

# THE POLLUTER PAYS PRINCIPLE AND ENVIRONMENTAL LIABILITY IN SOUTH AFRICA

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## 1 Introduction

Environmental liability rules are crucial in a country such as South Africa. The issue of liability pertaining to pollution of or harm to the environment is a critical area in our law as environmental liability is not adequately addressed in terms of South African law.<sup>1</sup> Liability law is thus directed towards the objectives of damage prevention and the distribution of loss in accordance with considerations of social justice.<sup>2</sup> Liability law is necessary in order to prevent environmental pollution or degradation. An example of pollution to the environment is when goods are transported and a traffic accident occurs, which results in the spillage of harmful substances. Harmful substances may for instance be easily transmitted to surface water or underground water.<sup>3</sup> These substances may have adverse effects on human health and the environment.<sup>4</sup>

In trying to address the issue of environmental liability, it is important to consider the role of common law with special emphasis on the law of delict. The law of delict may be used to impose liability for harm to the environment. Unlike the situation in other countries, the law of delict has not been extensively applied in South African environmental law.<sup>5</sup>

The problem is that the law of delict is limited in several ways as a tool for recovering environmental damages. For example, the law of delict requires that a person who sues for environmental pollution must have a special interest in the case at hand.<sup>6</sup> This, however, does not mean that the law of delict cannot play a useful role in relation to environmental liability.<sup>7</sup> The law of delict is applicable to water pollution. The law of delict has always been applied to water pollution cases. The importance of the law of delict was emphasised in *Rainbow Chicken Farm (Pty) Ltd v Mediterranean D Woollen Mills (Pty)*

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<sup>1</sup> Soltau 1999 SAJELP 48-50. See Oosthuizen 1998 SAJELP 360-361.

<sup>2</sup> Soltau 1999 SAJELP 48-50. See Oosthuizen 1998 SAJELP 355.

<sup>3</sup> Glazewski Law 514. Soil and groundwater contamination is typically associated with industrial and mining activities.

<sup>4</sup> Havenga 1995 SA Merc LJ 193-197.

<sup>5</sup> Soltau 1999 SAJELP 1.

<sup>6</sup> *Verstappen v Port Edward Town Board* 1994 3 SA 575 (D).

<sup>7</sup> Soltau 1999 SAJELP 1.

*Ltd*<sup>8</sup> where the court held that the producer of the effluent owes a common law duty of care towards others. *Colonial Government v Mowbray Municipality and others*<sup>9</sup> is another example where the law of delict was applied. The plaintiff in this case obtained an interdict against the municipality as its railway line was being damaged by storm and surface water run-off from a new housing development. The above stated cases were based on the principles of delict or common law. In order to identify shortcomings of the present law and generate proposals, the following will be discussed, common law, statutory law and international law within the framework of the polluter pays principle, and conclusion.

## **2 Common Law**

### **2.1 Liability at Common Law**

Environmental liability in South Africa has mostly been dealt with in the context of common law. At common law, liability is based on delictual liability. Delictual liability is generally based upon fault. Liability for environmental damage may then be found in the law of delict and all the requirements of a delict must be complied with before delictual damages may be claimed from the polluter.<sup>10</sup> The essential character of the law of delict is that it compensates for unlawfully inflicted pollution.<sup>11</sup> The essential requirement for delictual liability is that the wrongdoer must have committed a delict against the victim who must have sustained harm as a result thereof.<sup>12</sup> In the context of environmental pollution the spillage of harmful substances would be a compliance with this requirement.<sup>13</sup> The second requirement is wrongfulness. An act that causes harm to another person is not sufficient to constitute delictual liability, it must be wrongfully caused.<sup>14</sup> The third requirement for delictual liability is causation and causation is difficult to prove in environmental pollution cases.<sup>15</sup> Another important requirement in

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<sup>8</sup> *Rainbow Chicken Farm (Pty) Ltd v Mediterranean D Woollen Mills (Pty) Ltd* 1997 4 SA 578 (W).

<sup>9</sup> *Colonial Government v Mowbray Municipality and others* (1901) 18 SC 453.

<sup>10</sup> Kidd Environmental Law 126.

<sup>11</sup> Boberg *Delict* 16.

<sup>12</sup> Van der Walt *Principles* 20.

<sup>13</sup> Boberg *Delict* 16-18.

<sup>14</sup> Boberg *Delict* 16-18.

<sup>15</sup> Boberg *Delict* 16-18.

relation to delictual liability is loss. The damage suffered may constitute pure economic loss. Pure economic loss is dealt with below in the dissertation.

The commission of a delict entails liability if the defendant suffered pecuniary loss. This presents problems when the party which has caused pollution is brought to court for environmental pollution. This is caused by the fact that it is difficult to prove pecuniary loss in relation to compensation for environmental violations due to the inherent difficulty of placing monetary value on the environment.<sup>16</sup>

In addition to the problem of pecuniary loss there are also shortcomings in relation to *locus standi* at common law.<sup>17</sup> For instance, at common law an individual seeking to protect his or her environmental right has to prove a direct interest in the proceedings in order to have the necessary *locus standi*.<sup>18</sup> His interest in claiming relief in respect of that right arises when the right is infringed.<sup>19</sup> At common law a party that seeks to take legal action to protect the environment has to prove not only that he or she has *locus standi*, but also that he or she has a special interest in the environmental issue that is brought to court.<sup>20</sup> Courts have always held that in order to have standing an applicant must have a legally enforceable right.<sup>21</sup> In other words, the person who takes legal action against the infringer must be directly affected by environmental violation.<sup>22</sup>

In *Wildlife and Environment Society of South Africa v Minister of Environmental Affairs and Tourism*<sup>23</sup> an obiter remark was made that in relation to environmental legislation the *locus standi* has also been broadened as was the case in *Ferreira v Levin*.<sup>24</sup>

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<sup>16</sup> Oosthuizen 1998 SAJELP 360-361.

<sup>17</sup> Lyster 1994 SAJELP 520.

<sup>18</sup> De Waal, Currie and Erasmus (eds) *Human Rights* 522.

<sup>19</sup> Fuggle and Rabie (eds) *Environmental Management* 134. Scholtz 2005 TSAR 74.

<sup>20</sup> *Verstappen v Port Edward Town Board* 1994 3 SA 569 (D).

