

**An Analysis of Some Environmental Law Provisions and Alternative  
Governance Approaches for the Promotion of Corporate Social  
Responsibility in South Africa**

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## Abbreviations

APPA	-	<i>Atmospheric Pollution Prevention Act</i> 45 of 1965
CERES	-	Coalition for Environmentally Responsible Economies
CSR	-	Corporate Social Responsibility
DEAT	-	Department of Environmental Affairs and Tourism
DWAF	-	Department of Water Affairs and Forestry
ECA	-	<i>Environment Conservation Act</i> 73 of 1989
EIA	-	Environmental Impact Assessment
EMI	-	Environmental Management Inspectors
FSB	-	Financial Services Board
GRI	-	Global Reporting Initiative
JBL	-	Juta's Business Law
JSE	-	Johannesburg Securities Exchange
MPRDA	-	<i>Minerals and Petroleum Resources Development Act</i> 28 of 2002
NEMA	-	<i>National Environmental Management Act</i> 107 of 1998
NEMAQA	-	<i>National Environmental Management: Air Quality Act</i> 39 of 2004
NEMBA	-	<i>National Environmental Management: Biodiversity Act</i> 10 of 2004
NHRA	-	<i>National Heritage Resources Act</i> 25 of 1999
NWA	-	<i>National Water Act</i> 36 of 1998
OECD	-	Organisation for Economic Co-operation and Development
PAIA	-	<i>Promotion of Access to Information Act</i> 2 of 2000
PER	-	Potchefstroomse Elektroniese Regstydskrif
SAJELP	-	South African Journal of Environmental Law and Policy
SAPL	-	South African Public Law
SCA	-	Supreme Court of Appeal
TBL	-	Triple Bottom Line
THRHR	-	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg
UNEP	-	United Nations Environmental Programme

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## Abstract

For years the focus of most corporate entities has primarily been on economic performance. Little emphasis was placed on the impact of production and operations on society and/or the environment. Corporate social responsibility (hereafter CSR) ever since became a burning issue on many companies' strategic agendas in response to a change of approach in which attention is paid also to the needs and position of society (people) and the environment. CSR is, however, still mainly a legally unenforceable and voluntary endeavour and is dependent on self-regulation that could hamper its ideals.

This study aims, from a legal perspective, to determine the role of CSR in South Africa as well as the extent to which some existing South African environmental acts and alternative governance approaches facilitate its regulation and/or provides for the key values and principles that underpin CSR. The scope and meaning of CSR are explored with particular reference to sustainable development, corporate governance and the legal framework pertaining thereto. This study estimates, *inter alia*, the extent to which the *Constitution of the Republic of South Africa*, 1996 and environmental legislation, such as the *National Environmental Management Act* 107 of 1998, *National Water Act* 36 of 1998, *National Environmental Management: Biodiversity Act* 10 of 2004, *National Environmental Management: Air Quality Act* 39 of 2004, *National Heritage Resources Act* 25 of 1999 and the *Minerals and Petroleum Resources Development Act* 28 of 2002, as well as case law, translate the values and principles of CSR into legally enforceable terms for the corporate sector in South Africa. Furthermore, different alternative governance mechanisms are considered through which CSR principles and ideals could be realised.

This study concludes with critical comments on the key concepts, South African environmental legislation, and alternative governance mechanisms and a number of recommendations are made in an attempt to contribute to the improvement of CSR within the South African corporate sector

## Opsomming

Vir jare was die fokus van die meeste korporatiewe entiteite op ekonomiese prestasie. Min nadruk is gelê op die impak van produksie en werkverrigting op die gemeenskap en/of die omgewing.

Sedertdien het korporatiewe sosiale verantwoordelikheid (KSV) 'n belangrike item geword op baie maatskappye se strategiese agendas in antwoord op 'n verandering in benadering waarin aandag ook nou bestee word aan die behoeftes van die gemeenskap en die omgewing. KSV is egter hoofsaaklik 'n onafdwingbare en vrywillige poging vanuit 'n regsoperspektief wat staatmaak op selfregulasie en gevolglik die ideale agter KSV kan belemmer.

Hierdie studie stel ten doel om, vanuit 'n regsoperspektief, die rol van KSV in Suid-Afrika vas te stel as ook die mate waartoe sommige bestaande Suid-Afrikaanse omgewingswette die regulering en implementering daarvan bevorder en/of voorsiening maak vir die waardes en beginsels van KSV.

Die omvang en betekenis van KSV word ondersoek met spesifieke verwysing na volhoubare ontwikkeling, korporatiewe bestuur en die regsraamwerk wat daarmee verband hou.

Hierdie studie bepaal, *inter alia*, die mate waartoe die *Grondwet van die Republiek van Suid-Afrika*, 1996 en ander omgewingswetgewing soos die *National Environmental Management Act 107* van 1998, *National Water Act 36* van 1998, *National Environmental Management: Biodiversity Act 10* van 2004, *National Environmental Management: Air Quality Act 39* van 2004, *National Heritage Resources Act 25* van 1999 en die *Minerals and Petroleum Resources Development Act 28* of 2002, sowel as hofsake, die waardes en beginsels van KSV vertolk in toepaslike regsinstrumente van toepassing op die korporatiewe sektor in Suid-Afrika. Verder word verskillende

alternatiewe bestuursmeganismes bestudeer waardeur die beginsels van KSV en verbandhoudende ideale verwesenlik kan word.

Hierdie studie sluit af met kritiese kommentaar op sleutel-konsepte, Suid-Afrikaanse omgewingswetgewing en alternatiewe reguleringmeganismes. Verskeie aanbevelings word ook gemaak in 'n poging om by te dra tot die verbeterde werking van KSV in die Suid-Afrikaanse korporatiewe sektor.

## 1. Introduction

Corporate industries across the world are changing their way of conducting business in order to avoid the consequences of environmentally unsustainable practices.<sup>1</sup> These industries are increasingly pressured by the members of civil society to operate in a way that is conducive to their health and well-being,<sup>2</sup> whilst economic markets also seem to move towards more sustainable practices.<sup>3</sup> Sustainable development seems to become part of the strategic objectives of corporate industries, not only because of social and environmental concerns, but also, ironically, in the aim to pursue long-term economic development.<sup>4</sup>

Corporate entities used to focus solely on economic performance, but recent years saw a change in the challenges they face and hence, a change in their objectives.<sup>5</sup> Across many industrial sectors worldwide, corporations recognise the importance of taking a more holistic approach to business strategies and corporate transparency.<sup>6</sup> This more holistic approach is known as the Triple Bottom Line approach (hereafter TBL). TBL claims that the overall performance of a company should be measured based on its combined contribution to economic, environmental and social development.<sup>7</sup> Hence, for

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<sup>1</sup> This becomes clear from the various CSR reports of companies such as Sasol [www.sasol.co.za](http://www.sasol.co.za), De Beers Group [www.debeersgroup.com](http://www.debeersgroup.com) and Nedbank Group [www.nedbankgroup.co.za](http://www.nedbankgroup.co.za) as well as many other corporations. The reports can be found on the websites of the corporations. It is important to note that there is internationally a movement towards only entering into commercial agreements with companies if they can prove that they also have a sustainable development agenda. Freemantle and Rockey (eds.) *Corporate Citizen II* xii.

<sup>2</sup> Civil society seems to take more notice of critical social and environmental issues such as environmental emergencies, the protection of employees' rights, the importance of companies in the communities which they form part of as well as the rules of corporate governance. There is a greater community awareness and higher expectations of transparency and accountability from corporations and organisations. See Kakabadse and Morsing (eds) *CSR* 98 and Nelson and Wilson *Triple Bottom Line* 9.

<sup>3</sup> An example of this shift is, for example, the introduction of sustainability indexes on the economic market.

<sup>4</sup> Roy and Vésina 2001 *Corporate Environmental Strategy* 339.

<sup>5</sup> Dashwood *Corporate Social Responsibility* 189, Henriques and Richardson (eds) *TBL* 29, and Hoogervorst 2003 *Leadership* 26.

<sup>6</sup> Nelson and Wilson *Triple Bottom Line* iv.

<sup>7</sup> See Mullerat (ed) *CSR* 113. Sub-categories, which could resort under economic development, are profitability, wages and benefits, resource use, job creation and outsourcing. Sub-categories, which could resort under environmental development, are processes, products and services on the



a company to be more transparent and accountable and to operate in line with the TBL approach, it should, *inter alia*, expand on the scope of its annual reporting mechanisms to incorporate the different aspects of TBL.<sup>8</sup> One of the main focus points of TBL is the impact which business operations could have on the environment.<sup>9</sup>

For the international corporate sector and in South Africa, one of the consequences of increased attempts to incorporate TBL ideas and principles in its operations has been the birth of the notion of corporate social responsibility (hereafter CSR). CSR may be seen as an integral part of corporate governance and as one of the facilitative ways in which the TBL-approach could become part of the management activities of a company.<sup>10</sup>

Leaving the TBL approach and CSR behind for the moment, it is observed that South African legislation increasingly reflects an environmental consciousness. At the core of the environmental law framework stands section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).<sup>11</sup> The environmental right, *inter alia*, provides for sustainable development in section 24(b)(iii).<sup>12</sup> The *National Environmental Management Act* 107 of 1998 (hereafter NEMA) is environmental framework legislation which aims to achieve several objectives related to, *inter alia*, integrated environmental management in South Africa.<sup>13</sup> NEMA also makes provision for sustainable

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environment. Sub-categories, which could resort under social development, are health and safety, employee relations, ethics, human rights and working conditions. Fahy, Roche and Weiner *Beyond Governance* 249. TBL closely links with the idea of sustainable development in that both concepts consist of three dimensions, namely economic, social and environmental components. Elkington *Cannibals* 2. The notion of reporting on a business' environmental and social performance is also directly tied to sustainable development. Nelson and Wilson *Triple Bottom Line* 4.

<sup>8</sup> Werther and Chandler *Strategic CSR* 73.

<sup>9</sup> Nelson and Wilson *Triple Bottom Line* 8. This includes, *inter alia*, use of natural resources, pollution and waste generation.

<sup>10</sup> Corporate governance is discussed in more detail in paragraph 2.1 below. CSR is discussed in more detail in paragraph 2.2.

<sup>11</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>12</sup> S 24(b)(iii) provides for the right to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. This is discussed in 3.2 below. Sustainable development will be discussed in more detail in 2.3 below.

