmental Management Act 107 of 1998.
177 Section 34 (5) of the National Environmental Management Act 107 of 1998.
178 Supra.

that he has taken the measures required under section 34 (5) and therefore that the commission of the offence in question did not arise as a result of the failure on his part to take measures. If the employer succeeds in this defence the employees or agents or managers responsible for an act or omission which constitutes a schedule 3 offence shall be criminally liable for such offence in terms of section 34 (6) of the NEMA which provides that:

> Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer.[179]

The provisions of subsections (5) and (6) provide some protection to employers whose employees or agents or managers are mandated to engage in environmental activities which if not conducted with care may result in the perpetration of criminal offence under schedule 3 and they do this by providing for limitation of criminal liabilities of employers. The employees must therefore act with care as their actions may result in criminal convictions.

3.3.3 The environmental liability Principles

Section 2 of NEMA lays out guidelines that all government organs must follow when taking acts that may have a substantial environmental impact.[180] In other words, these principles serve as guidance that must be followed by state organs at all levels in carrying out their decision-making functions in accordance with NEMA or any other Act dealing with or relating to environmental protection.[181] The principles embodied in section 2 of NEMA that relate to environmental liability include; the polluter-pays principle, the precautionary principle, the environmental justice, and the life cycle responsibility. This study however

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179 Section 34 (6) of the National Environmental Management Act 107 of 1998

180 Section 2 (1) of the National Environmental Management Act 107 of 1998.

181 These principles "guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment" and this is set out in section 2 (1) (e) of the NEMA.

focuses only on the polluter-pays principle, the precautionary principle, and the environmental justice.

(a) The Polluter-pays principle

The "Polluter-pays principle" simply entails that, the costs of removing pollution that has been caused on the environment must be borne by the polluter. It is submitted that this principle demands that, the costs imposed either on the environment or the society through pollution "must be borne by the polluter himself".[182]

The "Polluter-pays principle" therefore, serves as the cornerstone of the environmental liability law. It establishes a requirement for incurring the costs of removing pollution by stipulating that, such costs "must borne by the person responsible for causing the pollution".[183] Oversea submits that:

> The polluter pays principle implies that it is for the polluter to meet the costs of pollution control and prevention measures, irrespective of whether these costs are incurred as a result of the imposition of some charge on pollution emission, or are debited through some other suitable economic mechanism.[184]

From the above contention it can be deduced that, the "Polluter-pays principle" demands that, the polluter should be the one bearing the expenses for controlling and preventing the continuance of the pollution caused by him. This will ensure that the environment remains in a good state. Securing a good state of the environment is another step towards ensuring that an environment is beneficial to the health and well-being of the people and this is the objective sought to be achieved by section 24 of the Constitution.[185]

The "Polluter-Pays Principle" is designed to keep pollution and environmental deterioration at bay.[186] This is to give effect to Section 24 (b) of the Constitution, which provides for the implementation of environmental protection measures aimed at inter alia;

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182 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p9.

183 Supra at p11. See also James *Crawford Brownlie's Principles of Public International Law* 279.

184 Supra, at *p*11.

185 Section 24 of the Constitution imposes the duty upon everyone not harm the environment and obliges the State to protect the environment so as to ensure that it safe and harmless to health and wellbeing of the people both present and future generation.

186 Oosthuizen F, 'The Polluter Pays Principle: Just a Buzzword of Environmental Policy' (1998) *SAJELP* p358.

preventing pollution, degradation, and ensure preservation of the environment.[187] This means that enforcing the Polluter-Pays Principle is one of the measures referred to in section 24 (b) of the Constitution for preventing pollution and degradation.

The Polluter-pays principle is generally construed to be the economic principle that strives towards the protection of the environment.[188] This understanding is based on the fact that, the application or implementation of the "Polluter-pays principle" has cost implication or effect upon the polluter.[189] As an economic principle, the "Polluter-pays principle" serve as an economic instrument that put in place some sort of incentives that encourage compliance with the existing environmental obligations such as the duty of care.[190]

The "Polluter-pays principle" as an environmental liability principle has also been used as a sanction to punish wrongful environmental conducts,[191] meaning to punish those conducts that constitute environmental harms or crimes such as pollution and degradation.[192] The Polluter-pays principle has also been used to give directives that must be taken by the perpetrator of environmental harm in order to rectify the inflicted damage.[193] For example the Polluter-pays principle was imposed to require the polluter to take measures such as payment of the costs to restore the environment to its pre-damage state. It also strives to steer or protect the environment from the conduct of the potential polluter.[194]

The Polluter-pays principle also integrates or combines both environmental protection and economic activities by demanding that the "environmental and social costs

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187 Section 24 (1) (b) (i-iii) of the Constitution of the Republic of South Africa, 1996.

188 Oosthuizen F, 'The Polluter Pays Principle: Just a Buzzword of Environmental Policy' (1998) *SAJELP* p356.

189 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p9.

190 Soltau Friedrich, 'The National Environmental Management Act and Liability for Environmental Damage' (1999) *SAJELP* p3-5. See also supra, at p11.