<sup>21</sup> Fuggle and Rabie (eds) *Environmental Management* 134.

<sup>22</sup> Fuggle and Rabie (eds) *Environmental Management* 132.

<sup>23</sup> *Wildlife and Environment Society of South Africa v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 (TKS).

<sup>24</sup> In *Ferreira v Levin* 1996 1 SA 984 (CC) it was that section 7 (4) (b) of the Constitution did not require that a person acting in his or her own interest had to be a person whose constitutional right had been infringed or threatened.

## 2.2 The Law of Nuisance

The law of nuisance is important in relation to environmental protection and can be used in certain instances of environmental pollution. The law of nuisance involves the unreasonable use of property, by one neighbour to the detriment of another.<sup>25</sup> This means that the requirements for a successful delict apply to neighbour law and the law of nuisance. A relationship exists between the set of common law rules making up neighbour law and environmental legislation.<sup>26</sup> Neighbour law and the law of nuisance are both subcategories of the broader common law. The common law rules of delict, nuisance and neighbour law can be used to protect environmental rights relating to noise, air and water pollution.<sup>27</sup> A landowner is for instance entitled to use his land without disturbance and unreasonable interference in terms of neighbour law and the law of nuisance.<sup>28</sup> Environmental protection in South Africa has, as stated in the introduction, been regulated by

common law, law of delict in particular. Under the common law, the test for negligence has two aspects, the question is, was the harm foreseeable and the question whether the defendant took reasonable steps to avert it.<sup>29</sup> Once it is established that the harm was reasonably foreseeable the question is asked whether the defendant took reasonable steps to avoid it. In *Pretoria City Council v De Jager*<sup>30</sup> the Supreme Court of Appeal outlined the following four considerations in deciding whether reasonable steps had been taken to prevent harm:

- (a) the degree or extent of the risk created by the actor's conduct,
- (b) the gravity of the possible consequences if the risk of harm materialises,

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<sup>25</sup> Havenga 1995 SA Merc LJ 196.

<sup>26</sup> Van der Walt and Midgley *Delict* 68-69. See Neethling *et al Delict* 295-296.

<sup>27</sup> Neethling *et al Delict* 371.

<sup>28</sup> Neethling *et al Delict* 8-14.

<sup>29</sup> Havenga 1995 SA Merc LJ 200. See Barnard *Law* 340.

<sup>30</sup> Barnard *Law* 340. See Brealey *Liabilities* 128.

- (c) the utility of the actor's conduct, and
- (d) the burden of eliminating the risk of harm.

Examples of pollution-related nuisances such as the pollution of a stream to render it not potable or dangerous to human health or environment include problems such as negligence in waste disposal.<sup>31</sup>

For example in *Verstappen v Port Edward Town Board*<sup>32</sup> the applicant sought an interdict against the respondent. The applicant based her claim to relief on the ground, that the manner in which the respondent managed its waste disposal site constituted a nuisance and danger to human health as it was dumped close to her property. The application was dismissed on the ground that the applicant lacked *locus standi*.<sup>33</sup> This is contrary to section 32 of NEMA<sup>34</sup> which broadens the narrow provisions of the common law in the area of environmental law. It provides that:

any 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.

It appears that a claim for damage caused by nuisance does not require proof of fault in the form of negligence.

In *Regal v African Superslate (Pty) Ltd*<sup>35</sup> the appellant applied for an interdict in terms of which the respondent would be prevented from allowing the slate to be washed onto the appellant's land. The court refused to grant an interdict on the ground that the respondent's omission to prevent the slate from being washed onto the appellant's property was not wrongful. The basis for this application was the allegation by the

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<sup>31</sup> Soltau 1999 SAJELP 44-45.

<sup>32</sup> *Pretoria City Council v De Jager* 1997 2 SA 46 (A).

<sup>33</sup> Neethling *et al Delict* 8-14.

<sup>34</sup> *Verstappen v Port Edward Town Board* 1994 3 SA 575 (D). In *Minister of Public Works & Others v Kyalami Ridge Environmental Association* 2001 (31) BCLR 652 (CC) it was held that the applicant had a direct and substantial interest in the proceedings in terms of section 38 © of the Constitution in the interest of the Alexandra victims.

<sup>35</sup> Depending on the circumstances, an aggrieved party has recourse to either an interdict or an action for damages.

appellant that the previous owner of the respondent's land had left slate waste to the bed of the river, which could reach and wash the slate onto the appellant's property. According to the appellant this constituted a nuisance. This is a significant advantage for plaintiffs, provided they bring their action within the ambit of nuisance, which requires that the defendant's use of land interfere with the use or enjoyment of land by plaintiff and usually the interference must be continuous to constitute nuisance.<sup>36</sup> In terms of the law of nuisance, the person who is usually liable is the person who owns or occupies the land from which the nuisance originates.<sup>37</sup>

### **2.3 Recognition of Pure Economic Loss**

Certain environmental incidents such as an oil spill constitute pure economic loss. For example, fishermen could lose revenue in the event of an oil spill due to destruction of fish stocks and tourist operators could also experience a slump in business as a result of the incident.<sup>38</sup> Pure economic loss may comprise loss that does not result from damage to property. On the other hand, pure economic loss may refer to financial loss that flows from damage to property or impairment of personality.<sup>39</sup> Pure economic loss can be categorised as follows:

- (i) loss suffered by a plaintiff where he does not suffer any physical injury to person or property,
- (ii) pure financial loss, such as clean-up expenses are recoverable if they are consequential to actual physical damage to property,
- (iii) preventive measures.<sup>40</sup>

Plaintiffs can recover damages in terms of South African law.<sup>41</sup>

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<sup>36</sup> Section 32 of NEMA

<sup>37</sup> *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A).

<sup>38</sup> *Neethling et al Delict* 8-16.

<sup>39</sup> *Neethling et al Delict* 8-16.

<sup>40</sup> Soltau 1999 *SAJELP* 37. Preventive measures seek to minimise environmental damage by requiring that action be taken at an early stage, or before such damage has actually occurred.

<sup>41</sup> *Havenga* 1995 *SA Merc LJ* 196.

