

SMALL BUSINESS AND THE CHANGING ENVIRONMENTAL ETHOS

1 Introduction

There is increasing awareness globally of the importance of conserving the environment. The environmental ethos is changing and industries are under increasing pressure to reduce the negative impact of their operations on the environment. Such negative impact includes, for example, the consequences of non-compliance with safety standards; harm to the general well-being of both employee and community; pollution from production processes; and the risks associated with the disposal of waste material.

Traditionally, South African environmental law has had little influence on long-term strategic industrial decision-making and the response of many industries to environmental law has been re-active rather than proactive. In the past, businesses, large and small, have not been too perturbed by environmental laws, mainly because penalties for environmental damage were not enough to deter potential offenders and environmental legislation was weakly enforced (see generally Lazarus, Currie and Short "The Legislative Framework: Environmental Law, Investment and Industrial Practice" in Bethlehem and Goldblatt (eds) *The Bottom Line: Industry and the Environment in South Africa* (1997) 9).

Businesses therefore often opted to ignore environmental issues and would merely pay fines if and when these were imposed. This was seen to make sound business sense as it was less costly to pay the fine than to take the prescribed preventative measure. Furthermore, concern about the impact of industries on the environment was generally directed at large corporations and environmental laws were, therefore, mainly enforced against such large companies. As a result, small businesses especially could afford to ignore environmental management completely. These small, medium and micro-enterprises (SMMEs) are defined as separate and distinct business entities, together with their branches or subsidiaries, if any, and include co-operative enterprises. In terms of the statutory definition they are managed by one or more owner, and predominantly carried on in any specified sector or sub-sector of the economy in accordance with the Standard Industrial Classification, for example, the mining and construction sectors. Enterprises are classified as micro-, very small, small, or medium enterprises in accordance with the following criteria: total full-time equivalent of paid employees, total annual turnover and total gross asset value (s 1 of The National Small Enterprise Act 102 of 1996).

Similarly the industrial hives in which micro- and small enterprises operated, established by the Small Business Development Corporation, were legally exempt from complying with certain legal provisions relating to the environment, for example, regulations concerning hazardous chemical

substances (Coleman "Small Business Management: A Case Study from the Western Cape Automotive Sector" in Bethlehem and Goldblatt (eds) *The Bottom Line: Industry and the Environment in South Africa* (1997) 145).

However, for various reasons, the environmental ethos in South Africa has changed and a strong and improved body of environmental law has developed. All business enterprises, large and small, now have to comply with an increasing number of complex environmental laws. Failure to do so could have significant legal and cost implications (Sampson "Environmental legal compliance audit" in Sampson (ed) *The Guide to Environmental Auditing in South Africa* (2002) 2.1). It therefore no longer makes business sense to ignore environmental laws.

No doubt, legal imperatives are a major force in creating a culture of sustainable development. Although there are those who recognise that sustainable development is necessary only in order to comply with the legal requirements, sustainable development is also necessary because it makes good business sense. Large enterprises, and possibly small enterprises, although here more research is needed, should recognise that sustainable development enhances business value and that compliance should, therefore, be seen as an investment in a sustainable future. These investments would then be long-term assets that would in due course enhance the value of the business (see Church *The Business Case for Sustainable Development (SD)* (2002) unpublished colloquium presented in part fulfilment of the requirements for the degree of PhD (Entrepreneurship) at the University of Pretoria).

The question that arises is whether this new dispensation will ultimately threaten the survival of small businesses in particular and, if so, what measures should be taken to ensure their future development and growth. As will be discussed below, the survival of SMME's as engines of economic growth is crucial to job creation in South Africa. At the same time the protection of the environment is crucial to sustainable development of the country and its peoples.

Resolving this dilemma can only be in the interest of society as a whole.

2 The change in the environmental ethos

The international legal principle of "sustainable development" has emerged against the background of a changing environmental culture. In terms of this principle, states must ensure that they develop and use their natural resources in a manner that is sustainable.