191 Milton, 'Sharpening the dog's teeth: of Nema and criminal proceedings' (1999) *SAJELP* p55-56.

192 Supra note 182.

193 Supra.

194 Supra.

associated with pollution and environmental harm are reflected in the ultimate market price for a good or service".[195]

What the above entails is that, the prices of the goods that are environmentally harmful "should be more costly" so as to ensure that the consumers opt for goods that are "less harmful to the environment".[196] This ensures for efficient and sustainable resource-allocation. The polluter-pays principle has been incorporated in section 2(4)(p) of NEMA which provides that:

> The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.[197]

The "Polluter-pays principle" also has International law recognition. This means that the Polluter-pays principle is also an international environmental law liability principle aimed at protecting the environment in the international level. It has been incorporated into an international instrument called the "United Nations Conference on Environment and Development" also known as the 'Rio Declaration'. Principle 16 of the Rio Declaration provides that:

> National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[198]

In "developing countries where the burden of internalising environmental costs is high", the Polluter-pays principle has controversial attention.[199] However due to the fact that the Polluter-pays principle has more effect in harmonising standards, it lays guidance for the formulation of the domestic environmental laws and policies.[200]

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195 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p12.

196 David Hunter et al *International Environmental Law and Policy* 5th ed (2015) p412.

197 Section 2 (4) (p) of the National Environmental Management Act 107 of 1998.

198 Principle 16 of the Rio Declaration.

199 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p10.

200 Supra, at p11.

The Polluter-Pays Principle's meaning and implementation are still up for debate especially in relation to the "nature and extent of the costs" imposed by the polluter-pays principle as well as those circumstances or grounds under which the Polluter-Pays principle does not apply.[201]

There are many debates around whether or not the polluter pays principle should be classified or construed as an environmental liability principle. Those who are at the contrary of classifying the Polluter-pays principle as an environmental liability principle submit that, the Polluter-pays principle simply entails the mere allocation of costs relating to pollution control.[202]

The practical implications of the "Polluter-pays principle" are evident in its:

> Allocation of economic obligations in relation to environmentally damaging activities, particularly in relation to liability, the use of economic instruments, and the application of rules relating to competition and subsidy.[203]

The Polluter-pays principle is criticised for its ineffectiveness in deterring wealthy people including rich companies from perpetrating pollution and degradation.[204] This is because rich people have enough money to pay for the costs of removing the pollution that they have perpetrated hence the Polluter-pays principle as an environmental liability principle will not protect the environment from the wealthy polluters who can afford to pay for the fines. In other words, the Polluter-pays principle cannot deter the rich people from harming the environment. It has been submitted that for the Polluter-pays principle to be effective in deterring all polluters including the rich ones, it must be coupled with punishment in the form of imprisonment.[205]

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201 James *Crawford Brownlie's Principles of Public International Law* 9th ed (2019) p280.

202 Supra.

203 Oversea Nabileyo, 'The Polluter Pays Principle and Environmental Liability in South Africa' (LLM mini-dissertation North West University) 2009 p12.

204 Chauke, 'The Critical Analysis of the Law on the Duty of Care to the environment in South Africa: challenges and prospects' (LLM mini-dissertation University of Limpopo) 2017 p59.

205 Supra.

(b) The Precautionary principle

Generally the precautionary principle entails that where the environmental consequences of an activity or cause of action are uncertain or likely to be harmful, precautionary steps aught to be taken to prevent the potential harm from taking place or occurring to the environment. The precautionary measures must be taken regardless of whether or not the harm is certain to happen. For this reason when a person engages in an activity the environmental consequence of which is unknown, the precautionary principle requires such person, prior to the performance of the activity, to take precautions aimed to prevent any possible harm from occurring to environment.

The lack of full information including scientific information relating to likelihood of harm occurring to the environment cannot be used as an excuse to abandon the taking of precautionary measures. For example if a coal station is to be built near settlement, the absence of a scientific evidence that emissions from the station will negatively affect the health of the surrounding residents does not debar the taking of precautionary measures to protect the surrounding residents from any harm that may be caused by the station even when such harm is unknown. Wingspread concurs by stating that:

> When an activity raises threats of harm to health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.[206]

The Precautionary principle as an environmental liability principle entails that, the environmental liability will be imposed upon the perpetrator of pollution or degradation if it can be proved that prior to the perpetration of the pollution or degradation in question, the perpetrator did not take the precautions to prevent the potential pollution or degradation form occurring or to protect the environment from such pollution or degradation.

The application of Precautionary principle is recommended in those cases where there is "a poor communication between project developers and interested and affected

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206 Wingspread Conference Statement on the Precautionary Principle (2008).

parties".[207] At the international level, the application of the precautionary principle is very limited. In terms of Principle 14 of the Rio Declaration, there must be sufficient certainty or likelihood of the occurrence of a serious environmental harm for the precautionary principle to be applied.[208] This provision limits the application of the precautionary principle because where the harmful environmental consequences of an activity are uncertain or less serious the precautionary principle in terms of principle 14 of the Rio Declaration will not be applicable.

The precautionary principle has also been incorporated into NEMA. The precautionary principle is embodied in Section 28 (1) of NEMA, which requires a person who plans to engage in an activity that may result in significant pollution or degradation to take reasonable precautions to prevent such pollution or degradation.[209]

The provisions of section 28 (1) which gives effect to the precautionary principle reads as follows:

> Every person who…may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring.[210]

A person who therefore fails to take precautionary measures with the result that environmental harm is caused by their activities will be liable to remedy such harm. The precautionary principle therefore does not only entail an obligation to protect the environment but also the liability for harming such environment hence it qualifies as environmental liability principle.