Pure economic loss caused wrongfully and culpably can be recovered on the ground of delict.<sup>42</sup> In principle, pure economic loss is recoverable in our law.<sup>43</sup> Therefore, in South African law the same problems cannot be encountered as in those legal systems where there is a tendency not to compensate pure economic loss.<sup>44</sup> Economic loss caused intentionally does not present the problem of indeterminate liability<sup>45</sup>, for the ambit of the defendant's intention is itself a limiting factor. The protection of pure economic loss involves the difficult problem of applying theoretical and practical limitations to keep liability within reasonable bounds.<sup>46</sup> In addition to pure economic loss, there is also a problem of placing monetary value on the environment when an aggrieved party is the landowner.<sup>47</sup> This is especially the case in relation to compensation for environmental pollution. However, in various instances an estimate is possible, for instance in the case of pollution of land where the rehabilitation costs are clear.

The recovery of damages in relation to pure economic loss has always been recognised by our courts.<sup>48</sup> For instance a plaintiff may sue in cases where another party acts in breach of a legal duty to act carefully.<sup>49</sup> Common law has shortcomings in relation to environmental liability, which flow from the private law focus of delict and its primary concern with compensating individuals, and not with the broader public interest.<sup>50</sup> A plaintiff who recovers damages for environmental harm but decides to use it for personal matters and undertakes no remedial action illustrates that shortcoming. The law of delict does not deny recovery for pure economic loss, rather it approaches claims based on

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<sup>42</sup> Van der Walt *Principles* 35.

<sup>43</sup> Van der Walt *Principles* 35.

<sup>44</sup> In *Smit v Abrahams* 1994 4 SA 1 [17D] (A) the plaintiff succeeded in his action against the defendant who damaged his vehicle in a collision. The plaintiff used the vehicle in his business, which suffered because of the loss of the vehicle. The plaintiff claimed payment of the market value of the vehicle and the expenses for vehicle, which he had to hire in order to conduct his business.

<sup>45</sup> Indeterminate liability can be described as a liability without certainty or limitation.

<sup>46</sup> Van der Walt *Principles* 35.

<sup>47</sup> Neethling *et al Delict* 8-16.

<sup>48</sup> *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1985 1 SA 475 (A). It was held in this case that the negligent breach of a contract for the rendering of professional services, which results in economic loss does not automatically result in a delict. It was further held that to cause pure economic loss negligently is not *prima facie* wrongful.

<sup>49</sup> *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 [7] (D). The court held that the defendant should reimburse the plaintiff for the loss incurred as a result of its breach of a legal duty to act carefully.

<sup>50</sup> Soitau 1999 SAJELP 38.

pure economic loss more circumspectly than it does with those arising from physical injury. The reason for this is the fear of creating indeterminate liability, for the economic consequences of an act may greatly exceed its physical effects.<sup>51</sup> Common law has long regulated activities that render the environment harmful to human health and the environment.<sup>52</sup> However, common law remedies may not be adequate to address environmental liability. Statutory rules are necessary to address liability in cases of environmental pollution or degradation.

### 3 The Liability Provisions of NEMA

#### 3.1 *The Meaning of the Polluter Pays Principle*

It is also important to take cognisance of section 24 of the Constitution<sup>53</sup>, which provides that: Everyone has the right to:

- (a) 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 *National Environmental Management Act*<sup>54</sup> is designed within the framework of the Constitution.<sup>55</sup> NEMA is aimed at the promotion of sustainable development. Section 2 of the Act<sup>56</sup> stresses one of its important aims as subsection 3 provides that 'development

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<sup>51</sup> Boberg *Law of Delict* 104.

<sup>52</sup> Anon <http://www2-win4.puk.ac.za/nxt/gateway.dll?> [17/09/2004]. Soltau 1999 *SAJELP* 34-45.

<sup>53</sup> *National Environmental Management Act* (hereafter referred to as NEMA).

<sup>54</sup> *Constitution of the Republic of South Africa*, 1996. See Scholtz 2005 *TSAR* 69.

<sup>55</sup> Section 2 of NEMA. Principle 22 of the *Stockholm Declaration* furthermore states that states should develop international law in relation to liability and compensation for the victims of pollution and environmental damage.

<sup>56</sup> Section 2 of NEMA.

must be socially, environmentally and economically sustainable.<sup>57</sup> In addition to sustainable development NEMA also promotes the polluter pays principle. The main objective of the polluter pays principle is the preservation and protection of the environment. The principle is a measure aimed at the prevention of pollution and environmental degradation as referred to in section 24(b) (ii) of the Constitution.<sup>58</sup> Section 24 directs the government to take measures to ensure that remediation of environmental damage takes place.<sup>59</sup> Section 2(4) (p) of the NEMA<sup>60</sup> which embodies the polluter pays principle provides that:

The costs of remedying pollution, environmental degradation and consequent health effects must be paid for by those responsible for harming the environment.

The polluter pays principle is an important cornerstone of environmental law. The polluter pays principle was included in the *Rio Declaration*.<sup>61</sup> The polluter pays principle holds that the cost imposed on society and the environment by pollution must be borne by the polluter. The polluter pays principle is generally accepted as an economic principle aimed at consumer protection.<sup>62</sup> The reason for characterising the principle as an economic principle is that the implementation of the principle has cost implications for the polluter.

The polluter pays principle may also be applied to impose sanctions for wrongful conduct, or to require correct measures to restore a given environmental asset to its pre-damage condition.<sup>63</sup> The polluter pays principle also serves to steer the conduct of potential polluters.<sup>64</sup> The elements of wrongfulness are crucial in the expansion of liability to novel situations, but section 24 of the Constitution may facilitate new developments in the environmental field, which may provide a technique for internalising environmental and other social costs into production processes and other activities in the implementation of

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<sup>57</sup> Scholtz 2005 *TSAR* 69.

<sup>58</sup> Oosthuizen 1998 *SAJELP* 358.

<sup>59</sup> Anon <http://www2-win4.puk.ac.za/nxt/gateway.dll> [17/09/2004]

<sup>60</sup> Section 2(4) (p) of NEMA.

<sup>61</sup> Principle 16 of the United Nations Conference on Environment and Development of 1992 (hereafter referred to as the *Rio Declaration*).

<sup>62</sup> Oosthuizen 1998 *SAJELP* 356.

<sup>63</sup> Sands *Liability* 869. See Milton 1999 *SAJELP* 55-56.