<sup>13</sup> Other objectives in terms of s 23 of NEMA concerning CSR, include the promotion of the integration of the environmental management principles; identifying, predicting and evaluating the actual and potential impact on the environment with a view to minimising negative impacts,

development.<sup>14</sup> The Constitution and NEMA, in regulating matters pertaining to the environment and sustainable development, provide for, amongst others, environmental obligations for both the private and public sector. Hence, corporate entities, as they form part of the private sector in South Africa, also have obligations in terms of the Constitution and NEMA. Apart from these two acts, there are various other acts that regulate environmental matters including, *inter alia*, the *National Water Act* (hereafter the NWA),<sup>15</sup> the *National Environmental Management: Biodiversity Act* (hereafter the NEMBA),<sup>16</sup> the *National Environmental Management: Air Quality Act* (hereafter the NEMAQA),<sup>17</sup> *National Heritage Resources Act* (hereafter the NHRA)<sup>18</sup> as well as the *Minerals and Petroleum Resources Development Act* (hereafter the MPRDA).<sup>19</sup>

This study aims, from a legal perspective, to determine the role of CSR in South Africa, and the extent to which some South African environmental acts and case law, facilitate and provide for the key values and principles that underpin CSR. Should the values and principles of CSR indeed be explicitly or implicitly provided in domestic environmental law, the corporate sector of South Africa is legally obliged to approach corporate governance in a fashion that answers at least to the *environmental* requirements of CSR. The hypothesis is then that the corporate sector of South Africa should be legally obliged to be environmentally sustainable and that the country should accordingly be in a position to prove a collective effort in law to meet the expectations of CSR that relate to environmentally sustainable development.

For the purpose of this study, the scope and meaning of CSR will be explored with particular reference to sustainable development, corporate governance, alternative

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maximising benefits and promoting compliance with the environmental management principles; ensuring that the environment receives adequate consideration before actions are taken; and ensuring the consideration of environmental attributes in decision-making concerning the environment.

<sup>14</sup> S 1(1) of NEMA defines sustainable development as '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.

<sup>15</sup> 36 of 1998.

<sup>16</sup> 10 of 2004.

<sup>17</sup> 39 of 2004.

<sup>18</sup> 25 of 1999.

<sup>19</sup> 28 of 2002.

governance approaches and the legal framework pertaining thereto. This study will also estimate the extent to which the Constitution, NEMA, the NWA, the NEMBA, the NEMAQA, the NHRA, as well as the MPRDA as far as it pertains to environmental issues, translate the values and principles of CSR into legally enforceable terms for the corporate sector in South Africa.<sup>20</sup>

This study is conducted by way of a literature review. Basic legal documents and primary sources are investigated and critically assessed.

The structure includes:

- Defining key concepts;
- Analysing some South African acts that may be relevant to CSR;
- Analysing alternative regulatory mechanisms for CSR; and
- Recommendations and concluding remarks.

## **2. Key concepts**

In order to estimate the extent to which the environmental requirements of CSR are legally enforceable in South Africa, an exposition of some key concepts is required. In this section the concepts of corporate governance, CSR and sustainable development (inclusive of the TBL approach) are unpacked. Following the exposition of these concepts an attempt will be made to draw on the links between the different definitions in order to distil some common values and principles.

### **2.1 Corporate governance**

The *King Report on Corporate Governance for South Africa, 2000* (hereafter King II) is a code of corporate conduct that defines corporate governance as a 'system by which

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<sup>20</sup> Because of length constraints, not all environmental legislation will be analysed. This study only focuses on primary acts in this regard.

companies are directed and controlled'.<sup>21</sup> Corporate governance is generally understood as a mechanism by means of which a corporation can be governed best. The central point of corporate governance lies in the proper balance between all powers and interests (inclusive of environmental interests) involved.<sup>22</sup> It relates to the structure and systems that officially assign power within organisations and manage the relationships between the owners and managers of a business.<sup>23</sup> Corporate governance has also been defined as:

A set of relationships between a company's board, its shareholders and other stakeholders. It also provides the structure through which the objectives of the company are set, and the means of attaining those objectives, and monitoring performance is determined.<sup>24</sup>

These explanations illustrate that corporate governance is concerned with both shareholders and the internal management aspects of a company. Corporate governance is an important mechanism to assist a company to achieve its corporate objectives. Monitoring performance is a key element in achieving these objectives.<sup>25</sup> The principle of disclosure plays an important role. The Johannesburg Securities Exchange (hereafter JSE) and the Financial Services Board (hereafter FSB), for example, play a monitoring role in ensuring that corporate governance principles are complied with since all listed companies must conform to it.<sup>26</sup> This, however, only pertains to companies listed on the JSE Social Reporting Index.

King II distinguishes between seven features of good corporate governance, namely: discipline; transparency; independence; accountability; responsibility; fairness; and

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<sup>21</sup> In 1994 the King Report on Corporate Governance was published, institutionalising corporate governance in South Africa. The Report was aimed at promoting the highest standards of corporate governance in South Africa. The evolution of time, however, necessitated that the King Report be updated. To this end King II was developed.

<sup>22</sup> The balance should be struck between directors, shareholders, investors and stakeholders. Hover 2005 *Nederduits Gereformeerde Teologiese Tydskrif* 115.

<sup>23</sup> Werther and Chandler *Strategic CSR* 7.

<sup>24</sup> OECD Principles of Corporate Governance 2004, 11.

<sup>25</sup> Mallin CA *Corporate Governance* 4.

<sup>26</sup> Hover 2005 *Nederduits Gereformeerde Teologiese Tydskrif* 115. King II, however, encourages all other companies that is not listed to also give due consideration to the application of the accompanying Code of Corporate Practices and Conduct insofar the principles are applicable. Institute of Directors 2002 [http://www.ecgi.org/codes/documents/executive\\_summary.pdf](http://www.ecgi.org/codes/documents/executive_summary.pdf).

social responsibility.<sup>27</sup> Although King II provides a good point of departure for South African companies to voluntarily embark on the road towards good corporate governance, this document does not have binding legal effect.<sup>28</sup> The corporate responsibility of compliance and commitment to the principles of corporate governance ultimately lie with the leadership of a corporation and should be blended into every level of the company.<sup>29</sup> In a well-led company, CSR means taking a balanced approach to address economic, social and environmental issues in a way that aims to benefit people, the company (in monetary terms) and the environment.<sup>30</sup> Ethical standards are considered a high priority in this regard. In South Africa the term social responsibility includes CSR, sustainable development, corporate citizenship, corporate social investment and sustainability.<sup>31</sup>

## **2.2 Corporate social responsibility**

Contemporary concerns about the sustainability and social responsibility of corporate industries caused CSR to become a global buzzword.<sup>32</sup> CSR is directly related to the notion of corporate governance discussed above.

<sup>20</sup> Institute of Directors 2002 [http://www.ecgi.org/codes/documents/executive\\_summary.pdf](http://www.ecgi.org/codes/documents/executive_summary.pdf); Mallin *Corporate Governance* 194 - 195; Wixley and Everingham *Governance* 2-3. Internationally, the four basic values at the core of corporate governance are fairness, accountability, responsibility and transparency. Rossouw 2002 *Koers* 407. These four basic values are also fundamental to international guidelines developed by the OECD, the International Corporate Governance Network and the Commonwealth Association for Corporate Governance. Institute of Directors 2002 [http://www.ecgi.org/codes/documents/executive\\_summary.pdf](http://www.ecgi.org/codes/documents/executive_summary.pdf).

<sup>28</sup> King II sets out mere guidelines, and is thus non-binding on companies. It states that the recommendations remain self-regulatory although conformance can be encouraged in various ways. The King Committee recommends however that it would be in the 'enlightened self-interest' of a company to adhere to these principles to the extent that is practicable and applicable. This is reflective of the 'comply or explain' philosophy underpinning the whole of the new corporate governance regime. See par 40 and 41 of the introduction and background of King II. This philosophy means that companies are required to explain when they fail to comply with corporate governance principles and their failure to comply would not be punishable. See for further discussion Mongalo 2004 *THRHR* 264-279.

<sup>29</sup> Hawkins DE CSR 114. See also *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd & others* [2006] JOL 17516 (W) in terms of the liability of directors.

<sup>30</sup> Institute of Directors 2002 [http://www.ecgi.org/codes/documents/executive\\_summary.pdf](http://www.ecgi.org/codes/documents/executive_summary.pdf)

<sup>31</sup> The indirect economic benefits include for instance increased sales, customer loyalty, keeping up with competition, improved productivity and corporate reputation. International Institute for Sustainable Development 2004 <http://www.iisd.org>.

<sup>32</sup> See, *inter alia*, Dashwood *Corporate Social Responsibility* 189; Jenkins and Yakovleva 2006 *Journal of Cleaner Production* 272; Sarbutts 2003 *Journal of Communication Management* 340; and

There is, however, no commonly-endorsed definition for CSR. In fact there are as many definitions of the concept as there are writers on this subject. According to Dashwood<sup>33</sup> the debate around the meaning of CSR, revolves around several broad questions. What does CSR entail, and how should it be conceptualised? To whom should corporations be responsible in terms of CSR? To what extent can or should corporations adhere to CSR? Who should take responsibility and exactly what does this responsibility entail? Moreover, should CSR be voluntary or legislated? One definition puts it that:

CSR is a concept whereby companies integrate social and environmental concerns in their business operation and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with the stakeholders.<sup>34</sup>

Mullerat<sup>35</sup> states that:

CSR can be defined as a concept whereby companies voluntarily decide to respect and protect the interests of a broad range of stakeholders and to contribute to a cleaner environment and a better society through active interaction with all. CSR is the voluntary commitment by business to manage its role in society in a responsible way. CSR is the commitment of business to contribute to sustainable development working with employees, their families, and the local communities in societies at large to improve their quality of life. CSR is cooperation between government, civil society and business.

According to the Global Compact,<sup>36</sup> CSR can be seen as 'obligations that companies must respect as basic principles in their operations towards human rights, labour standards and the environment.' The Global Compact sets out nine basic CSR principles that should be adhered to by multinational corporations.<sup>37</sup> These include, *inter*

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Rossouw 2002 *Koers* 413. Recent international development pertaining to CSR is the development of a working draft on an international standard for social responsibility. The working draft sets out several probable principles of CSR including, *inter alia*, legal compliance, recognition of stakeholders and their concerns, accountability, transparency, sustainable development, ethical conduct and the precautionary approach. The working draft is named the Guidance on Social Responsibility N113 Third Working Draft ISO26000 to be found at [www.iso.org](http://www.iso.org)

<sup>33</sup> Dashwood *Corporate Social Responsibility* 191.

<sup>34</sup> Commission of the European Communities, 2001.

<sup>35</sup> Mullerat (ed) *CSR* 97.