(c) The principle of environmental justice

Environmental justice is a very broad concept which sees the environment not only as nature but also as a home, neighborhood, and a workplace of the people hence it prioritises the interests of humans over those of the animals and when it comes to

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207 Chauke, 'The Critical Analysis of the Law on the Duty of Care to the environment in South Africa: challenges and prospects' (LLM mini-dissertation University of Limpopo) 2017 p52.
208 Principle 14 of Rio Declaration.
209 Section 28 (1) of the National Environmental Management Act 107 of 1998.
210 Section 28 (1) of the National Environmental Management Act 107 of 1998.

environmental protection.[211] The principle of environmental justice places at the center of social, political, economic and environmental relationships, the people's well-being rather than plants and animals.

According to the Principle of environmental justice, the poor and powerless people in a society are the most vulnerable to suffer from the adverse effects of environmental harms such as pollution and degradation hence it demands the correction of the inequalities among people so as to ensure that, all people regardless of their status in society equally benefit from the environment which must be "clean, sustainable, aesthetic and healthy".[212]

The principle of environmental justice has been incorporated into NEMA. Section 2 (4) (c) of NEMA stipulates that:

> Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.[213]

As it has already been outlined above, the principle of environmental justice prioritise the wellbeing of the people over those of the plants and animals, the Constitution has inherited this aspect of the principle of environmental justice by stipulating in section 24 that every person has the right to a healthy and safe environment..[214]

In South Africa the call for environmental justice emerged in the early 90s when the Apartheid laws were relaxed and political movements unbanned. The call for environmental justice was associated with the disposition that, the Apartheid subjected black citizens to extreme poverty and helplessness thereby, rendering them vulnerable to suffer from adverse effects of environmental harms in the form of pollution and

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211 Stephen Law (date unknown) http://www.enviropaedia.com.
212 Supra.
213 Section 2(4) (c) of the National Environmental Management Act 107 of 1998.
214 See section 24 of the Constitution of the Republic of South Africa, 1996. See also Alice Kaswan 'Environmental Justice and Environmental Law' (2017) *FELR*.

degradation.[215] The aim of the call for environmental justice in South Africa was to ameliorate the socio-economic conditions of the poor and marginalised citizens so as ensure that all citizens in South Africa equally benefit from the environment regardless of their status in society as well as to shield them against the adverse effects of environmental harms such as pollution.[216]

As an environmental liability principle, environmental justice can be construed to mean a principle that proscribes the perpetration of pollution and degradation on the environment without taking measures to curb the adverse effects of such pollution and degradation from harming those who are vulnerable or those who have no means to shield themselves from the effects of such pollution or degradation.

The "vulnerable persons" are therefore, those persons who are poor and have no financial means to shield their health or wellbeing against the adverse effects of pollutions and degradations. Environmental justice as a liability principle has also been construed mean a principle that demands:

> Cessation of the production of all toxins, hazardous wastes, and radioactive materials, and all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.[217]

Any person who therefore engages in an activity which causes or may cause pollution or degradation and who fails to take some reasonable actions in order to shield the vulnerable persons against the adverse effects of such environmental harms, is in terms of the principle of environmental justice, liable or accountable for any harm inflicted upon the vulnerable as a consequence of the perpetrated activities.

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215 Stephen Law (date unknown) http://www.enviropaedia.com.
216 Supra.
217 Mónica Ramirez-Andreotta (date unknown) https://www.sciencedirect.com.

CHAPTER 4

INTERNATIONAL LAW ON ENVIRONMENTAL LIABILITY

Environmental liability does not only exist in the national law but also finds recognition in the International law. The International law is defined to mean the body of rules established or created by treaties and customs which have been recognised and accepted by States as binding in their relations with one another.[218] The International law is not only binding in the relations between States but extends to the relations between States and international organisation as well as relations between international organisations themselves.

The recognition of environmental law in the international arena has given birth to the recognition of the principle of environmental liability in the International law level. The States have the legal obligation in terms of the International environmental law to act in an environmentally friendly manner so as to protect the environment hence the

[218] Malcolm Shaw (date unknown) https://www.britannica.com.

environmental liability exists in the international law to punish States or international entities that are responsible for environmental crimes. It is against this backdrop that:

> When breaching its international obligations, a State risks to be held liable for it. It must respond to the grievances of the subject to whom it caused prejudice when violating the latter's rights.[219]

The sources of environmental liability in the International law include; treaties or conventions, customary international law, case law and resolutions by international organisations such as the United Nations. There are also various international environmental law principles that are aimed at holding liable the perpetrators of environmental harms in the international level and these principles are discussed hereunder

4.1 International law Principles on environmental liability

4.1.1 States' duty not to cause environmental harm

In every State there are daily activities conducted by either the State or its subjects which have the potential to harm to the environment in the territories of other States. For example; the chemical emissions from the mining activities conducted in the territory of one State may run into the river which flows through the territory of another State thereby causing harm in the latter State. The question then is whether or not a State has the obligation to ensure that the activities conducted within its boundaries do not result in causing environmental damage in the territory of another State? and if so, what is the consequence of failing to carry out or comply with such a duty??