<sup>64</sup> Soltau 1999 *SAJELP* 38.

the polluter pays principle.<sup>65</sup> In fact, liability rules in relation to environmental pollution are still evolving at both national and international levels.<sup>66</sup> Section 28 of NEMA<sup>67</sup> refers to the polluter pays principle. It is accordingly the objective of this study to examine the environmental liability provisions as included in section 28 of NEMA as well as the role of the polluter pays principle.

NEMA contains various important provisions in relation to liability.<sup>68</sup> Section 28 of NEMA furthermore establishes distinctive environmental principles that are of great importance.<sup>69</sup> These distinctive principles include the polluter pays principle, the precautionary principle, sustainable development, life cycle responsibility and environmental justice. The focus of the study is however on the polluter pays principle.

The wording of section 2 (4) (p) reflects the notion of the polluter pays principle. Section 2 of NEMA serves as a guideline by reference to which any organ of state at every level must exercise any function in relation to decision-making in terms of this Act or any statutory provision concerning the protection of the environment.<sup>70</sup> Section 2 of NEMA contains principles that are binding upon the actions of all spheres of government that may significantly affect the environment.<sup>71</sup> It is accordingly necessary to investigate the polluter pays principle as this principle plays an important role in the implementation of environmental liability. The liability provisions of NEMA will further receive attention.

The polluter pays principle was originally recommended by the Organisation for Economic Co-operation and Development.<sup>72</sup> The principle is regarded as highly controversial in the developing countries in particular, where the burden of internalising environmental costs is conceived as being too high.<sup>73</sup> Nonetheless, because of its role in harmonising standards, the principle provides important guidance for formulating

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<sup>65</sup> Sands *Liability* 869.

<sup>66</sup> Sands *Liability* 869.

<sup>67</sup> Section 28 of NEMA.

<sup>68</sup> Sections 2 and 28 of NEMA.

<sup>69</sup> Scholtz 2005 *TSAR* 69.

<sup>70</sup> Scholtz 2005 *TSAR* 69. These principles guide the interpretation, administration and implementation of the Act, any other law concerned with the protection or management of the environment in terms of section 2 (1) (e) of NEMA.

<sup>71</sup> Scholtz 2005 *TSAR* 69.

<sup>72</sup> Organisation for Economic Cooperation and Development Council Recommendations of 1972.

<sup>73</sup> Hunter, Salzman and Zaelke *Law* 412.

domestic environmental laws and policies.<sup>74</sup> The polluter pays principle has also assumed a prominent position in international environmental policy.<sup>75</sup> For instance, Principle 16 of the United Nations conference On Environment and Development (Rio Declaration)<sup>76</sup> provides that:

national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.<sup>77</sup>

The polluter pays principle establishes the requirement that the costs of pollution should be borne by the polluter responsible for causing the pollution.<sup>78</sup> The meaning of the principle and its application to particular cases and situations, remain open to interpretation, particularly in relation to the nature and extent of the costs involved and the circumstances in which the principle will exceptionally not apply.<sup>79</sup> The polluter pays principle implies that it is for the polluter to meet the costs of pollution control and prevention measures, irrespective of whether these costs are incurred as a result of the imposition of some charge on pollution emission, or are debited through some other suitable economic mechanism.<sup>80</sup> The polluter should bear the expenses of preventing and controlling pollution to ensure that the environment is in an acceptable state.<sup>81</sup> The polluter pays principle is a form of economic instrument, which provides an incentive to encourage compliance with environmental obligations.<sup>82</sup>

As originally propounded, the polluter pays principle, is not a liability principle, but rather it is a principle for the allocation of the costs of pollution control.<sup>83</sup> To have a clear understanding of the polluter pays principle and what it stands for as a matter of international law and policy, one must maintain the distinction between the assessment

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<sup>74</sup> Hunter, Salzman and Zaelke *Law* 412.

<sup>75</sup> Gaines *Polluter Pays* 466.

<sup>76</sup> Principle 16 of the Rio Declaration.

<sup>77</sup> Brownlie *Law* 412.

<sup>78</sup> Brownlie *Law* 279.

<sup>79</sup> Brownlie *Law* 280.

<sup>80</sup> Hunter, Salzman and Zaelke *IELP* 413.

<sup>81</sup> Hunter, Salzman and Zaelke *IELP* 413.

<sup>82</sup> Soltau 1999 *SAJELP* 3-5.

<sup>83</sup> Brownlie *Law* 280.

of liability for the abatement of specific harms on the one hand and the allocation of the costs of broad preventive measures on the other.<sup>84</sup>

The polluter pays principle has been understood to mean mere internalisation of costs, whereas a modern interpretation also refers to liability. The polluter pays principle enjoys broad support internationally. The practical implications of the principle are in its allocation of economic obligations in relation to environmentally damaging activities, particularly in relation to liability, the use of economic instruments, and the application of rules relating to competition and subsidy.<sup>85</sup> The purpose of the polluter pays principle which is to promote efficient resource use and confirms the fundamental economic nature of the principle.<sup>86</sup>

The polluter pays principle is contained in sections 2 and 28 of NEMA. The principle is reflected in section 2 (4) (p) of NEMA in particular, which provides that the costs of remedying pollution, environmental degradation and consequent health effects must be paid for by those responsible for environmental pollution.<sup>87</sup> The polluter pays principle is designed to internalise externalities. The principle integrates environmental protection and economic activities, by ensuring that the full environmental and social costs associated with pollution and environmental harm are reflected in the ultimate market price for a good or service.<sup>88</sup> According to this principle, environmentally harmful goods should be more costly so that consumers prefer less polluting goods.<sup>89</sup> The effect will be a more efficient and sustainable allocation of resources.

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<sup>84</sup> Gaines *Polluter Pays* 468-469.

<sup>85</sup> Gaines *Polluter Pays* 468-469. The principle of polluter liability was adopted as international law in the Trail Smelter arbitral award, which compelled Canada to pay compensation for damages in the United States caused by a Canadian source of air pollution.

<sup>86</sup> Gaines *Polluter Pays* 468-469. The polluter pays principle has its ideological roots in economics not law.

<sup>87</sup> Gaines *Polluter Pays* 468-469. The polluter pays principle has its ideological roots in economics not law.

<sup>88</sup> Hunter, Salzman and Zaelke *IELP* 412.

<sup>89</sup> Hunter, Salzman and Zaelke *IELP* 412.