<sup>36</sup> The Global Compact is an initiative launched by the United Nations Secretary – General Kofi Annan as a set of nine basic principles that corporations should adhere to.

<sup>37</sup> United Nations 1999 [www.unglobalcompact.org](http://www.unglobalcompact.org)

*alia*, that corporations are expected to support a precautionary approach to environmental challenges by taking proactive steps and by avoiding serious and irreversible damage to the environment.<sup>38</sup>

King II acknowledges that social, ethical and environmental issues can no longer be regarded as secondary to usual business imperatives, and suggests that companies be required to report at least once a year on these 'non-financial' issues.<sup>39</sup> This suggestion supports the idea that CSR includes economic, social, ethical and environmental dimensions. CSR in this sense generally requires companies to conduct their business *bona fide* and to take active and responsible steps to reduce the impact of their operations on the environment, to protect the consumer's interests, to observe fundamental labour and human rights and to refrain from unethical practises.<sup>40</sup> CSR is furthermore expected to be integrated into all of a corporate entity's planning and daily activities. It is therefore not a responsibility that befalls a specific department, unit or particular activity only, but the responsibility of each part of the corporate entity.<sup>41</sup>

For purposes of this dissertation, CSR is defined as:

The voluntary recognition of a corporate entity that it should commit to, not only financial performance, but also to social and environmental performance. CSR covers the relationship between corporations and society with which they interact and in which they operate. CSR is a corporate entity's commitment to be accountable for its actions and its social and environmental footprint. It is also the alignment of a corporate entity's values and behaviour with the expectations and needs of its stakeholders.<sup>42</sup>

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<sup>38</sup> United Nations 1999 [www.unglobalcompact.org](http://www.unglobalcompact.org). There are many reported benefits to CSR including, *inter alia*, improved financial performance; enhanced brand image and reputation; increased productivity and quality; increased sale and customer loyalty; increased ability to attract, attain, motivate and develop employees; sharpen decision-making; reduce costs; improve risk management; and keeping up with competitors. ANON 2007 [www.csrnetwork.com](http://www.csrnetwork.com), Waiweru 2006 *Journal of Contemporary Management* 93-94.

<sup>39</sup> Wixley and Everingham *Governance* 107-116.

<sup>40</sup> Van Niekerk 2002 *South African Labour Bulletin* 62.

<sup>41</sup> Allouche (ed) *CSR* 41.

<sup>42</sup> These stakeholders include not only investors and customers, but also employees, suppliers, communities, special interest groups, the environment and society as a whole. In South Africa some ideas that accompany CSR are corporate citizenship, business ethics, corporate social investment and corporate sustainability.

## 2.3 Sustainable development

Corporate governance and CSR cannot be defined and understood without comprehension of the 'sustainable development' concept. In the *Report of the World Commission on Development and the Environment, Our Common Future*, 1987 (hereafter the Brundtland Report) the term 'sustainable development' was first coined and still is the most popular definition thereof.<sup>43</sup>

Sustainable development may be defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>44</sup> The Brundtland Report notes that if any change is to be made to environmental deterioration it should not be made in isolation of economic development and social concerns. It is, however, important to note that the lack of economic development creates its own kind of environmental stress. Economic development may negatively affect the environment by its demands on resources and resulting pollution.<sup>45</sup> To successfully achieve the goal of sustainable development, businesses must play a significant role, since they have a potentially major impact on the environment.<sup>46</sup> The fact that businesses play a significant role in achieving sustainable development is also acknowledged in international environmental instruments. Agenda 21 is, for example, a comprehensive action plan for a global partnership for achieving sustainable development.<sup>47</sup> It addresses social and economical aspects, conservation and resource management, roles of major groups and the means to implement this environmental soft-law instrument. Chapter 30 of Agenda 21 addresses the role of business and

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<sup>43</sup> The Brundtland Report served as catalyst for the United Nations Conference on Environment and Development in 1992 (hereafter Rio Conference). Glazewski *Environmental Law* 12–13. The Rio Declaration comprises of 27 principles based on the foundation of sustainable development. These principles reaffirm the principles in the 1972 Stockholm Declaration. Glazewski *Environmental Law* 35. For further discussion of the principles see Thornton and Beckwith *Environmental Law* 41.

<sup>44</sup> Chapter 2 of the Brundtland Report, Glazewski *Environmental Law* 12–15.

<sup>45</sup> Chapter 1 of the Brundtland Report.

<sup>46</sup> In chapter 8 of the Brundtland Report it is noted that industry extracts materials from the natural resource base and inserts both products and pollution into the human environment. It has the power to enhance or degrade the environment; it invariably does both'; International Institute for Sustainable Development 2002 [http://www.bsdglobal.com/sd\\_journey.asp](http://www.bsdglobal.com/sd_journey.asp). See Agenda 21, *Strengthening the Role of Business and Industry*, Chapter 30.

<sup>47</sup> Agenda 21 was developed in support of the Rio Declaration. Glazewski *Environmental Law* 35.



industry, emphasising the important role it plays in society as well as striving towards sustainable development.<sup>48</sup>

In South Africa, NEMA defines sustainable development as:

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.<sup>49</sup>

The importance of sustainable development in South Africa was recognised in, *inter alia*, *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*<sup>50</sup> where the Court observed, with reference to the constitutional environmental right, that:

'...the balancing of environmental interests with justifiable social and economic development is to be conceptualised well beyond the present living generation. This must be correct since s24 requires the environment to be protected for the benefit of 'present and future generations'.<sup>51</sup>

Moreover, the definition of 'environment' in South African law supports the notion that sustainable development relates to social, economic and environmental concerns. 'Environment' is defined in section 1 of NEMA as:

The surroundings within which humans exist and that are made up of -

- (i) land, water and 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 wellbeing;

It is clear that the definition of environment not only pertains to the natural environment but also includes social and economic components. The definitions of environment are thus therefore in line with, and serve to compliment the concepts of sustainable

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<sup>48</sup> Chapter 30.1 of Agenda 21, Glazewski *Environmental Law* 35.

<sup>49</sup> S 1(1)(xxix) of NEMA.

<sup>50</sup> 2004 (5) SA 124 (W).

<sup>51</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (W) at 143D.

development and CSR. Hence, although not mentioned explicitly, CSR is implied in the legal definition afforded to the environment and sustainable development.

For purposes of this dissertation the definition of sustainable development in NEMA will apply. Sustainable development is understood to imply a number of fundamental principles.<sup>52</sup> These principles include, *inter alia*, the principles of inter-generational equity and intra-generational equity, the polluter pays principle, the precautionary principle, the preventive principle and the duty of care principle. It also provides for a life cycle approach to be taken and the consideration of alternative approaches in order to be able to select the best practicable environmental option (hereafter BPEO).<sup>53</sup>

## **2.4 Linking the concepts**

CSR came to life in response to increased international focus on sustainable development with a shared focus on, integration of economic, social and environmental performance in, *inter alia*, the corporate sphere.<sup>54</sup> CSR is however particularly focused on the activities of corporate entities and the latter's contribution to achieving economic, environmental and social sustainability.<sup>55</sup>

Considering the definitions above, one can only but deduce a modern-day tendency which challenges corporations across the globe to make a paradigm shift towards sustainable development in not only financial terms.<sup>56</sup> CSR seems to be a facilitative vehicle to assist companies in making this shift towards sustainable development.<sup>57</sup> CSR should be integrated into the programmes, policies and plans of a corporate entity.<sup>58</sup> Corporate entities can, for example, play their part in sustainable development by means of CSR through implementing awareness- and educational programmes,

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<sup>52</sup> Thornton and Beckwith *Environmental Law* 42-43.

<sup>53</sup> Glazewski *Environmental Law* 16-19; Kidd *Environmental Law* 8-11; Thornton and Beckwith *Environmental Law* 40.

<sup>54</sup> Wixley and Everingham *Governance* 107.

<sup>55</sup> Jenkins and Yakovleva 2006 *Journal of Cleaner Production* 271-272.

<sup>56</sup> Hamann 2003 *Development Southern Africa* 238.

<sup>57</sup> Subramoney 2003 *Accountancy SA* 21, and Freemantle and Rockey (eds.) *Corporate Citizen* 7.

<sup>58</sup> Selman *Local Sustainability* 31.

endorsing public participation in decision-making that affects communities, investing in socio-economic upliftment and through a focus on, *inter alia*, cleaner technology, waste reduction and environmentally sound governance throughout the life-cycle of processes, products and services.<sup>59</sup>

CSR, however remains, unenforceable in the context of command and control type of regulation. Few concrete remedies exist where a company is not committed to CSR. The potential however of market-based regulation and CSR related requirements for improved business relationships and investments should not be underestimated. In South Africa, due to different factors such as cost, political-will, lack of knowledge and the presumed voluntary nature thereof, a vast number of industries and companies seem not yet to have embarked on CSR endeavours.<sup>60</sup> This issue is investigated further below. Considering, however, the aggressive growth in environmental law and policy in South Africa since the inception of the Constitution and improved focus on environmental law compliance and enforcement, the question arises as to whether or not the principles of CSR are not implicitly provided for or covered in the legal framework of the country. Should the legal framework indeed implicitly cover the underlying principles of CSR, it may have important effects as far as the traditional unenforceability and voluntary nature of CSR is concerned.

### **3. Analysis of South African environmental law**

#### **3.1 Introduction**

In order to determine the extent to which South African law implicitly or explicitly incorporates CSR, the following sections aim to review the scope and content of some environmental acts and aim to explore the extent to which some environmental acts require CSR. These specific environmental acts, as will be discussed below, were

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<sup>59</sup> Agenda 21, Chapter 30.

<sup>60</sup> However, there are a couple of major companies that have shown their commitment towards the environment. Some of these companies are, for example Toyota, Discovery Health, and Sasol which have shown that being environmentally responsible is good for business. See, *inter alia*, Freemantle and Rockey (eds.) *Corporate Citizen* 214.

chosen because these acts regulate different impacts that human activities have on the various environmental media.

### **3.2 Constitutional dimension**

Section 24 of the Constitution forms the basis of environmental law in South Africa. Section 24 comprises two components namely subsection (a) that is a traditional fundamental right, and subsection (b) that has the character of a socio-economic right.<sup>61</sup> Section 24 applies horizontally and vertically,<sup>62</sup> and reads as follows:

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

The fact that section 24 is horizontally applicable is significant, because this implies that all individuals (natural and juristic persons) have the constitutional obligation not to harm or negatively affect the environment of other right holders.<sup>63</sup> All individuals, including corporate entities, have the responsibility to uphold the right to an environment that is not harmful to their health or well-being. Section 24 allows everyone to enforce their environmental right against others in instances where their actions have a negative impact on their right to an environment that is not harmful to health or well-being.<sup>64</sup> It is thus a constitutional feature which may be employed to, for example, justify the enforcement of CSR.