Ideas underlying this concept have a long history in international instruments, but the "principle of sustainable development" was expressly referred to in a treaty for the first time in 1992 in the Preamble to the Agreement that established the European Economic Area (see in general Sands "International Law in the Field of Sustainable Development: Emerging Legal Principles" in Lang (ed) *Sustainable Development and International Law* (1995) 53). The concept of Sustainable Development means different things to different people depending on their particular perspective (see Bray "Towards Sustainable Development: Are We on the Right Track?" 1998

SAJELP 1). In the Brundtland Report, it was defined as development which meets the needs of the present without compromising the ability of future generations to meet their own needs. This definition was used for the purposes of the United Nations Conference on Environment and Development held in Rio in 1992 (*World Commission on Environment and Development (WCED): Our Common Future* (1987) 43; see in general Fri "Questions on Sustainable Development: An Introduction to the Essays" in Darmstadter (ed) *Global Development and the Environment: Perspectives on Sustainability* (1992) 1).

Beazley (*World Conservation Union, Caring for the Earth: A Strategy for Survival* (1993) 211) suggests the following definition: "improving the quality of human life while living within the carrying capacity of supporting ecosystems". Although there are various definitions of the term, it is generally recognised as meaning 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 (see too *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 3 All SA 201 (W) 218).

Environmental law, as it is currently practised in many countries, became established in western countries, particularly the United States in the 1970s, but it was only comprehensively introduced to South Africa much later. Although before 1990 there were already pollution control laws in place, mainly aimed only at protecting human health, most of the regulatory activity in this field has taken place in the last decade with the onset of the new constitutional dispensation.

At the turn of the century, Mohammed Valli Moosa, the then Minister of Environmental Affairs and Tourism, stated: "Environmental concerns are set to take centre-stage both globally and locally in the new millennium ... In South Africa we are faced with the realisation that we can no longer rely on what was once considered a limitless supply of natural resources" (see Glazewski "Foreword" in Glazewski (ed) *Environmental Law in South Africa* (2000) v).

There are many reasons for the change in the environmental ethos in South Africa and for the progressive developments in the environmental legal culture. These include the enactment of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"); government policy; public awareness and judicial response; as well as globalisation and international trade.

2.1 *The Constitution of the Republic of South Africa*

As the cornerstone of environmental law in South Africa, the Constitution not only provides a safety net for resolving environmental problems but elevates environmental concerns, traditionally seen to be secondary to other priorities such as economic development, to the level of a constitutional jurisprudence on fundamental human rights (Bruch, Coker and Van Arsdale "Breathing Life Into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa" 2000 SAJELP 21). The first reported case which

referred to the environmental right, albeit under the Interim Constitution of 1993, was *Minister of Health & Welfare v Woodcarb (Pty) Ltd* (1996 3 SA 155 (N)). In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (1999 2 All SA 381 (A) 389), environmental rights were recognised as fundamental, justiciable human rights and Olivier J stated: "Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns." In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* (*supra* 217) Claassen J said that "environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the Constitution" and further that "the constitutional right to environment is on a par with the rights to freedom of trade, occupation, profession and property entrenched in sections 22 and 25 of the Constitution".

As the supreme law in South Africa, the Constitution determines that any law or conduct inconsistent with its provisions is invalid and that obligations imposed by it must be fulfilled. Section 24 in turn provides that:

"Everyone has the right –

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

As well as containing an environmental right clause that has horizontal and vertical application (for a comprehensive survey of literature on the environmental right see Bray 1998 *SAJELP* 1), the Constitution recognises and entrenches the idea of sustainable development and its supporting principles.

Section 24(b) constitutionalises intergenerational equity. If the government does not take steps to secure its environmental goals, the individual's right to have the environment protected will be violated.