### 3.2. Section 28 of NEMA and the Reasonable Measures

Section 28 of NEMA<sup>90</sup> as stated above is also important in relation to the polluter pays principle. Section 28 (1) of NEMA<sup>91</sup> provides that:

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.<sup>92</sup>

Section 28 of NEMA<sup>93</sup> states that reasonable measures have to be taken to prevent pollution from occurring, continuing or recurring. Section 28 (8) provides for the authorities to recover costs incurred as a result of it acting under section 28 (7) of the Act from any or all of the following persons:

- (a) any person who is or was responsible for, or who directly or indirectly contributed to the pollution or degradation or the potential pollution or degradation,
- (b) the owner of the land at the time when the pollution or degradation or the potential pollution or degradation occurred, or that owner's successor in title,
- (c) the person in control of the land or any person who has or had a right to use the land at the time when-
  - (i) the activity or the process is or was performed or undertaken, or
  - (ii) the situation came about, or
- (d) any person who negligently failed to prevent-
  - (i) the activity or the process being performed or undertaken, or
  - (ii) the situation from coming about.<sup>94</sup>

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<sup>90</sup> Hunter, Salzman and Zaelke *IELP* 412.

<sup>91</sup> Section 28 of NEMA.

<sup>92</sup> Section 28 (1) of NEMA.

<sup>93</sup> The *National Water Act* contains almost identical provisions as NEMA with respect to activities, which cause or may cause water pollution in terms of section 19 of the Act.

<sup>94</sup> Section 28 of NEMA.

An important part of section 28 of NEMA is the category of persons on whom liability is non-exhaustive, because it refers to “every person”.<sup>95</sup> Section 28 (2) goes even further and stipulates three categories of persons, firstly an owner of land or premises, secondly, a person in control of land or premises, for example, a lessee and thirdly a person who has a right to use the land or premises on or in which, any activity or process is or was performed or undertaken or any other situation exists, which causes, has caused, or is likely to cause significant pollution or degradation of the environment.<sup>96</sup>

Section 28 (3) stipulates certain measures that should be taken by those persons identified above and every person responsible for the incident.<sup>97</sup> These measures include investigating, assessing and evaluating the impact on the environment.<sup>98</sup> The employees of the persons identified must be informed and educated in relation to the environmental risks of their tasks and the manner in which the tasks must be performed in order to avoid causing significant pollution or degradation of the environment.<sup>99</sup>

The activity or process causing the pollution or degradation must be stopped, modified and controlled.<sup>100</sup> The movement of pollutants or the causing of degradation must be contained and prevented, while any source of the pollution or degradation must be eliminated.<sup>101</sup> The effects of pollution or degradation must be remedied. In terms of section 28 (4) of NEMA<sup>102</sup>, section 28(6) (b)<sup>103</sup> and section 28 (7)<sup>104</sup> the director-general or the provincial head of the department of environmental affairs may take measures to remedy the situation and recover the costs incurred, from a number of stipulated persons including any person who is or was responsible for, or who directly or indirectly contributed to the pollution or degradation or the potential pollution or degradation. This section also includes the owner of the land at the time when the pollution or degradation

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<sup>95</sup> Section 28 (2) of NEMA.

<sup>96</sup> Section 28 (2) of NEMA.

<sup>97</sup> Section 28 (3) of NEMA.

<sup>98</sup> Section 28 (3) of NEMA.

<sup>99</sup> Section 28 (3) of NEMA.

<sup>100</sup> Section 28 (3) of NEMA.

<sup>101</sup> Section 28 (3) of NEMA.

<sup>102</sup> Section 28 (4) of NEMA.

<sup>103</sup> Section 28 (6) of NEMA.

<sup>104</sup> Section 28 (7) of NEMA.

or the potential for pollution or degradation occurred, or that owner's successor in title.<sup>105</sup> The person in control of the land or any person who has or had a right to use the land at the time when the activity or the process is or was performed or undertaken or the situation came about, or any person who negligently failed to prevent the activity or the process being performed or undertaken or the situation from coming about may also be held liable for the costs incurred.<sup>106</sup>

It is clear that all persons including the driver or owner of the truck or any type of transport carrying harmful substances, must take reasonable measures to prevent any environmental damage from occurring and they must exercise a duty of care.<sup>107</sup> If the necessary section 28 (1) measures are not taken, the director-general or provincial head of department, may after consultation, direct any person who fails to take these measures, to take a number of measures including to investigate, evaluate and assess the impact of specific activities and report thereon.<sup>108</sup> In order to escape liability the polluter is required to prove that reasonable measures have been taken to minimise and rectify the pollution or degradation of the environment.<sup>109</sup>

Section 30 of NEMA provides for emergency incidents.<sup>110</sup> In terms of this section an incident" is defined as:

an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed.<sup>111</sup>

It is evident that the definition is wide-ranging and includes matters such as toxic spills from industrial sites or in the course of transportation whether by air, road or sea.<sup>112</sup>

Section 30 (1) (b) of NEMA<sup>113</sup> defines as including any person who is responsible for

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<sup>105</sup> Section 28 of NEMA.

<sup>106</sup> Section 28 of NEMA.

<sup>107</sup> Glazewski *Environmental Law* 148-150.

<sup>108</sup> Glazewski *Environmental Law* 150-151.

<sup>109</sup> Glazewski *Environmental Law* 149-151.

<sup>110</sup> Section 30 of NEMA.

<sup>111</sup> Section 30 (1) of NEMA.

<sup>112</sup> Glazewski *Environmental Law* 153.