States have an obligation to ensure that the activities conducted within their boundaries do not result in causing harm or environmental damage to their neighbouring States. In the "*1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*" the

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219 Sandrine Maljean-Dubois, 'International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives' (2017) *TUP* p3.

International Court of Justice (ICJ) acknowledged the existence of the State's obligation not to cause environmental harm to the territory of another State when it stated that:

> The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[220]

The legal obligation of a state not to destroy or harm the environment of neighboring states manifests itself in two ways. The first form of this obligation is called the *obligatio erga omnes* which entails that an obligation is owed to the international community as whole or rather to all existing States. In terms of this obligation the State is obliged to ensure that its activities do not cause harm to the environment in the territory of any State in the world.

The second form of the State's obligation not to cause environmental harm to the neighbouring States arises by way of contract or treaty between States and therefore, unlike the *obligatio erga omnes* which is owed to all States in the world, this obligation is owed to Specific States which are parties to an agreement creating the obligation in question. This means that under this obligation the State is obliged to monitor activities conducted within its territory so that they do not cause environmental harm but only to the territories of those specific States which are parties to an agreement giving rise to the obligation.

In the former obligation (*obligatio erga omnes*) environmental liability arises regardless of which State has suffered environmental harm since this obligation is owed to all States in the world however, in the latter obligation the environmental liability will be imposed only if the State which has suffered environmental harm is a party to an agreement creating the obligation in question.

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220 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports p225.

The imposition of liability upon a State in transgression of International law obligation such as the state's duty not cause harm was acknowledged in case of *Factory at Chorzów, Germany v Poland* by the Permanent Court of International Justice when it stated that:

> It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[221]

The two forms or manifestations of the State's legal obligation not to cause harm to the territories of another States were confirmed in *Barcelona Traction case (Belgium v Spain)* where the Court stated that:

> An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[222]

The legal obligation of a State not to cause environmental harm to the territory of the neighbouring States is associated with or rather linked to the principle of "good neighbourliness" which also entails that, there must be some good neighbouring relationship between States in a sense that, e ach state should ensure that its actions do not impair the environment of neighboring states. The principle of "good neighbourliness" is discussed hereunder.

4.1.2 The principle of good neighbourliness

The Yale Law Journal in its publication called "*The New perspectives on International Law*" has defined the principle of good neighbourliness to mean a principle that, "obligates states to try to reconcile their interests with the interests of neighboring states".[223] The understanding of the principle of good neighborliness lies in the disposition of the limitation of what is known as the State's Sovereignty. State's sovereignty is an inherent

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221 *Factory at Chorzów, Germany v Poland* (1928) PCIJ A No 17 p29.
222 *Belgium v Spain* 1970 ICJ Reports para 33.
223 The Yale Law Journal, 'The New perspectives on International Law' (1973) *JSTOR* p1665.

power of the State to do anything necessary to govern itself without accounting to anyone.[224]

Previously, sovereignty entitled the States to "freely use resources within their territories regardless of the impact this might have on neighbouring States".[225] However this is no longer the case since the state's sovereignty is now limited to the extent to which its use violates the territorial integrity or sovereignty of other States.[226] Oppenheim concurs to the limitation of State's sovereignty by stating that:

> A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.[227]

Max Valverde Soto also concurs to the above statement when he states that:

> The concept of sovereignty is not absolute, and is subject to a general duty not to cause environmental damage to the environment of other states, or to areas beyond a state's national jurisdiction.[228]

This means that although the State enjoys sovereignty, it is prohibited from exercising it powers in a manner that impairs the environment or violates the territorial integrity or sovereignty of another State. The principle of "good neighbourliness" therefore, requires the state to ensure that any actions carried out on its territory do not impair the environment in another state's territory.

The State's obligation to ensure good neighbourliness or rather the obligation not impair upon the environment of the neighbouring States is not only applicable to activities conducted by the State but also extend to activities conducted by private individuals within that State and this was confirmed in the *Trial Smelter case* (*United States v. Canada)* where the Court held that, The state must not let its territory to be used in a way that harms another state's territory.[229] This means that a State has an obligation to put in place

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224 The Free Dictionary (date unknown) https://thefreedictionary.com.

225 Chinthaka Mendis 'Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project' (2006) *NFF* p10.

226 Supra.

227 Oppenheim , 'International Law' (1912) *NYLGC* P220.

228 Max Valverde Soto, 'Genera Principles of International Environmental Law' (1996) *ILSA* p195.

229 *United States v Canada* (1949) 2 RIAA 829.

measures such as laws in order to ensure that, the activities conducted by private individuals within its territory do not result in causing environmental harm to the territories of the neighbouring States.

The State's obligation to ensure good neighbourliness by not causing environmental harm in other State's territories or rather in simple terms the limitation of State's sovereignty has been acknowledged in *Island of Palmas Case* (*United States v. The Netherlands*) where Arbitrator Huber stated that:

> Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States.[230]

As an environmental liability principle, the principle of "good neighbourliness" entails that a State has the responsibility to put measures to see to it that its environmental activities that may impair the environmental in the territory of another State do not result in causing such harm. This obligation resembles the duty to care for environment and therefore, can be construed to be the International environmental law-duty of care for the environment. Any State which is therefore in breach of this duty incurs liability for the environmental harm inflicted upon the environment in the territory of another State and this was the case in *Trail Smelter Case* (*United States v. Canada*).