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<sup>61</sup> Glazewski *Environmental Law* 72.

<sup>62</sup> S 24 should be read with s 8 of the Constitution which states that the Bill of Rights binds natural and juristic persons to the extent that it is applicable to such persons. The environmental right is thus horizontally applicable. Currie and De Waal *Bill of Rights* 524-525.

<sup>63</sup> Currie and De Waal *Bill of Rights* 524-525. Juristic persons include, *inter alia*, companies, closed corporations and associations.

<sup>64</sup> If a company or person does not exercise proper control, it can be held liable for actual damages as well as for imminent danger.

CSR is complimentary to the content of section 24. Corporations have a duty to prevent harm to the environment. In as far as section 24 is horizontally applicable the environment clause (read with section 38 of the Constitution and section 32 of NEMA) affords *locus standi* to any interested and affected party when a corporate entity seems to be non-compliant with the environmental right. CSR may be considered as a facilitative tool in which a company can be preventive in terms of environmental right violations that could result from its operational or other activities. The wording 'and other measures', in section 24(b) further obliges corporate entities to employ any appropriate measures to secure the ecologically sustainable development and use of natural resources.<sup>65</sup> The notion of CSR and the activities that form part thereof may, when interpreted extensively, be viewed as a suitable 'other measure' for corporate entities to comply with their constitutional obligations.

Section 32 of the Constitution provides for the right to access to information which has an important role in environmental protection efforts. This right is of cardinal importance in environmental law litigation, but is also an important tool to ensure informed public participation in decision-making processes.<sup>66</sup> This right provides any interested and affected parties with the right to access to any state information, as well as any information held by private bodies, including corporate entities, that are required for the protection of, amongst others, the environmental right.<sup>67</sup> The *Promotion of Access to Information Act*<sup>68</sup> (hereafter PAIA) was enacted to give effect to the right established in section 32.<sup>69</sup> The purpose of PAIA is to encourage a culture of transparency and accountability in public and private bodies, and to promote a transparent and accountable society in which people have access to information that enables them to

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<sup>65</sup> "Other measures' can include to mean, *inter alia*, administrative measures carried out in terms of environmental governance mandates, including the protection of natural resources, regulation of pollution, enforcement of environmental laws, and policy development. 'Other measures' may further include measures of an administrative, technical, financial or educational nature." Feris and Tladi *Environmental Rights* 263 and Kotze "Judicial Enforcement" 6-7. See s 4 below for discussion on other mechanisms that could fall within the meaning of 'other measures'.

<sup>66</sup> Currie and De Waal *Bill of Rights* 522.

<sup>67</sup> S 32 of the Constitution. However, in terms of the *Promotion of Access to Information Act* 2 of 2000 there is certain information that one does not necessarily have access to, these information is set out in chapter 4 of Part 2 pertaining to public bodies and chapter 4 Part 3 pertaining to private bodies.

<sup>68</sup> 2 of 2000.

<sup>69</sup> Currie and De Waal *Bill of Rights* 687.

exercise and protect their rights.<sup>70</sup> The key objective of PAIA is to promote effective governance in all public and private bodies. This can be done by empowering and educating people to know and understand their rights under PAIA in order for them to exercise their rights against public and private bodies.<sup>71</sup> Section 32 of the Constitution should also be read with section 31 of NEMA which pertains to access to environmental information.<sup>72</sup> Corporate sustainability reporting is a CSR tool that can be used by corporate entities to ensure that stakeholders are well informed and that the company operates in an open and transparent way.<sup>73</sup>

Section 38 of the Constitution establishes a very wide *locus standi*, which promotes the enforcement of all constitutional rights, including the environmental right.<sup>74</sup> Section 38 provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

This right gives a company's stakeholders (and any affected party for that matter) legal standing in order to protect their environmental right against the company whose activities have an adverse affect on the environment. For example, if a company, operating without the necessary permit or environmental authorisation, causes air pollution to such an extent that it has a detrimental effect on people, especially its neighbours and the community, it is clear that the company is not conforming to

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<sup>70</sup> Preamble of the PAIA.

<sup>71</sup> S 9(e)(i) of the PAIA.

<sup>72</sup> S 32 makes explicit provision for the access to environmental information held by the State which relates to the implementation of NEMA or any other law affecting the environment as well as information on the state of the environment and threats to the environment. Glazewski *Environmental Law* 98-99.

<sup>73</sup> Corporate sustainability reporting is the reporting by corporate entities across economic, environmental and social dimensions. See par 4.3.3 below further discussion on sustainability reporting.

<sup>74</sup> S 38 of the Constitution should be read with s 32 of NEMA

constitutional provisions and certainly not promoting CSR. Stakeholders can subsequently sue the company as well as force it to comply with its environmental law obligations and in this way also force the company to become more socially responsible.<sup>75</sup>

CSR is about the relationship between the company and its stakeholders. All stakeholders have legal standing in terms of section 38, as well as access to relevant information in terms of section 32 which can be used in order to protect their environmental right in section 24. Hence, a company must ensure that the relationship between the stakeholders and itself is nurtured by taking all interests of stakeholders into consideration. Considering the above sections it is derived that one may use a number of constitutional provisions in order to encourage corporate entities to incorporate CSR into their business decisions and activities. One may conclude that the Constitution requires CSR in that, in order to secure compliance to some constitutional provisions, the implementation of at least some varieties of CSR is a prerequisite.

### **3.3 Environmental legislation**

#### **3.3.1 NEMA**

NEMA is environmental framework legislation and is applicable to both the public and private sectors, to all environmental media, as well as to all industries. Section 2 outlines a number of environmental principles and these should guide everyone, also corporate entities in their daily decision-making pertaining to activities that may have an effect on the environment. The principles include, *inter alia*, the preventive principle, precautionary principle; polluter pays principle, transparency, life cycle approach, environmental assessment and TBL (insofar as the principles underline sustainability, since TBL is not explicitly provided for). It is argued that the environmental principles resonate the principles of CSR in that it is based on, *inter alia*, sustainable development, ethical conduct, transparency, prevention as well as the precautionary principle. By

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<sup>75</sup> See in this regard the case of the *Minister of Health & Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N).

incorporating these principles into all business decisions and operations, it seems inevitable that the BPEO will be applied in each situation, and, in that way ensures that the company adheres to CSR responsibilities.

NEMA provides in Chapter 5 for integrated environmental management. NEMA specifically makes provision in section 24 for environmental authorisations that need to be obtained for certain listed activities that are set out in regulations to NEMA.<sup>76</sup> In order to obtain such an environmental authorisation an environmental impact assessment (hereafter EIA) needs to be conducted.<sup>77</sup> EIA is a method of assessing the possible future environmental impact of activities and formulating mitigating measures to prevent this. This is in line with CSR. Public participation also plays an important role in the process of obtaining such an environmental authorisation.<sup>78</sup> All interested and affected parties must be informed of what is happening during all stages of the process as well as be given the opportunity to make comments on reports as well as state their concerns. This ensures that a company has to be transparent and take all stakeholders into consideration in order to be able to obtain an environmental authorisation and hence promotes good CSR practices.

Section 28 of NEMA places a general duty and positive obligation on everyone, including corporate entities, which cause, have caused or may cause pollution or degradation of the environment, to look after the environment. This duty relates to historical, present as well as future pollution and environmental degradation.<sup>79</sup> A corporate entity should take all reasonable measures to prevent pollution or degradation from occurring, continuing or recurring and should minimise and remedy pollution or

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<sup>76</sup> GN R 385, GN R 386 and GN R 387 in GG No 28753 of 21 April 2006.

<sup>77</sup> The listed activities are set out in GN R 386 and GN R 387. GN R 385 sets out the process that must be followed depending on the listed activities. There are two processes that can be distinguished. The one is an application subject to basic assessment regarding listed activities as set out in GN R 386. The other is an application subject to scoping and environmental impact assessment regarding listed activities as set out in GN R 387.

<sup>78</sup> Reg 56 of GN R 385.

<sup>79</sup> In *Chief Pule Shadrack & another v Gencor Limited & others*-case it was found that s 28 does not have retrospective effect.



degradation which has already been caused to the environment.<sup>80</sup> CSR activities may assist a corporate entity in realising these obligations as far as decision-making is concerned. By incorporating CSR into business decisions and thus into business activities, it will be possible for the company to know what their environmental risks are and thus enabling them to manage their environmental risks in such a manner that they prevent or minimise the impact that they have on the environment.

Chapter 7 of NEMA provides for the establishment of the Environmental Management Inspectorate (hereafter EMI). The EMI consists of environmental enforcement officials from different government departments situated in all three spheres of government.<sup>81</sup> Amongst others, officials employed by Department of Environmental Affairs and Tourism (hereafter DEAT), municipal officials and officials employed by other state organs may be designated as environmental management inspectors (hereafter EMIs). EMIs must monitor compliance with and enforce the specific environmental acts they have been mandated to enforce which include, *inter alia*, NEMA, and NEMBA.<sup>82</sup> Their powers range from routine inspections to administrative powers such as the issuing of compliance notices.<sup>83</sup> Since 2005 the EMI is specifically focusing their attention on the corporate sector in the aim to improve compliance with environmental legislation in South Africa. There is thus also a clear indication from government and its enforcement agencies that increasingly there is a need for corporate entities to pay sufficient attention to all legal requirements pertaining to their ecological footprint and environmental impact. Legal compliance is one of the CSR principles in that by ensuring that corporate entities comply with environmental law, good CSR practices are promoted.

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<sup>80</sup> The wording provides for a very wide duty of care on what seems to be a potentially limitless category of people or companies. When a person or company fails to take measures in order to comply with this duty of care, the DEAT may issue directives ordering to take measures. If there is still failure to comply, the DEAT will take measures on their behalf and recover costs.

<sup>81</sup> The EMI was created through an amendment to the NEMA that came into effect on 1 May 2005. Chapter 7 of NEMA now provides for environmental management inspectors to be designated by the Minister of DEAT and Macs.

<sup>82</sup> Ss 31D and 31G of NEMA. See also Glazewski *Environmental Law* 156.

<sup>83</sup> Ss 31 H en 31K of NEMA.

Section 32 of NEMA expands on the *locus standi* provision in section 38 of the Constitution.<sup>84</sup> *Locus standi* is given to anyone who may seek relief regarding any breach or threatening breach, of the principles in section 2 of NEMA. The reinforced emphasis on the right of individuals and groups of people to approach courts for relief in the case of environmental disasters puts pressure on corporate entities to be environmental compliant.