The Constitution creates a standard against which any activity that impinges upon the environment may be measured. It provides a test by which all laws that regulate such activities may be judged. According to the standard created, any activity which results in the unreasonable infringement of a person's right, as well as laws controlling such activity while permitting the infringement, may be challenged as unconstitutional. Where an industry operates in such an unconstitutional manner the court may be called upon to intervene (see too Winstanley "South African Laws and Policies Which Influence the Adoption of Cleaner Technology" 1998 *SAJELP* 269 271).

The new dispensation places an obligation on the government to protect the environment through laws and other measures that prevent pollution, provide for conservation, and secure ecologically sustainable development and the use of natural resources. Although "other measures" are not defined, these could possibly include government incentives such as tax incentives,

tradeable-emissions permits and subsidies. There has consequently been a fundamental change in the environmental statutes during the last decade that clearly reflects the influence of the so-called "environmental right". Probably the most important of these new enactments is the National Environmental Management Act (107 of 1998, hereinafter "NEMA") which provides for a framework for environmental governance in the country, the regulation of government activities; the prohibition, restriction or control of activities which are likely to have a detrimental effect on the environment and those relating to environmental authorisations and enforcement. The approach to water management has been radically changed by the National Water Act (36 of 1998) which is one of the most innovative and comprehensive laws regulating water in the world. Significant environmental law enactments since 1994 include the Marine Living Resources Act (18 of 1998); the Nuclear Energy Act (46 of 1999); the National Nuclear Regulator Act (47 of 1999); the Mineral and Petroleum Resources Development Act (28 of 2002); the National Environmental Management: Protected Areas Act (57 of 2003); the National Environmental Management: Biodiversity Act (10 of 2004); and the National Environment Management: Air Quality Act (39 of 2004).

Furthermore, section 184 of the Constitution establishes the South African Human Rights Commission (SAHRC). Such Commission must:

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights; and
- monitor and assess the observance of human rights in the Republic.

Its powers are to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated and to carry out research and educate.

The statute provides that each year the SAHRC "must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education *and the environment*" (own emphasis).

Another innovation is that section 38 of the Constitution opens the way for class actions not previously recognised in South African law. This is because the section determines that various persons have the right to approach a competent court where fundamental rights have allegedly been infringed or threatened and the court may grant appropriate relief, including a declaration of rights. An organisation may therefore litigate in the public interest or claim relief on behalf of a person whose right has been infringed. (See *Van Huyssteen v Minister of Environmental Affairs and Tourism* (1995 (9) BCLR 1191 (C)); *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* (1996 3 All SA 462 (Tk)); *McCarthy v Constantia Property Owners' Association* (1999 4 SA 847(C)); and Kidd "Suburban Aesthetics and the Environmental Right" 1999 SAJELP 257 for a useful discussion of the last case.)

In South Africa there are a number of non-governmental environmental organisations as well as other human rights organisations that would be

willing to initiate litigation on environmental issues against industries that cause environmental degradation and against government agencies that fail to comply with their legal obligations. In terms of section 18 of the Constitution, “everyone has the right to freedom of association” which is a fundamental right for environmental advocacy. Association not only allows for economics of scale but also means that people joined together can have a stronger say in environmental matters affecting them. A recent example is the case of *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Eskom Holdings Ltd* (2005 3 SA 156). Here the applicant was a NGO acting not only on its own behalf but in the public interest and on behalf of the residents of Cape Town who might be exposed to potential risks posed by a pebble bed modular reactor at the site of the Koeberg Nuclear Power Station.

All African nations ensure the right of association, albeit in a limited way in certain countries (for a discussion of this right in African countries see Bruch *et al* 2000 SAJELP 21).

It is to be expected that litigation in respect of environmental issues will increase. Even if government should overlook legal compliance by industry, the Constitution has created a new environmental “watch-dog” by giving the public the means to insist upon enforcement of environmental legislation.

The Constitution also entrenches the right of access to state information as well as to information which anyone has that would be required in order to exercise or protect a fundamental right (s 32). Access to environmental information is also provided for in NEMA and in the Promotion of Access to Information Act (3 of 2000; and see Du Plessis “The Right To Environmental Information in the New National Environmental Management Bill” 1998 SAJELP 395).