<sup>113</sup> Section 30 (1) (b) of NEMA.

the incident or any person who owns any hazardous substance involved in the incident or was in control of any hazardous substance involved in the incident at the time of the incident. Section 30 (3) (d) (i) of NEMA places certain duties and obligations on the responsible persons. The incident must be reported immediately to the director-general, the South African Police Service, the relevant fire prevention service, the relevant provincial head or municipality and all persons whose health may be affected by the incident.<sup>114</sup> The report must contain a number of stipulated items including the nature of the incident, any risks posed by the incident, the toxicity of the substances or by-product released by the incident and any steps that should be taken in order to avoid or minimise the effects of the incident on public health and the environment.<sup>115</sup> The effects on public health should be assessed immediately.<sup>116</sup> This is for example the case when traffic accident occurs and the spillage of harmful substances contaminate water in the dam that is used to supply water to residents. The responsible person for such an incident may be the driver or carrier who might have been negligent by driving recklessly or by failing to transport the goods with the necessary caution. The person who owns hazardous substances involved in the incident at the time of the incident may be liable and the driver may also be liable as the person in control of the goods when the incident occurred.<sup>117</sup>

In addition to NEMA there are other statutes which are significant in relation to liability, for example *Environment Conservation Act*<sup>118</sup> and *Genetically Modified Organisms Act*<sup>119</sup>. In terms of section 31A of Environment Conservation Act, the polluter may be directed to rehabilitate the environment at its own expense if such environmental pollution was caused by its activity.<sup>120</sup> Section 31A (1) of the Environment Conservation Act provides that when a person performs any activity or fails to perform any activity and the environment is or may be seriously damaged, endangered or detrimentally affected,

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<sup>114</sup> Glazewski *Environmental Law* 148-154.

<sup>115</sup> Glazewski *Environmental Law* 148-154.

<sup>116</sup> Section 30 (4) (a)-(d) of NEMA.

<sup>117</sup> Section 30 (1) (b) of NEMA.

<sup>118</sup> Environment Conservation Act 73 of 1989.

<sup>119</sup> Section 17 (2) of Genetically Modified Organisms Act 15 of 1997 echoes the precautionary principle in providing that users shall ensure that appropriate measures are taken to avoid an adverse impact on the environment which may arise from the use of genetically modified organisms.

<sup>120</sup> Section 31A of the Environment Conservation Act 73 of 1989.

the Minister of environmental affairs, local authority or government institution, as the case may be, may direct such person in writing to stop or cease such activity.<sup>121</sup> The abovementioned bodies may also order the person to take relevant and suitable steps within a specified time to eliminate, reduce or prevent damage; danger or detrimental effect it may have on the environment.<sup>122</sup> The bodies mentioned in section 31A (1) may furthermore order the polluter to rehabilitate, at his or her own expense, any damage caused to the environment as a result of his or her activity.<sup>123</sup> If the polluter fails to take the necessary action as directed, the body concerned may perform the activity and recover costs from the polluter itself.<sup>124</sup> In terms of Environment Conservation Act, a polluter may be directed to take steps to eliminate, reduce or prevent damage to the environment and may have to rehabilitate any damage caused to the environment.<sup>125</sup> The polluter may be directed to take the relevant steps, if the relevant minister is of the opinion that the polluter is performing an activity that may damage the environment.<sup>126</sup>

According to the Genetically Modified Organisms Act<sup>127</sup> which introduces the user pays principle, the users are required in terms of the Act to ensure that appropriate measures are taken to avoid an adverse impact on the environment, which may arise from genetically modified organisms. The polluter pays principle can be implemented through a variety of methods aimed generally at internalising environmental costs, including for example the use of taxes, and the elimination of subsidies for pollution control.<sup>128</sup> The imposition of liability on the person who causes environmental pollution is a clear way of applying the polluter pays principle.<sup>129</sup> One way to ensure that greater caution will be applied to avoid the occurrence of damage to the environment is indeed to impose liability on the party responsible for an activity that bears such risks of causing environmental damage.<sup>130</sup> This means that, when an activity really results in damage,

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<sup>121</sup> Section 31A (1) of the Environment Conservation Act 73 of 1989.

<sup>122</sup> Section 31A (1) of the Environment Conservation Act 73 of 1989.

<sup>123</sup> Section 31A (1) of the Environment Conservation Act 73 of 1989.

<sup>124</sup> Section 31A (1) of the Environment Conservation Act 73 of 1989.

<sup>125</sup> Environment Conservation Act 73 of 1989.

<sup>126</sup> Environment Conservation Act 73 of 1989.

<sup>127</sup> Genetically Modified Organisms Act 15 of 1997.

<sup>128</sup> Brownlie *Law* 414.

<sup>129</sup> Brownlie *Law* 414.

<sup>130</sup> Brownlie *Law* 414

the party in control of the activity has to pay the costs of repair.<sup>131</sup> If the principle is to be applied fairly, it must be ascertained that the polluter has degraded the environment and the extent of degradation should also be given precise monetary value.<sup>132</sup> Precise monetary value is difficult to achieve, but recovery of costs after a clean up campaign is possible. The polluter pays principle is applicable at the domestic level and does not govern relations or responsibilities between states at the international level.<sup>133</sup> The content of the polluter pays principle appears to involve strict liability, although the polluter pays principle is an economic policy.<sup>134</sup> The polluter pays principle as stated above is still at a developing stage.

Of importance in relation to the polluter pays principle is the fact that it is a principle that is now recognised internationally as a way of promoting environmental protection and it is also compatible with the principle of sustainable development.<sup>135</sup> The polluter pays principle is adopted by section 2 (4) (p) of NEMA. Section 28 of the Act promotes reasonable corrective measures. The duty to enforce the reasonable corrective measures by means of directives falls upon the director-general or provincial head of the department. The duty to take reasonable measures is triggered when a person's activities cause, caused or threaten to cause significant pollution or degradation of the environment. The threshold set by significant pollution or degradation is not very clear.<sup>136</sup> It is not clear whether by significant pollution or degradation the Act refers to harm to humans or damage to property. The framework within which section 28 attempts to address the problem of liability is general in that it does not state clearly the circumstances in which liability may arise. Practically it is not possible to avoid pollution incidents, because in some cases environmental pollution or harm may emanate from lawful activities. However, lawful those activities may be, the principle should be that the polluter must be liable in relation to environmental harm caused by its operations. Section 28 of NEMA is therefore not specific in relation to polluter liability.

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<sup>131</sup> Brownlie *Law* 414.

<sup>132</sup> Brownlie *Law* 415.

<sup>133</sup> Thornton and Beckwith *Law* 14.

<sup>134</sup> Brownlie *Law* 277-281.

<sup>135</sup> Brownlie *Law* 278-279.

<sup>136</sup> Oosthuizen 1998 *SAJELP* 358-360.