Section 34 of NEMA provides for pecuniary awards against persons, including corporate entities convicted of contravening various enactments in NEMA. This provision reiterates the need for environmental law compliance by corporate entities.<sup>85</sup> Section 34(7) makes provision for criminal proceedings against present as well as previous directors of corporate entities that omit or omitted to take certain steps in order to prevent degradation of the environment. Such directors that acted in a contra-CSR fashion can be held personally liable of an offence. In so far as the latter provisions may have severe consequences for corporate entities, it is important for corporations to ensure compliance to environmental legislation in order for directors not to be held personally liable which is possible through different CSR activities, since CSR is driven

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<sup>84</sup> S 32 reads as follows:

Any person or group of persons may seek appropriate relief in respect of any 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 person's 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.

<sup>85</sup> S 34(5) of NEMA states that whenever any manager, agent or employee does or omit to do an act which had been in his or her task to do or refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3. If the act or omission of the manager, agent or employee occurred because the employer failed to take reasonable steps to prevent the act or omission in question, then the employer shall be guilty of the said offence. However, no penalty other than a fine may be imposed, or be liable on conviction to penalties specified in the relevant law. This includes an order to pay an amount for loss or damages suffered, or the financial advantages enjoyed as a result of the offence. Furthermore, s 34(6) states that whenever any manager, agent or employee does or omits to an act which it had been his or her task to do or to refrain from doing on behalf of the employer he or she shall be liable to be convicted and sentenced as if he or she were the employer.

by management. In terms of section 424 of the Companies Act<sup>86</sup> if a director acts recklessly, personal liability is also inevitable. If a director is not acting in the best interest of the environment, it may be seen as reckless behaviour in terms of section 424. This provision is wide enough in order for courts to bring environmentally harmful behaviour by persons to book.

### 3.3.2 MPRDA

The activities of the mining industry not only have an impact on the community in which they operate, but also have a considerable impact on the environment. For the first time ever in South Africa, sustainable development and the environment have been given some effect in mining legislation.<sup>87</sup> The MPRDA specifically makes provision in section 37 for the section 2 principles of NEMA.<sup>88</sup> All prospecting, mining and related operations must be conducted in accordance with these principles.<sup>89</sup> This suggests that CSR principles, although not provided for explicitly in MPRDA, are implied and should be considered by the mining industry in all aspects of decision-making, especially since mining has such an immense impact on the environment.

The MPRDA considerably differs from the fundamental principle of company law, which states that directors of a company are not personally liable for the company's liabilities except, however, if a director act recklessly, especially in terms of the environment, personal liability is inevitable.<sup>90</sup> It is stated in section 38 of the MPRDA that directors can be held liable, jointly and severally, for any unacceptable negative impacts regarding the environment.<sup>91</sup> In terms of pollution the mine must, as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its

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<sup>86</sup> 61 of 1973.

<sup>87</sup> Glazewski *Environmental Law* 469.

<sup>88</sup> All the principles have a direct bearing on the mining sector, especially the principles of precaution, prevention and the polluter pays. Glazewski *Environmental Law* 480.

<sup>89</sup> S 37(1) of the MPRDA.

<sup>90</sup> Reckless behaviour in terms of s 424 of the *Companies Act* 61 of 1973 regarding the environment can be for example not taking reasonable measures to prevent or minimize harm to the environment, and not acting in the best interest of the environment. Glazewski *Environmental Law* 468.

<sup>91</sup> S 38(2) of the MPRDA

natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.<sup>92</sup> The mine is also responsible for any environmental damage, pollution or ecological degradation as a result of its operations and which may occur inside and outside the boundaries of the mining area.<sup>93</sup> Section 43 states that the holder of a right or permit will remain responsible for any environmental liability, pollution or ecological degradation and management thereof until a closure certificate has been issued.<sup>94</sup>

From these sections it is clear that a holder of a permit or right in terms of the MPRDA has a duty of care towards the environment and society as a whole. The mining legislation emulates vast resemblances with the notion of CSR and the components thereof. Since mining has a considerable effect on the environment and society, it is clear that the mining industry has a social responsibility towards its stakeholders. CSR can thus have a positive impact on the mining industry.

### 3.3.3 NWA

Chapter 3 of the NWA specifically aims to protect water resources. Part 4 deals with the prevention of pollution. Section 19(1) of the NWA mirrors the provisions set out in section 28 of NEMA which states that:

An owner of land, a person in control of land or a person who occupies or uses the land on 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 pollution of a water resource must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.<sup>95</sup>

This section imposes a general obligation on the persons as set out in section 19(1) to take reasonable measures in order to prevent pollution of a water resource. Thus, a

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<sup>92</sup> S 38(1)(d) of the MPRDA.

<sup>93</sup> S 38(1)(e) of the MPRDA.

<sup>94</sup> S 43(1) of the MPRDA.

<sup>95</sup> S 19(1) of the NWA.

very wide duty of care exists in terms of water resource protection. The section is also retrospective like NEMA, in that it also refers to pollution that has already been caused.<sup>96</sup> A catchment management agency may, for example, direct any person who fails to take reasonable measures to commence taking specific measures.<sup>97</sup> If a person or company does not comply with such a directive, the agency may take the measures it considers necessary to remedy the situation<sup>98</sup> and may recover all costs incurred jointly and severally from those persons stated in section 19(5).

Section 21 of the NWA sets out what constitutes a water use. Section 22 makes provision for the permissible use of water as well as setting out which water uses require general authorisation or which require a licence. Water use licensing requirements as set out in the NWA support CSR in that a company with a licence must operate alongside environmental parameters. If a company does not comply with all the requirements as set out in the licence the company will be guilty of an offence and will not comply with the CSR requirements.

In terms of CSR, corporate entities have a responsibility towards its stakeholders to use water resources in a manner that is not harmful to the environment.<sup>99</sup> Section 151(1)(i) of the NWA makes provision that a person will be guilty of an offence if he or she unlawfully and intentionally or negligently commits any act or omission which pollutes or is likely to pollute a water resource. In terms of section 154 whenever an act or omission by an employee or agent constitutes an offence, the employer will be liable to conviction for that offence. Thus, directors can also be liable in terms of the NWA. As was seen above, management should be the driving force of CSR in a company. If CSR

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<sup>96</sup> See *Gencor*-decision where the Court found that the duty of care clause does not have retrospective effect.

<sup>97</sup> S 19(3) of the NWA.

<sup>98</sup> S 19(4) of the NWA.

<sup>99</sup> Corporate entities not only have a duty of care in terms of s 19 regarding water resources, but also in terms of the common law. The Roman Law maxim '*sic utere tuo ut alienum non laedas*' meaning that one must use one's property in such a way as not to harm another, rings especially true with regard to water resources. See *Rainbow Chicken Farm (Pty) Ltd v Mediterranean D Woollen Mills (Pty) Ltd* 1963 (1) SA 201 (N) where there was pollution of the Sterkspruit river in KwaZulu-Natal, the court held that the polluter owes a common law duty of care towards others. Glazewski *Environmental Law* 549.

good practice is followed by the management of a company, the directors will less likely be liable, because preventative measure will have been taken by management in order to prevent pollution of a water resource in the first place.

### 3.3.4 NEMBA

The NEMBA is aimed at the conservation and sustainable use of biodiversity in South Africa.<sup>100</sup> The application of the NEMBA must be guided by the principles of section 2 of NEMA and be read in conjunction with any applicable NEMA provisions.<sup>101</sup> Section 4(1)(b) stipulates that the NEMBA is applicable to all human activity that affects biodiversity, and thereby also refers to activities of all corporate entities.

Section 2(a)(iii) of the NEMBA specifically makes provision for the fair and equal benefit-sharing amongst stakeholders regarding bio-prospecting involving indigenous biological resources.<sup>102</sup> In order to be able to engage in bio-prospecting one must be in possession of a permit. Acquiring a permit is a very complex procedure. The applicant must disclose all information prior to any application before such a permit is even contemplated.<sup>103</sup> The issuing authority must be satisfied that the interests of all stakeholders in the proposed bio-prospecting project are protected.<sup>104</sup> The permit is generally only issued by the issuing authority if the applicant has disclosed all material information and by doing so obtained the informed consent of the stakeholders regarding access;<sup>105</sup> if a material transfer agreement has been entered into, regulating

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<sup>100</sup> The NEMBA is based on the 1992 Convention on Biological Diversity which South Africa ratified in 1995.

<sup>101</sup> Ss 7 and 6(1) of the NEMBA.

<sup>102</sup> This is set out in more detail in Chapter 6 of the NEMBA.

<sup>103</sup> This includes an extensive disclosure of all financial and non-financial arrangements, including direct and indirect financial benefits.

<sup>104</sup> S 82(1)(a) and (b) define stakeholders as follow:

- (a) A person, including any organ of state or community, providing or giving access to the indigenous biological resources to which the application relates; and
- (b) An indigenous community –
  - (i) Whose traditional uses of the indigenous biological resource to which the application relates have initiated or will contribute to or form part of the proposed bio-prospecting; or
  - (ii) Whose knowledge of or discoveries about the indigenous biological resources to which the application relates are to be used for the proposed bio-prospecting

<sup>105</sup> Ss 82(2)(a) and 82(3)(a) of the NEMBA.

the provision of access;<sup>106</sup> and if they have entered into a benefit-sharing agreement that provides for the sharing of future benefits that may arise.<sup>107</sup>

CSR is implied through these requirements, which hence promote the inclusion of good CSR practices, by corporate entities. Corporations need to inform all stakeholders prior the engagement in activities as well as giving back to the community within which they operate. By meeting all the necessary requirements in order to obtain a permit, the corporate entity is sure to be in line with CSR practices.

### 3.3.5 NEMAQA

The NEMAQA aims to protect the atmospheric environment by providing measures for the enhancement of air quality in South Africa as well as the prevention of pollution and environmental degradation.<sup>108</sup> As is the case with the NEMBA, the application of the NEMAQA must be guided by the principles of section 2 of NEMA and be read in conjunction with any applicable NEMA provisions. Thus it also resonates the principles of CSR.

Chapter 4 of the NEMAQA deals with air quality management measures which centre around the listing and licensing of activities, provided for in sections 21 and 22 of the Act. No listed activities may be undertaken without an atmospheric emissions licence in terms of Chapter 5 of the NEMAQA. The licence holder needs to comply with all the requirements as set out in the licence. If the requirements are not met the licence can be revoked and the licence holder will be guilty of an offence. In order for a company to be in line with the principles of CSR, regarding to air as an environmental media, the company needs to comply with all the requirements of the licence and so be more likely to be environmentally responsible.