In certain cases the exercise of this right could make environmentally based litigation much easier. It is in the interest of civil society for the public to know of environmental threats and their origins. For example, where a person reasonably believes that his or her environmental right is being infringed by the discharge of noxious gasses into the atmosphere, the alleged polluter could be called upon to disclose what emissions are being released. In the case of *Van Huyssteen v Minister of Environmental Affairs and Tourism (supra)*, the right of access to information, in terms of section 23 of the Interim Constitution 1993, was interpreted. The applicants were trustees of a trust that owned property near an ecologically sensitive area and the respondents wanted to develop a steel mill in the vicinity. The court held that the applicants had a right of access to all state information relevant to the mill project.

2.2 Government policy

As already mentioned, the Constitution also places an obligation on the government to protect the environment and the government therefore has a duty to align its policy to give effect to this requirement. In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights and has a particular responsibility to sustain

and promote the values of the Constitution (see *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs supra*).

The White Paper on Environmental Management Policy for South Africa (GNR 749 of 1998-05-15), which seeks to give effect to the Constitution, serves as a framework for environmental policy. It covers various aspects of such policy, primarily those dealing with environmental principles, strategic environmental goals and objectives, and governance. The overarching principle is stated to be sustainable development and 23 other principles are set as a guide to the government to achieve this. In this regard, seven strategic goals have been identified. An important goal pertains to providing an effective institutional framework and legislation. This would include auditing existing legislation and reviewing it with the purpose of developing relevant and effective environmental legislation, norms and standards. Moreover, the policy determines that in its strategic management of the environment, government at all levels should take specific measures, for example, having an integrated environmental management and planning system in place in order to give decision-makers necessary information on all the possible adverse environmental effects of any action. Measures should also be taken to improve the enforcement of legislation including the development of administrative control procedures and the punishment of environmental transgressions as well as measures determining liability for environmentally harmful actions in the form of fines, compensation claims, and restitution and rehabilitation orders.

Sustainable development is the ultimate goal and conservation of the environment is crucial to government policy. However, it should not be forgotten that the alleviation of poverty and conservation of the environment are not mutually exclusive in attaining this goal.

The need to alleviate poverty and to create employment has been recognised by a government committed to the stimulation and growth of small business enterprises. Clearly because government is committed to both the protection of the environment and the promotion of the small business enterprise as an economic growth engine to alleviate poverty, government policy must take cognisance of the fact that small business may not survive within the constraints of a new environmental ethos and this issue is discussed below.

2.3 *Public awareness and judicial response*

With the entrenchment of an environmental constitutional right and the re-introduction of South Africa into the global community, public awareness and concern about the impact that industry and business in general are having on the environment has increased. Furthermore, in South Africa and internationally, there is an increasing acceptance of the conservation ethic, more particularly in respect of the conservation of renewable and non-renewable resources (McConnachie "Environmental Conservation in South Africa – Its Application to the Built Environment" 1998 *SAJELP* 99).

NEMA (s 2) sets out various principles, which apply to all organs of state in respect of environmental management, and recognises *inter alia* that

development must be socially, environmentally and economically sustainable and that sustainable development requires the consideration of all relevant factors including the following: community well-being and empowerment must be promoted through environmental education, *the raising of environmental awareness*, the sharing of knowledge and experience and other appropriate means (own emphasis).

This trend could lead to the public being more vigilant about environmental offences and, therefore, more likely to litigate. Furthermore, at least in theory, the greater the public's concern for an issue, the more stringent the laws that develop (see too Sampson *Introduction to a Legal Framework to Pollution Management in South Africa* (2001) 7).