In the *Trail Smelter Case,* a mining company in Canada operated a smelter which emitted lead and zinc. The smoke from the smelter resulted in the destruction of crops and forest of the United States. Canada was found to have failed to carry out its responsibility to ensure that activities carried out on its territory do not impair neighboring territories, in this case, the United States. Canada was held liable for harm incurred by United States and the Arbitral Tribunal decided the following;

c) Canada was directed to take measures to decrease air pollution caused by emissions from zinc and lead smelter processes.
d) For the destruction of US agriculture and forestry, Canada was judged accountable in damages.

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230 *United States v The Netherlands* (1928) 2 RIAA 829.

The Arbitral Tribunal also further emphasised the seriousness of the State's responsibility to ensure good neighbourliness by not to causing harm to the environment in the territory of another State when it stated that:

> Under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[231]

Although the *Trial Smelter case* ruling was based on air pollution, it is argued that it also applies to water pollution [232] for example; where chemicals from the mining activities in one State runs into the river which follows into the territory of another State thereby destroying human lives or the species or livestock of the people in that area of the latter. This was the case in *Corfu Channel Case* (*United Kingdom v. Albania*).[233]

The *Corfu Channel Case* arose from the events that took place on the 22nd of October 1949 when two British cruises and two warships entered the North Corfu Strait through the channel that was in the waters of Albania. This channel was declared a safe channel free from mines which are small explosives devices concealed underneath the water. The two warships came into contact with the mines which exploded destroying the two warships and claiming forty five lives. The International Court of Justice (ICJ) held that, there is no way the mines could have been placed without the knowledge of Albania and therefore that, Albania had an obligation to notify:

> for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and to warn the approaching British warships of the imminent dangers to which the minefield exposed them.[234]

Albania was therefore found to have failed in its responsibility not to cause harm to another State in this case, the UK. The ICJ consequently held that, Albania was liable for

231 *United States v. Canada* (1949) 2 RIAA 829.
232 Chinthaka Mendis 2006 United Nations / Nippon Foundation Fellow p11.
233 *United Kingdom v. Albania* (1949) ICJ Reports.
234 *United Kingdom v. Albania* (1949) ICJ Reports p22.

the “loss of the British warships and the lives of the British sailors”.[235] The ICJ further ordered Albania to compensate the UK for the loss suffered.[236]

4.1.3 The principle of international cooperation by States

Unlike the principle of good neighbourliness which places an obligation on State not to cause an environmental harm to the territory of another State, the principle of international cooperation as argued by Max Valverde Soto places:

> an obligation on states to prohibit activities within the state's territory that are contrary to the rights of other states and which could harm other states or their inhabitants.[237]

The principle of international cooperation also requires States to cooperate with one another in “investigating, identifying, and avoiding environmental harm”.[238] This means that, a State that refuses or fails to cooperate with other States in “investigating, identifying, and avoiding environmental harm” is liable in terms of the principle of international cooperation for any environmental harm suffered by another State as a result of such failure or refusal to cooperate.

Many international environmental treaties make provisions that demand the cooperation by States in exchanging and generating for example; “commercial, technical, scientific, and socioeconomic information”.[239] The exchange of information between States as cooperative measure to prevent or avoid environmental harm is very crucial especially in the monitoring of the “domestic implementation of international obligations”. Max Valverde Soto gives an example of the importance of the exchanging of information between States by stating that:

> A cooperative exchange of information regarding the trade of endangered wildlife is critical in tracing the population flow of animals. The same occurs with greenhouse effect emissions.[240]

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235 Chinthaka Mendis ‘Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project’ (2006) *NFF* p12.
236 Supra.
237 Max Valverde Soto, ‘Genera Principles of International Environmental Law’ (1996) *ILSA* p197.
238 Supra.
239 Supra.
240 Supra, at p198.

It has been submitted that the State's obligation to cooperate with other States in "investigating, identifying, and avoiding environmental harm" is not an absolute one since it is limited by for example; "municipal conditions such as the protection of patents".[241]

4.1.4 The principles of prior notification and good faith consultation

The principle of prior notification entails that, where the activities that are likely to cause environmental harm to another State are to be conducted by or within the territory of a State, the acting State is obliged to notify the other State of its intention to carry out such activities and this is to ensure that, the other State becomes aware of the potential harm and have an opportunity to avoid such imminent harm.

According to the International Law Committee[242] the principle of prior notification requires "States planning potentially damaging activities to provide prior and timely notification to all potentially affected States".[243]

Max Valverde Soto concurs with the above International Law Committee's definition of the principle of prior notification. He defines the principle of prior notification to mean a principle that obliges "acting states to provide prior, timely notification and relevant information to every state that may be adversely affected by its environmental activities".[244]

This means that in terms of the principle of prior notification, an acting State which fails to give notification prior to conducting environmental activities that adversely affect another State is liable for any environmental harm the other State may suffer in consequence of such failure.