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<sup>106</sup> S 82(2)(b)(i) of the NEMBA.

<sup>107</sup> S 82(2)(b)(ii) of the NEMBA

<sup>108</sup> S 2(a)(i) and (ii) of the NEMAQA.

### 3.3.6 NHRA

The NHRA is the central act regulating the management of South Africa's heritage resources.<sup>109</sup> The NHRA aims to empower civil society to nurture and conserve their heritage resources in order to leave it behind for future generations to use and enjoy. The NHRA sets out several principles pertaining to heritage resources management.<sup>110</sup> Almost similar to the NEMBA, the NHRA principles states that relevant communities should be consulted regarding how these heritage resources should be managed. This should be done with respect to cultural values as well as making a contribution to social and economic development.

Section 43 of the NHRA makes provision that the Minister may publish regulations on financial incentives for the conservation of heritage resources.<sup>111</sup> In terms of section 48 certain requirements must be met regarding a permit in terms of the NHRA. Section 50 also makes provision, as in NEMA, for heritage inspectors which should see to the enforcement and compliance in terms of the sections of the NHRA.

This act may imply for companies that certain principles must be followed in managing a heritage resource and in order to develop<sup>112</sup> on a heritage site a corporate entity will first have to obtain a permit from the South African Heritage Resource Agency. If such a permit is obtained, the corporate entity still has a duty of care regarding the use of the heritage resource as heritage resources forms an important part of the history and

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<sup>109</sup> Glazewski *Environmental Law* 518.

<sup>110</sup> S 5(1)(a)–(d) of the NHRA.

<sup>111</sup> This is an example of market-based instruments that can facilitate CSR. It will be discussed below.

<sup>112</sup> "development" is defined in s 1 of the NHRA as any physical intervention, excavation, or action, other than those caused by natural forces, which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future well-being, including -

- (a) construction, alteration, demolition, removal or change of use of a place or a structure at a place;
- (b) carrying out any works on or over or under a place;
- (c) subdivision or consolidation of land comprising, a place, including the structures or airspace of a place;
- (d) constructing or putting up for display signs or hoardings;
- (e) any change to the natural or existing condition or topography of land; and
- (f) any removal or destruction of trees, or removal of vegetation or topsoil.



beliefs of communities and must thus be managed in such a way that acknowledges the right of affected communities to be consulted. For example, when a mining company find graves on its property, it should fence off the graves as well as make it accessible to the community in order for them to visit the graves. Thus although CSR is not explicitly provided for, some of its principles including public participation, transparency, and sustainable development are at least eminent in some of the provisions.

In summary, the acts discussed above require companies to, *inter alia*, be in possession of certain environmental licences that permit them to commence or continue with certain activities. If the requirements as set out in the licences are not met, the company involved will be at fault and guilty of an offence. This can result in directors being personally liable for damage caused. In terms of CSR these licence requirements force companies to operate alongside environmental requirements. Evidently also, public involvement is crucially important in achieving many of the aims set by the environmental laws in South Africa. Hence, the acts discussed have been observed not to explicitly provide for CSR, but CSR is implied through the application of the NEMA section 2 principles as well as that consideration must be given to the environment through requirements set out in permits and licenses.

### **3.4 Case law**

In order to estimate whether South African environmental law provides for CSR activity on the part of corporate entities, it may be useful to briefly consider the outcome of the Court's decision in the *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others*.<sup>113</sup>

In this matter the applicant was the Department of Water Affairs and Forestry (hereafter DWAF) and the respondents were a number of mining companies in the North West Province. A directive was given by DWAF directing the mines to pump underground

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<sup>113</sup> *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006 JOL 17516 (W).

water in order to avoid pollution.<sup>114</sup> The mines, however, failed to comply with the directive. DWAF brought an urgent application for an order declaring the mines in contempt of court, subsequent to their failure to comply with a court order, which ordered them to comply with provisions of directives issued under section 19 of the NWA.<sup>115</sup> Section 19 of the NWA establishes a duty of care in terms of water resources as discussed above.

In order to avoid liability, all directors resigned simultaneously.<sup>116</sup> The Court found this action not to conform to good corporate governance which is essential for the well-being of a company.<sup>117</sup> The Court stressed the following:

The King Committee, correctly in my view, stressed that one of the characteristics of good corporate governance is social responsibility. The Committee stated as follows: "A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration (see King Report March 2002 at 12 paragraph 18.7)."<sup>118</sup>

Attempts by directors to escape environmental liability may in future be dealt with greater severity by the judiciary. In the *Stilfontein*-case the Court emphasised the important role of CSR in terms of environmental matters and that "business as usual" for

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<sup>114</sup> The mining area underground is linked to each other by way of tunnels. Thus, if one mine should stop pumping out water the other mines will overflow and this will be the cause of great water pollution. Par 1 of [2006] JOL 17516 (W).

<sup>115</sup> The interest of the applicant lies therein that the mining activities of the respondents resulted in a situation where water resources will be polluted if water is not extracted from underground and treated properly. Par 13.2 of [2006] JOL 17516.

<sup>116</sup> The court found this to be a very unusual occurrence. This occurrence was so unusual that the court could not find any precedent in South African law to guide its decision. Par 16.1 of [2006] JOL 17516.

<sup>117</sup> The Court also stated that a company's directing mind and will is vested in its directors, who cannot just walk away when it is convenient for them to do so. If the respondents actually applied their minds to the matter of the directive given they would have realised that the first respondent in the matter was indeed capable to comply with the directive. Par 16.5 of [2006] JOL 17516 The Court also stated that in South Africa, the corporate community widely accepted the findings and recommendations of King II, par 16.7 of [2006] JOL 17516.

<sup>118</sup> Par 16.9 of [2006] JOL 17516.

mines can no longer continue.<sup>119</sup> The Supreme Court of Appeal (hereafter the SCA), however overturned the judgement in the recent case of *Kebble and others v Minister of Water Affairs and Forestry*.<sup>120</sup> Notwithstanding the judgement of the SCA, it is clear that the courts are starting to recognise the importance of CSR and will possibly in future require and enforce CSR, not only for mines but also other corporate entities. The Court in the *Stilfontein*-case leaves us with the idea that CSR can be used as an instrument by corporate entities to facilitate their environmental duties.

## **4. Regulatory mechanisms for CSR**

### **4.1 General**

An evaluation of the extent to which South African environmental law provides for the inception of CSR also requires, *inter alia*, consideration of the existing mechanisms or tools in law that complement and/or may indirectly necessitate the inception of CSR activities in the corporate sphere.

The enhancement of environmental performance (and hence at least also the environmental requirement of CSR), can be achieved by means of applying different types of environmental management tools. These include, *inter alia*, 'command and control' type of regulatory instruments, civil-based instruments, market-based instruments and self-regulation.<sup>121</sup>

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<sup>119</sup> The Court extensively explored and applied the provisions of the NWA. Reference to NEMA and the MPRDA were also made. No attempt, however, was made to critically interpret and apply the provisions of these acts.

<sup>120</sup> *Kebble and others v Minister of Water Affairs and Forestry* [2007] JOL 20659 (SCA).

<sup>121</sup> Kidd 2002 SAJELP 21-50; Du Plessis and Nel "Environmental Governance" 1; Nel and Du Plessis 2001 SAJELP 13. These environmental management tools should be used to achieve sustainability. As a rule one would use the 'command and control'-instrument however, there is a movement towards alternative regulatory approaches, Kidd 2002 SAJELP 28.

## 4.2 Existing regulated instruments

### 4.2.1 'Command and control' - type regulation

'Command and control' - type regulation is based on the assumption that human behaviour that impacts on the environment needs to be regulated by means of a range of legislative standards, prohibitions and restrictions and that any person who contravenes these should be sanctioned.<sup>122</sup>

The efficient use of this type of regulation requires a strong legislative framework and enforcement structures.<sup>123</sup> In South Africa, NEMA makes provision for the use of, *inter alia*, model by-laws,<sup>124</sup> authorisations,<sup>125</sup> permits, licences,<sup>126</sup> requests for information,<sup>127</sup> directives and orders,<sup>128</sup> reporting,<sup>129</sup> inspections, prosecutions<sup>130</sup> and penalties,<sup>131</sup> interdicts and restraint orders,<sup>132</sup> the setting of standards;<sup>133</sup> environmental restoration orders,<sup>134</sup> liability reforms<sup>135</sup> as well as audits.<sup>136</sup> These all fit 'command and control' - type regulation.

The problem with 'command and control' - type of regulation is that it can be inflexible and inefficient. It generally focuses on rights, not interests; discourages innovation and

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<sup>122</sup> Paterson 2006 *PER* 1.

<sup>123</sup> This includes legislation, access to justice, competent judiciary and penalties.

<sup>124</sup> S 46 of NEMA. These model by-laws may provide for environmental management performance audits to be conducted. In terms of s 26(2)(d)(i) the government's performance is reported on by means of an annual audit on Agenda 21 matters.

<sup>125</sup> S 24 of NEMA.

<sup>126</sup> The issuing of permits, licences, authorisations and directives are still done in terms of sectoral-specific legislation. Nel and Du Plessis 2001 *SAJELP* 29.

<sup>127</sup> PAIA as well as s31 of NEMA.

<sup>128</sup> S 28(7) of NEMA.

<sup>129</sup> S 28(5) of NEMA.

<sup>130</sup> S 34 of NEMA.

<sup>131</sup> S 44(3) of NEMA.

<sup>132</sup> This is dealt with in terms of common law.

<sup>133</sup> S 7(3)(e) of NEMA read with s 146(2)(b)(i) of the Constitution.

<sup>134</sup> Ss 28 and 30(6)-(9) of NEMA.

<sup>135</sup> S 28(8) of NEMA.

<sup>136</sup> It is essential that all three dimensions of sustainable development be covered by the audit. Elkington *Cannibals* 373.

is often environmental-media specific.<sup>137</sup> This form of regulation is dependent upon effective enforcement by government, and the availability of sufficient resources such as manpower, technology and finances.<sup>138</sup> Traditional regulatory systems such as 'command and control' - type systems are therefore not the primary drivers for socially responsible business behaviour. However, they are expected to continue to play a role in environmental performance, particularly to the extent that they may provide incentives to internalise the external costs of environmental impacts.<sup>139</sup>

'Command and control' - type regulation facilitates CSR by way of licence and permit requirements as was seen from the above legislation. Although this is a good method to ensure compliance with CSR principles, and creating a level playing field by setting minimum legal requirements, it is inflexible and leaves little room for innovative CSR practices.