Case law reflects a change in the attitude of the courts toward environment-related offences and they seem to be following a more cautious and socially responsible approach than before. In the past, where there was any doubt as to the harm caused, courts were inclined to favour business, whereas presently they seem to favour the environment and public health in instances of doubt. The cases of *Minister of Health & Welfare v Woodcarb (Pty) Ltd (supra)* and *Lascon Properties (Pty) Ltd v Wadeville Investment Company (Pty) Ltd* (1997 3 All SA 433 (W)) reflect the new attitude of the courts. Here the court was of the view that, on a proper construction of regulation 5.9.2 of the regulations promulgated under the Mines and Works Act (27 of 1956), there seemed to be an inference that the legislature had intended to provide a civil remedy for damage, caused by a breach of the regulation, extending beyond a mere interdict.

2 4 *Globalisation, international environmental law and international trade*

Globalisation or world shrinkage has become a way of life over the past decade and South Africa is now part of the global economy. Political changes together with international contact and communication have engendered a culture of greater international co-operation. This is reflected in foreign policy and the jurisprudence of our courts. Particularly in the light of the new constitutional dispensation, international law will play a more pertinent role in domestic law.

The Constitution (s 232) confirms the common law position that customary international law is recognised as law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament (for a discussion on customary international law and the environment see Glazewski 37). It also confirms that the Republic is bound by international agreements which were binding when the Constitution took effect (s 231(5)) and sets out the respective rights and obligations of the executive and legislative arms of government regarding the adoption of international agreements (s 231). Furthermore, when interpreting legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (s 233) and a court, when interpreting the Bill of Rights, must consider international law (s 39; see Bruch *et al* 2000 SAJELP 21 for a discussion on

the various ways that judiciaries around the world have interpreted and applied the right to a healthy environment and the duty to protect it).

Our courts are also undergoing a globalisation process and decisions already reflect the fact that issues of global concern will be taken into account in relevant circumstances. In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* (*supra* 218) where international law was referred to in a discussion of “sustainable development”, Claassen J stated that it “has been held that the goal of attaining sustainable development is likely to play a major role in determining important environmental disputes in the future. This is so because sustainable development constitutes an integral part of modern international law and will balance the competing demands of development and environmental protection”.

International law on environmental protection has developed rapidly. There are numerous international organisations involved with the development and implementation of environmental laws (for a discussion of the main ones see Glazewski 32). With South Africa now being part of the international community, it actively participates in regional and international organisations. Furthermore, there are over 300 treaties aimed at protecting the environment. Although South Africa is not a party to all of these treaties and is therefore not specifically bound by them, these treaties do reflect the general principles within which countries generally are expected to act for the benefit of all mankind and they serve as guidelines (Kiss “Economic Globalization and the Common Concern of Humanity” in Kiss, Shelton and Ishibashi (eds) *Economic Globalization and Compliance with International Environmental Agreements* (2003) 7).

South Africa’s participation in environmental conventions was traditionally haphazard and arbitrary but there are now several legal instruments which oblige the government actively to pursue and participate in international agreements and conventions. South Africa is party to over 50 international conventions which are either directly or indirectly relevant to the environment (see further, Glazewski 46).

Moreover, section 25(3) of NEMA states that the Minister of Environmental Affairs may introduce legislation in Parliament or make such regulations as may be necessary to give effect to an international environmental instrument to which the Republic is a party.

International trade practices further serve to engender a culture of compliance with measures protecting the environment. Many countries have rigid environmental standards and in order to trade with these countries, traders are expected to have used similar standards of production. So too, foreign investors often demand that recipient countries have environmental standards similar to their own (see too Sampson *Environmental Auditing* 5.3.3.2). Market related incentives such as eco-labels (that is statements to the effect that the product is eco- or environment friendly) also encourage producers to meet certain environmental requirements. Multilateral bodies such as the World Trade Organisation, the United Nations and the International Standards Organisation (ISO) are increasingly entering into agreements that regulate environmental aspects of trade.

As mentioned, South Africa is now active internationally, partaking in international trade agreements and ratifying international conventions. There is thus growing pressure to harmonise environmental standards internationally and to introduce environmental criteria into international trade agreements.