It has also been submitted that in the case of natural disasters or other instances of emergencies, the States are obliged to notify other States which are likely to be harmed

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241 Supra. See also Ozone Protection Convention.

242 International law Committee is "a body of experts responsible for helping develop and codify international law. It is composed of 34 individuals recognized for their expertise and qualifications in international law, who are elected by the United Nations General Assembly every five years".

243 International law Committee *Practitioner's Guide to International Law* p155

244 Max Valverde Soto, 'Genera Principles of International Environmental Law' (1996) *ILSA* p198.

or affected by such disasters.[245] This is also provided for by the Rio Declaration which stipulates that:

> States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.[246]

Apart from giving prior notification, an acting State is also obliged upon request and within a reasonable period, to enter into a "good faith consultation" with States which are likely to suffer environmental harm in consequence of the activities to be conducted by the acting State.[247] It has also been submitted that the principle of good faith consultation requires:

> States to give potentially affected States an opportunity to review and discuss proposed harmful activities, and to take affected States' interests into account.[248]

The principles of prior notification and good faith consultation are properly embodied in the Rio Declaration under principle 19 which stipulates that:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[249]

States although are obliged to give prior notification and to enter into "good faith consultations" with the potentially affected States, they are not obliged to obtain consent from the potentially affected States in order to carry out their activities nor are they obliged to act in accordance with the wishes of the affected States.[250] However the acting States must act reasonably especially where their environmental activities are being objected by the potentially affected States. An acting State that acts unreasonably thereby causing harm to the territory of another State is liable for such environmental harm.

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245 Supra at p200.
246 Principle 18 of the Rio Declaration.
247 Max Valverde Soto, 'Genera Principles of International Environmental Law' (1996) *ILSA* p199.
248 International law Committee *Practitioner's Guide to International Law* 2nd ed (2014) p155.
249 Principle 19 of the Rio Declaration.
250 Supra.

4.1.5 The State's duty to compensate for environmental harm

Generally in terms of the international environmental law, all States have the legal duty to ensure that the environmental activities conducted in their territories do not result in causing environmental harm to the territories of other States, and this is anchored in the principles of the State's duty not to perpetrate environmental harm and the principle of good neighbourliness.[251] The duty to compensate for environmental harm therefore, serves as the international environmental law liability principle that imposes direct liability upon defaulting States who have caused a harm to the environment of the territory of another State.

A State whose environmental activities have caused environmental harm in the territory of another State is required to "stop the wrongful conduct and re-establish the condition that existed prior to the wrongful conduct".[252] If the re-establishment of the pre-existing condition is not feasible, the State in fault is obliged to compensate the State which suffered environmental harm as a consequence of the activities of the acting State.[253]

What the above principles mean is that, the State will be obliged to make compensation to the victim-State if the wrongful conduct of the former State has caused a harm to environment in the territory of another State and the re-establishment of the pre-existing condition of the latter State's environment is not practically possible. In the context of International environmental law, the wrongful conduct arises where the:

> a) Conduct consists of an action or omission imputed to a state under international law; and b) such conduct constitutes a breach of an international obligation of the state.[254]

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251 The State's duty not to cause environmental harm obliges States to ensure that environmental activities conducted within its territory do not result in causing environmental harm in territories of other States.

252 Max Valverde Soto, 'Genera Principles of International Environmental Law' (1996) *ILSA* p202.

253 Supra.

254 Supra, at p202.

However the above definition of wrongful conduct has been criticised for causing a lot of confusion or rather problems in the international environmental law. These problems relate to the following questions:

> First, what are the criteria for imputing liability to a state? Second, what is the definition of environmental damage? Third, what is the appropriate form of reparation?[255]

In the first question which relates to the criteria used to impute liability upon a State whose wrongful conduct has caused environmental damage to another State, there are three solutions or rather options for imposing liability.[256] The first option is the use of fault (negligence) as a criteria to impose liability hence, in terms of this criteria a State whose wrongful conduct has been committed negligently thereby causing some impairment to environment in the territory of another State is liable in damages for such environmental damage.[257] The second option is the use of strict liability whereby "there is a presumption of responsibility but defenses are available".[258] The third option is the use of absolute liability where "no cause of justification is possible, and a state would be liable even for an act of God".[259]

In the second question which relates to what environmental damage mean, the concept of environmental damage should be defined or expounded within the pillars of breach or violation of international environmental law. This means that for a harm to be construed as or qualify to be an environmental damage it must has been carried out in transgression of the International environmental law.[260] the concept of environmental damage has also been construed to mean "any injury to natural resources as well as degradation of natural resources, property, landscape, and environmental amenities".[261]

The answer to the third question which relates to what form of reparation is appropriate in the event of wrongful conduct or rather the perpetration of environment harm has been

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255 Supra. See also Draft Articles on State Responsibility, [1980] 2 Y.B. Int'l L. Comm'n p30-34.
256 Max Valverde Soto, 'Genera Principles of International Environmental Law' (1996) *ILSA* p202.
257 Supra.
258 Supra.
259 Supra.
260 Supra, at p204.
261 Supra.

provided by the Permanent Court of Justice which held that, an appropriate form of reparation is one that:

> Wipe out all the consequences of the illegal act [or wrongful conduct] and reestablish the situation [or pre-existing condition] which would, in all probability, have existed if that act had not been committed.[262]