#### 4.2.2 Civil-based regulatory instruments

Civil-based regulatory instruments as opposed to 'command and control' - type of regulatory instruments include, *inter alia*, tools such as environmental education;<sup>140</sup> public awareness of environmental matters,<sup>141</sup> improved access to information,<sup>142</sup> public participation, increased *locus standi*, class actions, improved access to courts,<sup>143</sup> green

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<sup>137</sup> Kidd 2002 SAJELP 27.

<sup>138</sup> Progress is being made regarding the enforcement of environmental legislation by means of EMIs who has the mandate to see to the enforcement and compliance of certain environmental legislation.

<sup>139</sup> The idea behind the polluter pays principle is that polluter must bear the costs of pollution and not society at large. When referred to externalities, it means that the negative costs of producing a product is not built into product costs, but are borne by society at large. Glazewski *Environmental Law* 19.

<sup>140</sup> S 2(4)(h) of NEMA.

<sup>141</sup> Ss 2(4)(f) of (g) and 3 of NEMA.

<sup>142</sup> S 31(2) of NEMA makes provision for the Minister to make regulations regarding access of members of the public to privately held environmental information. S 31 must be read with s 32 of Constitution which is the right of access to information. The *PAIA* also formulates a general right of access to information held by the state and private institutions.

<sup>143</sup> S 32 of NEMA.

rights,<sup>144</sup> eco-labelling, private prosecution,<sup>145</sup> beneficial cost awards<sup>146</sup> and the protection of whistle blowers and workers.<sup>147</sup>

Most of these tools are provided for in South African legislation, if one considers for example improved access to information provided for in PAIA as well as environmental information in terms of section 31 of NEMA; public participation is a key factor in obtaining an environmental authorisation in terms of section 24 of NEMA. It is however also one of the principles in section 2 of NEMA and thus also applicable to the MPRDA and NEMBA.<sup>148</sup> Section 31 of NEMA also provides for the protection of whistle blowers. The wide *locus standi* that has been established by section 32 of NEMA and section 38 of the Constitution is also important as a civil based regulatory instrument or tool. Any interested and affected party now has the right to approach courts in the case where environmental rights and other statutory environmental provisions have been infringed. This certainly may contribute to making corporate entities more environmentally compliant.

Civil-based regulatory instruments give society the power to stand up against corporate entities. Not only do interested and affected parties now have *locus standi* in respect of environmental matters, but they also have access to any relevant information held by

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<sup>144</sup> S 2(4) read with s 32 of the Constitution.

<sup>145</sup> S 33 of NEMA.

<sup>146</sup> Ss 33(3)-(4) and 34(4) of NEMA.

<sup>147</sup> S 31(3)-(8) of NEMA.

<sup>148</sup> Public participation is very important for CSR and must be promoted since it involves all of a company's stakeholders. Public participation calls for a continuous two-way communication process through which environmental concerns and needs are investigated and solved by the proponent as well as involving full public understanding of the processes and mechanisms. NEMA mandates public participation in several sections, *inter alia*, s 2(4)(f), s 23(2)(d), s 24(7)(d) and s 25(3)(f), as well as in the environmental impact assessment (hereafter EIA) regulations and the EIA guideline document of the Department of Environmental Affairs and Tourism (hereafter DEAT). The objectives of public participation are to educate and inform the public in terms of environmental matters, to identify problems, values, needs and attitudes, to help find solutions to problems, conflict resolution and to adhere to green rights. There are advantages and disadvantages to public participation. Some advantages to public participation are that it boosts public confidence in proposed projects, it can improve relations, it makes planning and decision-making more transparent, it empowers the public, it accommodates public concerns and it provides useful information. The disadvantages of public participation are that it makes project planning more complex, there is an uncertainty about the success of the developments, potential delays, it can be costly, and the technical issues are not always understood by the public. See further the *Draft National Policy Framework for Public Participation* of 2005.

the corporation which may be required to be successful in court. Corporate entities may apply CSR principles and good practices by making use of civil-based instruments as an alternative governance instrument, to not only become legally compliant but also to be more socially and environmentally responsible.

#### 4.2.3 Market-based regulatory instruments

Market-based regulation is not foreign to the South African legal framework. Recently, the National Treasury released a draft policy paper for discussion entitled: *A Framework for Considering Market-Based Instruments to Support Environmental Fiscal Reform in South Africa*, 2006 (hereafter Draft Policy Paper).<sup>149</sup>

The Draft Policy Paper defines market-based instruments as:

“...a group of policy instruments that seeks to correct environmentally-related market failures through the price mechanism.”<sup>150</sup>

Market-based regulatory instruments include, *inter alia*, instruments such as incentives and awards, disincentives, tradable permits, depository refund systems, security deposits, environmental charges, trade restrictions, pricing policies, differential indirect taxes, tax concessions, subsidies, product charges, resource charges, emission charges, process charges, two-tier tariffs, green purchasing, user fees and a national environmental fund.<sup>151</sup>

The Draft Policy Paper examines, *inter alia*, concepts such as “green taxes” or “environmental taxes” which are market-based instruments. These taxes aim to adjust existing revenue laws to yield results that are, in essence, friendly to both the environment and the economy and which may provide financial incentives for industry to be more environmentally responsible. The benefits of these taxes may even improve

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<sup>149</sup> National Treasury Market-Based Instruments: Draft Policy Paper, 2006.

<sup>150</sup> National Treasury Market-Based Instruments: Draft Policy Paper 2006, 2.

<sup>151</sup> Nel and Du Plessis 2001 *SAJELP* 16; Paterson 2006 *PER* 3.

foreign policy by ensuring compliance by South Africa with multilateral environmental agreements, such as the Kyoto Protocol.<sup>152</sup> Some existing green taxes include, *inter alia*, vehicle taxation,<sup>153</sup> product taxation<sup>154</sup> and aviation taxation.<sup>155</sup> Unfortunately, these taxes are at the moment solely used to increase tax revenue with minimal direct benefits to the environment.

Be this as it may, environmental taxes may contribute to solving environmental problems and ensure sustainable economic growth and development in South Africa. Green taxes also discourage behaviour that threatens our already fragile environment. The same holds true for CSR practices, which encourage corporate entities to make decisions that have the least negative impact on the environment. CSR enables corporations to turn what seem to be obstacles into opportunities which benefit the environment.<sup>156</sup> Market-based regulatory instruments encourage corporations with financial incentives to make use of CSR practices.

### **4.3 Self-regulation**

#### **4.3.1 General**

As opposed to regulatory instruments provided for in legislation, self-regulation refers to voluntary initiatives taken by the private sector in order to ensure environmentally sustainable practices. Self-regulatory tools include, for example, international agreements, co-operative agreements, the implementation of environmental management systems or other forms of controlled self-regulation inclusive of reporting in terms of sustainability performance. Some of these instruments are briefly discussed.

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<sup>152</sup> Other advantages that market-based instruments offer include that it offers a greater flexibility to establish efficient practices, as well as acting as incentive for innovative practices, it is more cost-effective and it is a source of government revenue. Paterson 2006 *PER* 3.

<sup>153</sup> This includes customs and excise duty on vehicles and road licensing fees.

<sup>154</sup> This is for example the plastic shopping bag levy. GN R 625 of 9 May 2003: Plastic carrier bags and plastic flat bags in terms of s 24(d) of *Environment Conservation Act* 73 of 1989.

<sup>155</sup> This includes aviation fuel levies, airport taxes and passenger departure tax.

<sup>156</sup> The plastic bag levies, for example, opened up a market for the production of more durable shopping bags which is more environmental friendly than the normal plastic bags.



#### 4.3.2 Voluntary environmental agreements

There are different types of voluntary environmental agreements that can be entered into. Voluntary environmental agreements can be made between industries themselves, between industry and the community or between industry and any sphere of government. These can include, *inter alia*, unilateral agreements,<sup>157</sup> private agreements,<sup>158</sup> negotiated environmental agreements, contractual agreements,<sup>159</sup> and public voluntary agreements.<sup>160</sup>

South African environmental legislation provides for a specific type of environmental agreement that compliments the idea of self-regulation. An environmental management co-operative agreement (hereafter EMCA) is a co-regulated instrument whereby an interactive relationship is established between government and industry in order to improve the environmental performance of an industry beyond or in accordance with the minimum requirements of law. NEMA sets out the mandate for EMCAs in section 35 of the Act. The benefits regarding EMCAs are that such agreements may be reached and amended faster than other instruments; it is more focused on specific needs and is more flexible than other instruments; and EMCAs build relationships and gives greater business certainty. It may also be used as an alternative tool for conflict resolution.<sup>161</sup>

Voluntary environmental agreements are promising tools that can be used by corporate entities to facilitate CSR practices, by engaging either with government or with the community in order to reach an agreement that suite everyone involved. Since it is voluntary, it is more likely that the parties will keep to the conditions in the agreement, as it was initiated by the parties themselves.

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<sup>157</sup> This may include environmental improvement programmes defined by the private sector.

<sup>158</sup> For example contracts between private companies and those affected.

<sup>159</sup> This may be agreements between civil authorities and industry and/or the public.

<sup>160</sup> Paton *Voluntary Environmental Initiatives* 38-39.

<sup>161</sup> For further in-depth discussion see Scholtz *Milieuconvenanten* 171-224 and Fischer *EMCAs* 1-71.

### 4.3.3 Sustainability reporting

Sustainability reporting refers to a situation where a corporate or other body voluntarily opt to report on performance based on a number of pre-determined performance indicators. Of particular relevance in the context of CSR is the notion of Corporate Sustainability Reporting. Corporate Sustainability Reporting is the process of reporting on a corporate entity's non-financial activities. Such reports concern the extent of the impact of corporate entity activities and are influenced by the environment and other stakeholders.<sup>162</sup> In recent years there has been an upward trend in sustainable reporting. The worldwide growth of socially responsible investment funds, investment rating systems such as the Dow Jones Sustainability Index, JSE and investment policy disclosure requirements are placing financial pressure on corporate entities to make non-financial disclosures in this respect.<sup>163</sup>

The Global Reporting Initiative (hereafter GRI) is a multi-stakeholder process and independent institution that was initially convened by the Coalition for Environmentally Responsible Economies (hereafter CERES), along with the United Nations Environmental Programme (hereafter UNEP). The GRI's mission is to develop and publish globally applicable Sustainability Reporting Guidelines. These guidelines, which are voluntary in nature, can be used by organisations to guide them on how they should report in their Sustainability Report or Annual Report on their TBL performance in terms of all their activities, products, and services.