3 The changing ethos and its effect on industry

In the past, business could afford to ignore environmental laws either because they were not enforced or because, when they were enforced, relatively small fines could be paid and business could continue as usual. With the changing environmental ethos this will no longer be possible. Prosecutions for environmental wrongs are fast becoming the order of the day and, as Winstanley points out, the “green Scorpions” (the new Regulatory Directorate of Authorisations and Compliance) are making their presence felt (Winstanley “Ten Years of Democracy” 2004 *De Rebus* 58-59).

While large companies were generally targeted by the public and state over the last decade and in certain instances were forced to start developing environmental management systems within the company, small businesses on the other hand were less prone to attack and were not forced to manage the environment. In any case such enterprises were few in number. However, it can be expected that their number will increase. Cumulatively, the environmental effect of a large number of small businesses would be highly significant.

The White Paper on National strategy for the development and promotion of Small Business in South Africa (GN 213 of 1995-03-20) and the National Enterprises Act (102 of 1996) *inter alia* clearly reflect the government’s commitment to the process of stimulating and promoting small business and the creation of an appropriate enabling environment.

In section 2 of the Growth and Development Summit Agreement of 7 June 2003, the unemployment problem in South Africa was addressed and it was agreed that a range of “immediate interventions” are required, including small enterprise promotion. It was also recognised that small enterprise promotion, especially the development of black-owned small enterprises, is a crucial component of job creation in the economy.

While public concern about industry’s impact on the environment was mainly directed towards large companies, this has in fact started to change. Increased pressure on small businesses to comply with environmental norms and standards can be expected. There is already public awareness and censure of the cumulative effect that small enterprises have on the environment. Five years ago this was highlighted in a report published in a national newspaper. In the reported interview, a chemical consultant who had done extensive research for the government stated that in South Africa small concerns made up to 80% of all players in a given industry. At that time in the chemical manufacturing industry, there were 80 big producers who he found “generally toe the line, not only because they are watched by government but because their product is exported and has to adhere to international guidelines. But there are 2000 small manufacturers with nobody

watching them. These are the guys that cause problems.” In the report the official line that small businesses themselves are ultimately responsible for disposal of their waste products was criticised and the report concluded that “something must be done about it!” (Shaw “Small Businesses are Big Culprits” 10 May 1997 *Saturday Star*).

Furthermore, environmental legislation, which is increasing, applies to big and small business alike. In the light of the discussion of the changing environmental ethos there is no doubt that failure of small business to comply with environmental laws could have significant legal and financial implications for them. Criminal liability could result in substantial costs for the offender whether or not the latter was an individual or a juristic person. These costs might include large fines prescribed by environmental and related statutes. Perhaps even more costly would be the closure of the enterprise until such time that legal requirements were met. For example, in terms of section 29 of the Environment Conservation Act (73 of 1989), the unlawful disposing of waste could result in a conviction with a maximum fine of R100 000 or ten years imprisonment. In the same conviction a court could, in addition, award a fine of three times the commercial value of anything constituting the offence. Where a company has unlawfully been disposing of its waste for the past five years, this may result in a fine of three times the value of what the company saved during this period by not paying for a waste service supplier to remove and dispose of the waste in a lawful manner. Fines for pollution have traditionally been ridiculously low and could even be absorbed by offenders as one of the normal costs of production.

Since the object of the fine is to deter offenders, the size of fines can be expected to increase significantly to ensure their deterrent effect. Civil remedies such as interdicts and actions for damages are also possible and, as already mentioned, civil litigation is likely to increase with attendant increased costs. Furthermore, in certain instances, liability for the costs of clean-up and rehabilitation of the environment may be incurred. Examples of this kind of liability can be found in various statutes. In terms of the NEMA, every person who causes, has caused or may cause significant pollution or degradation of the environment, must take reasonable measures to prevent it from occurring, continuing or recurring, or when it cannot reasonably be avoided or stopped, to minimise and rectify it. Although the Act does not define “reasonable measures” it does suggest that in appropriate circumstances this will include clean-up procedures and rehabilitation of the environment. Where the responsible party fails to take these measures, an authority may do so and recover the costs from what may be described as potentially responsible parties.