According to the Permanent Court of Justice restitution in kind is an example of appropriate form of reparation. Where restitution is not possible or practically feasible to be made, there must be payment of a sum which is equivalent to:

> The values which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[263]

It has been strongly submitted that, restitution or restoration has its own challenges and problems. These problems are have been clearly expounded by Max Valverde Soto when he stated that:

> The problem is that at the environmental level, an identical reconstruction may not be possible. An extinct species cannot be replaced. However, at the very least, the goal should be to clean-up the environment and restore it so that it may serve its primary functions. But, even if restoration is physically possible, it may not be economically feasible. Moreover, restoring an environment to the state it was in before the damage could involve costs disproportionate to the desired results. Such elements, combined with the lack of legal precedent and the insufficiency of the traditional state's inability to assess environmental damage, makes the panorama difficult.[264]

The practical application of the State's duty to compensate for environmental harm is evident in the In the *Trail Smelter Case* (*United States v. Canada)* where Canada through its mining activities destroyed the US environment (crops and forests) and was therefore ordered by the Arbitral Tribunal to make compensation the US for the environmental harm that the US has suffered. This is a clear indication that the State's duty to compensate for

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262 Supra.
263 Supra.
264 Supra.

environmental harm serves a direct environmental liability principle under the international environmental law.[265]

4.2 The Rio Declaration on environmental liability

The Rio declaration makes provisions for the imposition of environmental liability in the international level where environmental harm has been perpetrated. The Rio declaration under Principle 2 reaffirms the disposition that, although the States are entitled in terms of the International law, in particular the "principle of sovereignty", to do as they wish within their territories without accounting to anyone, they have the legal duty to:

> To ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[266]

Principle 2 imposes liability upon any State whose activities have caused environmental harm in the territory of another State as a result of the failure by the former State to put in place measures in order to ensure that environmental activities conducted in its territory do not cause impairment to the environments of other States. Such acting State will therefore bear the costs for rectifying the environmental damage done in territory of the victim-State.

States do not only have the responsibility to guard against the negative effects of their activities on the environments of the neighbouring States, they also have a duty in terms of principle 13 to develop their national environmental liability laws so as to hold accountable the perpetrators of pollution and degradation within their own territories.[267] Principle 13 further obliges the State to also develop their national law pertaining to compensation for the States who are victims of environmental crimes such as; pollution and other environmental damage perpetrated by the former.[268]

It can be submitted that the States in terms of principle 13 ought to have strict environmental liability laws in order to curb any possible perpetration of environmental

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265 *United States v. Canada* (1949) 2 RIAA 829.
266 Principle 2 of the Rio Declaration.
267 Principle 13 of the Rio Declaration.
268 Supra.

harm within their territories. The provisions of principle 13 of the 'Rio Declaration' read as follows:

> States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.[269]

The Rio Declaration also requires States to apply caution on the activities that may cause severe degradation or the transportation of harmful substances that may cause harm to the human health not only of its subjects but also of those of other States. In terms of principle 14 the States must cooperate with one another in discouraging and preventing:

> The relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.[270]

Any State that fails to cooperate with other States in discouraging or preventing the relocation or transfer "to other States of any activities and substances that cause severe environmental degradation" and as a result of such failure harms the environment of another State, is liable for costs of rectifying such environmental harm in terms of principle 14 of the Rio Declaration.[271]

4.3 The Stockholm declaration on environmental liability

The Stockholm declaration acknowledges the importance of maintaining a good state of the environment and therefore the need to hold accountable those whose actions are detrimental to the environment. It affirms that an environment is essential to the person's "well-being and to the enjoyment of basic human rights the right to life itself protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world" and that environmental

269 Principle 13 of the Rio Declaration".
270 Supra, in principle 14.
271 Supra.

protection and improvement "is a major issue which affects the well-being of peoples and economic development throughout the world".[272]

In terms of principle 21 of the 'Stockholm declaration', States have the legal obligation to take precautionary measures aimed at ensuring that, their activities which causes or are likely to injure an environment do not result is causing damage to the territorial environment of other States. It provides that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[273]

Principle 21 can be construed to be imposing 'environmental liability' in that any State that fails to conduct their activities responsibly by failing to control them with the result that the environment of another State is harmed, the former shall bear the liability for such damage. States under principle 22 are further obliged to cooperate with each other in order to:

> Develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[274]

It is clear that the Stockholm Declaration does not only recognise the duty to protect the environment for the wellbeing of all people, it also affirms the imposition of liability upon States who perpetrate environmental harms in the territories of others. The seriousness of environmental liability under the Stockholm Declaration is also evident in the provisions of principle 22 that compel States to effect active cooperation in the development of the "international law regarding liability and compensation for the victims" of environmental harms such as pollution caused by activities in their jurisdictions.[275]

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272 Proclamation 1 and 2 of the Stockholm declaration.
273 Supra.
274 Supra, in principle 22.
275 Supra.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

Indeed South Africa has never neglected to recognise the significant role played by the environment in the existence of human life as well as the need to preserve the biodiversity (flora and fauna) that subsists within the environment itself. It is beyond contention that the environment has become the core on which the existence of life in general has been

anchored hence it is construed to be the home for different living species both human and animals since they are dependent on it for food, air, water, and other needs.