The report is usually structured around a Chief Executive Officer statement, key environmental, social and economic indicators, as well as a profile of the reporting entity, descriptions of relevant policies and management systems, stakeholder relationships, management performance, operational performance, product performance and a sustainability overview. GRI has mandate as an international

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<sup>162</sup> Stakeholders include employees, customers, suppliers, government investors, NGOs and the community. Mitchell, Hill and Stobie 2005 *Southern African Journal of Accountability and Auditing Research* 67.

<sup>163</sup> This is because of pressures that society and NGOs are putting on corporate entities to perform Ballou, Heitger and Landes 2006 *Journal of Accountancy* 65.

standards body, to make sustainability reporting as routine as financial reporting, while achieving the highest standards of consistency and strictness.<sup>164</sup>

Sustainability reporting as a self-regulatory tool is of significance to good CSR practices as it is a key tool that is used to engage with stakeholders as well as making relevant information easily available to all stakeholders. It also encourages a company to be open and transparent in the way the operations are managed, which is also in line with the principles of CSR.

#### *4.3.4 Environmental management systems and standards*

Environmental management systems (EMS) and standards provide another increasingly popular self-regulatory tool. The increasing demand by the private sector for internationally recognised codes of practice or standards that define the minimum requirements for sound environmental management practices brought about, amongst others, the environmental management standard ISO 14001:1996.<sup>165</sup> The standard was generated by the International Organisation for Standardisation (hereafter ISO) by means of an international consensus process. Organisations that adopt and apply ISO14001 based management systems are generally speaking respected for their environmental achievements worldwide.<sup>166</sup> The requirements have been revised and improved by the follow-up ISO 14001:2004.<sup>167</sup>

ISO 14001 specifies the requirements for environmental management systems. These systems are based on the generic 'Plan, Do, Check, Act' (hereafter PDCA) cycle of

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<sup>164</sup> For further information visit [www.globalreporting.org](http://www.globalreporting.org)

<sup>165</sup> This is a specification standard that defines the minimum requirements for environmental management systems. Some other initiatives of interest are AA1000, The Committee of Inquiry, Dow Jones Sustainability Index, Ethical Trading Initiative, Global Sullivan Principles, London Benchmarking Group, SA8000, OECD Guidelines for Multinational Corporation and World Business Council for Sustainable Development. These will not be discussed as South Africa primarily uses ISO.

<sup>166</sup> Nel and Du Plessis 2002 *SAJELP* 52.

<sup>167</sup> Companies had until 15 May 2006 to make the transition to the new standard. On that date the old standard had expired. So if the company is now ISO14001:1996 certified they will have to update their environmental management system in order to meet the new ISO14001:2004 requirements.

activities, which are known as the Deming model of management.<sup>168</sup> The Deming management model requires the formulation of a structured plan of action to address identified gaps. ISO 14001 can be used to ensure sustained compliance with the law by means of the Deming PDCA cycle.<sup>169</sup> ISO 14001 also demands the implementation of all intentions, compliance with legal requirements, as well as continual improvement of the environmental management system's performance.<sup>170</sup> The process of continual improvement implies that managers must implement measures in order to continually improve on all their systems, activities, products and services, as well as be able to address their environmental impacts.

Organisations that meet the requirements of the ISO14001 certification are believed to build their confidence with customers, suppliers, employees, investors and the society within which they have to earn their 'licence to operate'. Certification demonstrates, *inter alia*, that the environmentally friendly approach has been integrated into the processes of an organisation and is based on self-initiative and own commitment.

Good CSR practices is a direct result from the implementation of an EMS and thus inevitably form an essential part of an corporate entity's sustainability management that will provide several benefits to the corporation such as ensuring legal compliance by going beyond minimum requirements, identification of relevant environmental issues, minimization of risks and pollution within the organisation, reduce waste management, savings on consumption of energy and materials, enhanced competitiveness, gain in reputation and image, better performance in external rating and assessment, and it lays a good foundation for environmental and sustainability reports by putting in place a framework for continual improvement of environmental performance.<sup>171</sup> These reports are necessary especially when it comes to triple bottom line reporting.<sup>172</sup>

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<sup>168</sup> Nel and Du Plessis 2002 *SAJELP* 52, Nel and Du Plessis 2001 *SAJELP* 17-19.

<sup>169</sup> Nel and Du Plessis 2002 *SAJELP* 53.

<sup>170</sup> Introduction of ISO 14001:2004.

<sup>171</sup> See [www.iso.ch/](http://www.iso.ch/) for more information on ISO 14001.

<sup>172</sup> De Clercq *Sustainability* 2. 'Triple bottom line approach means actively managing and reporting on all dimensions (social, environmental and economic) of company performance.' Manaaki Whenua Landcare Research 2006 [www.landcareresearch.co.nz/about/tbl\\_reporting.asp](http://www.landcareresearch.co.nz/about/tbl_reporting.asp). Companies are becoming aware that they should be socially responsible if they want to be economically successful.

In summary, there seems to be a shift away from the traditional 'command and control' - type of regulation towards alternative environmental governance approaches, such as civil-based instruments, market-based instruments as well as self-regulatory instruments, which results in the innovative integration of multiple environmental management tools and governance instruments.<sup>173</sup>

Legislation is to some extent a result of compromise so there would be various forces that may well bring the relevant standards down as compared to what might be ideal.<sup>174</sup> The opportunities and benefits posed for corporations by CSR include, *inter alia*, that corporations can set their own higher standards that must be conformed to in order to be in line with international standards as well as gaining a competitive edge in its field.

Failure to take note of CSR can have an impact on a corporate entity's reputation and image. However, corporate entities that do pay attention to CSR enjoy the benefits of, *inter alia*, gaining the trust of investors and other stakeholders as well minimizing their ecological footprint.<sup>175</sup> It is expected of corporate entities to not only comply with legislation but to go beyond the necessary and establish good relationships with all stakeholders reflecting consideration for communities and the environment. This is possible, if the management of a corporate entity implements good CSR practices throughout the corporate entity's activities, products and services. Openness and performance that promotes confidence and trust should lie at the heart of the corporate entity, who seeks to enjoy a long term 'licence to operate'.<sup>176</sup>

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Companies are starting to demonstrate their commitment towards the environment by means of so-called triple bottom line reporting. Allouche (ed) CSR 146.

<sup>173</sup> Nel and Du Plessis 2001 *SAJELP* 25.

<sup>174</sup> Mongalo 2004 *THRHR* 275.

<sup>175</sup> Hawkins DE CSR 115.

<sup>176</sup> Holliday, Schidheiny and Watts *Walking the talk* 22.

## 5. Conclusion and recommendations

This dissertation aimed to establish the extent to which the unenforceable notion of CSR or at least some components thereof, feature in South African environmental legislation.

CSR is a concept that is becoming increasingly important for corporate entities, globally and in South Africa. Corporate entities are responding to CSR either by trying to keep up with fast changing legislation (inclusive of environmental legislation) or by implementing CSR on a self-regulatory basis. A corporate entity that follows a policy of openness and transparency will choose to be responsible especially in terms of their social and environmental impacts.<sup>177</sup> CSR is based upon the concept of sustainable development with a focus on the so-called TBL and is situated in the realm of good corporate governance.

With reference to NEMA, NWA, NEMBA, NEMAQA, NHRA and the MPRDA it is possible to arrive at the elementary conclusion that although CSR does not feature explicitly as an enforceable obligation in any environmental law instrument, CSR is implied and can assist in facilitating compliance with the principles that underpin CSR.

The mere implied provision for CSR as well as the voluntary nature thereof may be problematic because corporate entities are not legally obliged to comply with CSR principles, hence it is in light of the discussions in this dissertation suggested that CSR be explicitly incorporated into environmental legislation in order to make corporate entities more aware and liable in terms of their social and environmental responsibility. While initially merely provided for as a guideline to take into consideration by decision-makers, it will create the possibility to promulgate legislation in order to make it enforceable in coming years. The first step towards CSR should thus be legal compliance and then by making use of the various different alternative governance mechanisms available to achieve it.

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<sup>177</sup> Holliday, Schidheiny and Watts *Walking the talk* 22.

Although CSR is only implied in environmental legislation, certain mechanisms can be applied to strengthen the principles of CSR. The different mechanisms that are available to achieve CSR include, *inter alia*, command and control-type regulation, civil-based regulatory instruments, market-based regulatory instruments as well as self-regulatory mechanisms such as voluntary environmental agreements, EMS, standards and sustainability reporting. It is crucial to use management tools in order to monitor and evaluate the overall corporate performance.<sup>178</sup> This necessitates companies to report on key performance areas that relate to company values and purpose, stakeholder expectations, governance systems and global issues.<sup>179</sup> Companies should report to other stakeholders, apart from the shareholders, to whom it has a responsibility. This includes employees, customers, suppliers, the broader community and even the environment in which they operate.<sup>180</sup> In order to achieve sustainability through CSR it is suggested that a more hybrid use of multiple governance instruments be considered in order to protect the environment more effectively.<sup>181</sup>

Corporate entities have a social responsibility towards society and especially towards the environment in an era where the environmental bounty of the world seems at risk. In order for a corporation to be in line with TBL as well as with the principles of CSR, corporate entities need to minimise their ecological footprint and give back to the community within which they operate. For a company to be in line with CSR principles, and thus minimizing its ecological footprint, it is recommended that the company advocates, *inter alia*, for internal policies that support good corporate governance, sustainability and energy efficiency, supports investments that are both environmentally sustainable and make good business sense, undertakes low-carbon innovations from energy-saving to recycling. This could also set an example to all of the company's stakeholders.

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<sup>178</sup> The use of an external evaluation is recommended. Kakabadse and Morsing (eds) CSR 103.

<sup>179</sup> Manaaki Whenua Landcare Research 2006  
[www.landcareresearch.co.nz/about/tbl\\_reporting.asp](http://www.landcareresearch.co.nz/about/tbl_reporting.asp).

<sup>180</sup> Clutterbuck *et al* *Actions Speaks Louder* 11.

<sup>181</sup> Nel and Du Plessis 2001 SAJELP 14.

In conclusion it is suggested that, in light of the state of the environment internationally and in South Africa, government should consider providing explicit legal CSR obligations to improve corporate governance. Whilst sufficient implicit provisions have been included in the body of law that came into being since 1996, explicit provisions may be required for the principles of CSR to become truly enforceable. The legislature may, for example, focus on aspects of CSR such as public participation in corporate environmental decision-making, public environmental performance reporting, and EMS certification. The benefit is that a solid body of law already exists which only need to be extended or amended to explicitly provide for CSR in some instances. This, together with a hybrid use of innovative governance approaches and mechanism may significantly contribute to entrench and promote CSR in South Africa.



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