## 4 International Law

### 4.1 *Liability Regime in International Law*

European Community environmental law constitutes a highly developed and sophisticated body of law, which has existed, and continues to exert, a profound influence on the content of international law.<sup>137</sup>

It is against this background that the directive on environmental liability with regard to the prevention and remedying of environmental damage will be discussed in this study. Following incidents of environmental pollution in member states of the European Community the European Parliament decided to draft a White Paper on environmental liability.<sup>138</sup> The aim of this White Paper was to set out a structure for European Community environmental liability regime that aims to implement the polluter pays principle. According to the description of the White Paper, environmental liability is aimed at making the causer of environmental damage (the polluter) pay for the damage that he has caused.<sup>139</sup> Environmental regulation lays down norms and procedures aimed at preserving the environment.<sup>140</sup> Environmental liability is aimed at addressing the consequences of the violation of these norms and procedures.

Therefore, an objective is to make the polluter liable for the damage he has caused. If polluters have to pay for damage caused, they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Environmental liability results in prevention of damage and in internalisation of environmental costs. Liability may also lead to the application of more precaution, resulting in avoidance of risk and damage.

Environmental liability makes the causer of environmental damage (the polluter) pay for remedying the damage that he has caused. Liability is only effective where polluters can

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<sup>137</sup> Bergkamp *Liability* 40-60.

<sup>138</sup> Paragraph 1 of the *EC White Paper on Environmental Liability of 2000*.

<sup>139</sup> Paragraph 2 (1).

<sup>140</sup> Paragraph 4.

be identified, damage is quantifiable and a causal connection can be shown.<sup>141</sup> It is therefore not suitable for diffuse pollution from numerous sources. Reasons for introducing an EC liability regime include improved implementation of key environmental principles ('polluter pays', prevention and precaution) and of existing EC environmental laws, the need to ensure decontamination and restoration of the environment, better integration of the environment into other policy areas and improved functioning of the internal market. Liability should enhance incentives for more responsible behaviour by firms and thus exert a preventive effect, although much will depend on the context and details of the regime.<sup>142</sup>

Article 1 of the directive,<sup>143</sup> states that the purpose of the directive is to establish a framework of environmental liability based on the polluter pays principle and to prevent and remedy environmental damage. Article 2<sup>144</sup> of the directive states that the fundamental principle of the directive should be that an operator whose activity has caused environmental damage or the imminent threat of such damage is to be held financially liable for environmental damage. The intention is to induce operators to adopt measures and develop practices to minimise the risks of financial liabilities.

Article 8<sup>145</sup> provides that the directive should apply, as far as environmental damage is concerned, to occupational activities, which present a risk for human health or the environment. These activities should be identified, in principle, by reference to the relevant community legislation, which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health and the environment. According to Article 7<sup>146</sup> activity means any activity carried out in the course of an economic activity, business or an undertaking, irrespective of its private or public, profit or non-profit character. Article 13<sup>147</sup> of the directive acknowledges that not all forms of environmental damage can be remedied by means of environmental

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<sup>141</sup> Paragraph 4 (2) (1).

<sup>142</sup> Paragraph 4 (4).

<sup>143</sup> Article 1 of the *Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004*.

<sup>144</sup> Article 2.

<sup>145</sup> Article 8.

<sup>146</sup> Article 7.

<sup>147</sup> Article 13.

liability mechanism.

According to Article 15<sup>148</sup> of the directive the obligation of prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community's environmental policy and that public authority should ensure the proper implementation and enforcement of the scheme provided for by this directive. The directive specifically introduces the polluter pays principle so that parties whose activities have caused environmental damage can be held liable for environmental pollution.<sup>149</sup>

Article 18 of the directive<sup>150</sup> is couched in a rather strong language as it states that, according to the polluter pays principle, an operator causing environmental damage or creating an imminent threat of such damage, should in principle, bear the cost of the necessary preventive or remedial measures. It is appropriate that the operators should ultimately bear the cost of assessing environmental damage and as the case may be, assessing an imminent threat of such damage. The directive is very explicit in its approach to the polluter pays principle. The fact that an operator is held liable for imminent threat to the environment reflects the seriousness with which the directive takes environmental pollution.

The design of the directive is such that polluters should be aware of the consequences that may flow from environmental pollution. It is not only aimed at polluters, but also at potential polluters as it also refers to potential polluters and the imminent threat of the environmental damage. Article 4(5) of the directive<sup>151</sup> provides that this directive shall only apply to environmental damage or to an imminent threat of such damage caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators.

Article 13<sup>152</sup> of the directive provides that the persons referred to in Article 12(1)<sup>153</sup> shall have access to a court or other independent and impartial public body competent to

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<sup>148</sup> Article 15.

<sup>149</sup> Article 14.

<sup>150</sup> Article 18.

<sup>151</sup> Article 4 (5).

<sup>152</sup> Article 13.

<sup>153</sup> Article 12 (1).

review the procedural and substantive legality of the decisions of the competent authority under this directive.

Article 6(1)<sup>154</sup> of the directive states that where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/ or other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of devices and the necessary remedial measures.

The directive is an important directive on which our environmental liability regime can be modelled. Its purpose is clear in respect of the manner in which environmental damage has to be addressed. The directive has its shortcomings. For instance article 14<sup>155</sup> of the directive states that member states shall take measures to develop financial security instruments to cover liability of the operators. It is not stated explicitly as to what the consequences will be in the event of failure by member states to comply with this article. The directive does not compel member states to transpose it in their domestic laws. Member states may choose not to apply it at national level.

## 5 Conclusions and Recommendations

Environmental pollution may be caused by a spillage of harmful substances. This normally happens during transportation of harmful substances especially by road. The spillage may occur as a result of a traffic accident or any other incident that may result in such a spillage. In terms of common law the polluter may be held liable in terms of the law of delict to compensate environmental damages caused during the transportation of harmful goods.<sup>156</sup> The law of delict may be problematic especially in relation to the liability of the parties. The law of delict may also not be wide enough as the *locus standi* requirement could be problematic. In terms of the law of delict, there must be a wrongdoer who must commit an act against a victim. The victim must sustain a harm as a

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<sup>154</sup> Article 6 (1).

<sup>155</sup> Article 14.