It is against the above backdrop that South Africa has incorporated into national law the obligation or duty to safeguard the environment as the environment has the crucial role to play to the existence of life generally. This obligation has become conceptualised as the “duty of care for the environment” and entails an obligation to ensure for the wellness and safety of the environment. It obliges everyone including the State who engages in activity likely to cause environmental harm such as pollution and degradation, to reasonable measures in to order to ensure that such environmental harm does not occur, recur or continue.

South Africa has earned an acknowledgment as one of the countries in the globe with the best environmental laws. Unlike in other jurisdictions, South Africa has incorporated into its Constitution the environmental rights that explicitly demands for the safeguard of the environment This is reflected in Section 24 of the Constitution, which guarantees everyone the right to a healthy and safe environment. Section 24 is interpreted as the constitutional clause recognizing and embodying the obligation to take care of environment.

The incorporation of the environmental rights into the Constitution under section 24 is a clear indication that South Africa is seriously committed to the care and protection of the environment. Section 2 of the Constitution stipulates that, the “Constitution is the supreme law and any law or conduct inconsistent with it is invalid”. This means that, the ‘environmental rights’ in South Africa by virtue of their incorporation into the Constitution have supreme status hence any law or conduct that seeks to defeat them is invalid.

The incorporation of the duty of care for the environment into the Constitution has changed the Common law application of this duty in our law. Gone are the days when the duty of care did not apply to the environment directly, but solely applied for the protection of private individuals' interests rather than the environment. Under our constitutional dispensation, the ‘duty of care’ is also owed to the environment and for its direct

protection. It therefore, does not only exist to protect the interests of individuals like it was the case under Common law, but also exists to protect the environment directly.

South Africa has further incorporated the 'duty of care' for environment into legislation. Section 28 of NEMA has become the legislative provision providing for the general legislative 'duty to care for the environment'. It obliges everyone "who causes, has caused or may cause significant pollution or degradation of the environment [to] take reasonable measures [in order] 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 minimise and rectify such pollution or degradation of the environment".

Under the South African law the obligation to care for environment has retrospective application and therefore, applies to all polluting or degrading activities regardless of when such pollution or degradation took place. Thanks to the 2009 Amendment of the NEMA which did away with the Bareki decision which restricted the retrospective application of the NEMA only to polluting and degrading activities that took place not before 1999 when the NEMA came into force. This means that under the current position, the polluter is obliged to take reasonable measures in order to remove pollutants from the environment regardless of when such pollution has been perpetrated.

The failure to comply with the 'duty of care for the environment' in South Africa is sanctioned, and this is conceptualised as environmental liability. Any person who therefore breaches the duty of care for the environment by polluting or degrading the environment is liable for the costs of rectifying such environmental harm. The most common environmental liability principle under the South African law is the polluter-pays principle which entails that, any person who perpetrates environmental damage is liable for the costs of removing or rectifying such damage. A polluter is therefore liable for the costs of removing the pollutants on the environment.

The environmental liability therefore exists to protect environmental rights and to compel fulfilment of all environmental obligations. It seeks to achieve this by threatening sanctions or penalties to any person who transgresses the environmental rights or fail to comply

with the environmental obligations among which includes the duty of care for the environment. Environmental liability therefore serves as environmental law weapon to penalise acts which do not comply with environmental law or which cause harm to the environment.

International law recognizes environmental liability for transgressions of the duty of care for the environment. Under the International law, the States have the legal duty to take reasonable steps to ensure that the activities carried out in their territories do not harm the environment in the territory of other States. The State that fails to do so with the result that harm is caused to the environment in the territory of other State is liable for such harm.

5.2 Recommendations

The following must be done in order to establish effective accountability for transgressions of the obligation to care for the environment:

The State must make reporting platforms available to and accessible by the public in order to ensure that the members of the public are able to report any irresponsible environmental activity that causes or may cause environmental harm. This will make it difficult for anyone to escape liability for the environmental harm they have perpetrated regardless of where such harm took place.

The State should introduce educational programs aimed at educating the members of society about their environmental rights and obligation. This will contributes towards holding liable the perpetrators of environmental harm because a person who knows their environmental rights is likely to hold accountable anyone who violates such rights.

When enforcing the polluter-pays principle which of course has been incorporated into the NEMA, the monies that the Court must demand from the polluter should not be limited to the amount necessary to remove the pollution from the environment, but must include also a fine for the perpetration of such pollution. The courts must also consider imposing imprisonment in those cases where a mere fine or payment of money will not deter further

perpetrations of environmental harms and this is recommended in those cases where the perpetrator is a wealthy person or entity.

At the international level the imposition of environmental liability can be effective if the following is done;

All States should take serious the principle of prior notification and consultation by developing their national laws in order to bind themselves through such laws to give prior notification to the neighbouring States of their intention to carry out activities which are likely to cause harm in the latter's territories or to consult the latter about the intended activities. These notifications and consultations must be mandatory and their compliance must therefore not be optional.

A new convention should be promulgated at the UN level and signed by member States which allows for criminal sanctions to ensue and imposed upon the responsible officials of the States whose negligent activities have harmed the environment in the territories of another States or where such faulting State has violated any international environmental law.

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