With regard to pollution of a water resource, the National Water Act (36 of 1998) section 19(1) imposes a general duty on an owner of land, a person in control of land or a person who occupies or uses the relevant land to take all reasonable measures to prevent the pollution from occurring, continuing or recurring. Furthermore in terms of section 20(4), he or she must *inter alia* take all reasonable measures to contain and minimise the effects of the pollution and to undertake clean-up procedures.

The liability for non-compliance with environmental laws, which may range from liability for violation of administrative law requirements to violations of

statutory duties that result in harm, could be incurred not only by the business itself but personally by the directors, officers and employees of the enterprise concerned. For example, in terms of section 34 of NEMA, persons who were directors at the time of the commission of the offence, could face personal liability for several listed environmental offences where they failed to take reasonable steps to prevent the company committing the offence. Similarly, agents, managers and employees could face personal liability.

Moreover, it is envisaged that the mandatory environmental impact assessment (EIA) and authorisation as determined by legislation, that is in terms of the Environment Conservation Act (73 of 1989) and regulations made under it, as well as NEMA (Act 107 of 1998) will influence business practice significantly. In the light of the judgment in *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* (2002 1 All SA 10 (C)) failure to comply with the relevant legislation by the enterprise concerned may in the first place lead to criminal sanctions being imposed as well as an order to take remedial action. In the second place, failure to comply with the relevant legal requirements before the start of the identified activity would have the effect that authorisation could not be granted afterwards. This might have dire financial consequences, particularly where clients withdrew their custom because the enterprise was not able to retain its International Standards Organisation accreditation (such as the ISO 14 001 certification) as it did not comply with the environmental laws generally. Furthermore, in the light of increasing sensitivity to the environment, the public image of an enterprise that incurred environmental liability could suffer substantially with resultant loss of business.

While it is clear that it would be incumbent upon small businesses to comply with environmental law, it is not clear whether they would in fact be able to respond to such pressure and therefore their sustainability might be at stake.

Small businesses have reduced economies of scale with lower production capacities and often do not have financial resources to expand their businesses, to invest in research and development and to meet recurrent costs. The knowledge base of small businesses is usually smaller than that of larger companies and they may therefore not have the appropriate skill to address environmental problems. These constraints are internationally recognised, as is evidenced by international initiatives directing specific assistance to small businesses. For example Danish support is given through their business-to-business programme to emerging black-owned businesses in South Africa. The programme is described as providing technical assistance and some limited financial support, with a specific mechanism for covering the costs of environmental studies, occupational health improvements and environmental protection (Coleman 145).

In the light of the fact that government recognises the need for the stimulation and growth of small businesses, it would be unfortunate if their survival were threatened by stricter enforcement of environmental laws. As government is committed to both the survival of small business and to the enforcement of environmental law, a paradoxical situation exists. There are various possibilities that might resolve this dilemma and it is suggested that

government provide assistance to small business enterprises in respect of environmental matters.

One option is to exempt them from the relevant statutory measures protecting the environment (this would be analogous to the exemption determined in an affirmative action clause). This would be problematic particularly in the light of the clear constitutional protection of the environment in terms of the Bill of Rights as already outlined. A more feasible solution would be to provide such enterprises with assistance, financial or otherwise. This could include, for example, providing incentives, subsidies, tax relief and education programmes with regard to environmental matters.

4 Conclusion

No doubt, legal imperatives are a major force in creating a culture of sustainable development. However, even though this may be so, small enterprises generally do not have the resources, financial or otherwise, to comply. Consequently, the present legal constraints might threaten their very survival. Since government policy clearly recognises the importance of such enterprises as engines for economic growth, it should ensure their survival by assisting them to comply with environmental law.

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