<sup>156</sup> Boberg *Delict* 16-20.

result of that wrongfully caused act.<sup>157</sup> In addition to the requirement of wrongfulness, there should be a fault on one or more of the parties. This refers to general blameworthiness or the reprehensible state of mind of someone who acted wrongfully and may take the form of either intention or negligence.<sup>158</sup> In terms of environmental pollution the question could be whether the person concerned could have acted negligently when the spillage of harmful substances occurred. There should be a wrongful intention or negligence on the part of the defendant.<sup>159</sup> Liability may arise only if harm was caused in a wrongful manner. The term wrongfulness depends on the legal conviction of the community.<sup>160</sup> These requirements may complicate an action against environmental offenders. For example if a spillage of harmful goods or substances occurs in an open field and that is not privately owned, it would be difficult to take action against persons responsible for environmental pollution. The reason is that nobody could have sustained harm in those circumstances in terms of the law of delict.

The introduction of NEMA has been a positive move in the development of environmental law in South Africa. Section 2 (1) of NEMA<sup>161</sup> states that the principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. Of the principles set out in section 2, section 2 (4) (p) is of vital importance in relation to the polluter pays and environmental liability. It is section 2 (4) (p) of NEMA that adopts the polluter pays principle.<sup>162</sup> This provision states that those responsible for harming the environment must bear the cost of remedying the pollution, environmental degradation and the consequent health effects of the pollution. This principle is important in environmental law as a pillar of environmental liability. Section 2 (4) (p) is, however, not an adequate measure in relation to polluter liability as it does not define the polluter pays principle. NEMA is good indication in relation to polluter liability. NEMA seeks to give effect to section 24 of the Constitution which provides that the environment must be protected for the benefit of present and future generations. NEMA also promotes the notion of sustainable development as it states that development

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<sup>157</sup> Boberg *Delict* 16-20

<sup>158</sup> Neethling *et al Delict* 360-371.

<sup>159</sup> Neethling *et al Delict* 360-371.

<sup>160</sup> Boberg *Delict* 16-20.

<sup>161</sup> Section 2 (1) of NEMA.

<sup>162</sup> Section 2 (4) (p) of NEMA.

must be socially, environmentally and economically sustainable. The protection of the environment is an integral part of economic development and cannot be viewed in isolation from it. Principle 3 of the *Rio Declaration*<sup>163</sup> states that the right to development has to be fulfilled in an equitable manner in order to meet developmental needs of the present and future generations. It is now recognised that the model of economic development based on the depletion of natural resources and the deterioration of the environment is not in line with the principle of sustainable development, which section 24 of the Constitution seeks to promote.<sup>164</sup>

The polluter pays principle<sup>165</sup> has been adopted in terms of section 2 (4) (p) of NEMA. But the adoption of the polluter pays principle in terms of section 2 (4) (p) of NEMA is not adequate in South African circumstances. Section 2 (4) (p) is vague in relation to liability and does not identify activities that may pose risk to the environment. Financial liability the EU directive promotes is not addressed by NEMA. A single comprehensive environmental liability regime is necessary for South Africa in the light of the shortcomings of our common law, and sections 2(4)(p) and 28. Liability law in its present form is fragmented and does not provide certainty for our courts.<sup>166</sup> This means that the fragmented approach in relation to environmental liability addressed by either adopting a law that may cover all environmental management sectors or by having NEMA amended.

In South Africa an environmental liability law based on the polluter pays principle can provide an important justification for the harmonisation of national liability laws.<sup>167</sup> South African law in relation to environmental liability as stated above is fragmented in its present form. It can also provide a sound legal basis for establishing liability for environmental protection, pollution or damage in contrast to the current rules relating to delictual liability that have to be relied on.<sup>168</sup>

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<sup>163</sup> Principle 3 of the United Nations Conference on Environment and Development of 1992.

<sup>164</sup> Thornton and Beckwith *Law* 77.

<sup>165</sup> It is generally accepted that the principle as a concept is materially an economic principle aimed at environmental protection. The rationale for characterising the principle as such is that it has cost implications for the polluter.

<sup>166</sup> Oosthuizen 1998 *SAJELP* 360.

<sup>167</sup> Oosthuizen 1998 *SAJELP* 360.

<sup>168</sup> Oosthuizen 1998 *SAJELP* 360.

The polluter pays principle is a new concept that is still at developing stage. But it has been well-canvassed in recent times in terms of international conferences on environment. South Africa is a developing country with a number of challenges in relation to the protection of the environment. This can be done in the form of amendment to the existing statute, namely NEMA or a new comprehensive statute and this can eliminate the fragmentation of environmental liability law in South Africa. It is necessary for the legislature to define the polluter pays principle.

If the legislature can succeed in properly defining the polluter pays principle, the principle will represent an important strategy for controlling environmental harmful activities in South Africa. The polluter pays principle, in the directive is clear in relation to environmental liability. Articles 1 and 2 of the directive are explicit in relation to liability. These articles as stated above can be used to improve our liability law in relation to the protection of the environment in South Africa. Article 2 of the directive states that the fundamental principle should be that a carrier who is responsible for pollution or who poses imminent threat to the environment is to be held financially liable. The intention is to induce carriers or operators of harmful goods to adopt measures and practices to minimise incidents of spillage of harmful goods because they may avoid financial liability. Article 8 of the directive states that activities that pose risk to the environment must be identified especially those that have an impact on human health and the environment.

The polluter pays principle is based on the recognition that society in its pursuit of economic development is always prone to environmental pollution. The polluter pays principle can be implemented through a variety of methods aimed at internalising environmental costs, including for example the use of tax fees and elimination of subsidies for pollution control.<sup>169</sup> There is therefore a need to control and prevent environmental pollution. The developed world has been criticised for putting trade and economic development before environmental considerations.<sup>170</sup> South Africa as a developing country should not take the same route in her pursuit of economic

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<sup>169</sup> Hunter, Salzman and Zaelke *IELP* 412-414.

<sup>170</sup> Thornton and Beckwith *Law* 77.

development. The polluter pays principle has its own imperfections. The principle has the potential to lead to social and economic disruptions, if implemented without exceptions. The principle is intended to promote efficient and rational resource use, not necessarily as a punitive measure. The polluter pays principle applies to identifiable polluters that have sufficient economic resources to pay for their environmental polluting activities. The polluter pays principle remains, however the best option in relation to environmental protection and preservation. The polluter pays principle is important in relation to the principle of sustainable development. The polluter pays principle is also important for a country such South Africa that is a developing country with massive natural resources to protect and serious developmental challenges. The polluter pays principle is not intended to undermine developing and fragile economies, but to protect resources.

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