

# Environmental Law

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Small town Regional Court ruling has big-time environmental liability consequences for a company director



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## Small town Regional Court ruling has big-time environmental liability consequences for a company director

The long-standing yet seldomly relied upon director liability provision – section 34(7) in the National Environmental Management Act 107 of 1998 (NEMA) – finally bared its substantial teeth in a court order that was handed down by Magistrate RM Nkuna on 21 September 2023 in the Phalaborwa Regional Court against Southern Sky Hotel and Leisure (Pty) Ltd (Southern Sky), the previous owner of the Hans Merensky Hotel, Golf and Spa and its sole director, Shamira Rinderknecht (Rinderknecht).

With the 2010 Soccer World Cup in mind and in anticipation of a tourism boom, Southern Sky under the directorship of Rinderknecht, significantly expanded the facilities at the Hans Merensky Hotel, Golf and Spa without applying for an amendment to the existing environmental authorisation.

The tourism boom of the Soccer World Cup was short-lived, and the Hans Merensky Hotel, Golf and Spa soon fell into decline leaving little funds for ongoing maintenance, let alone critical infrastructure improvements such as the expansion of the sewage infrastructure, which was unable to handle the sewage being generated, even with declining guest numbers. As a result, numerous sewage spillages occurred which caused significant pollution and degradation of the immediate environment as well as a watercourse that flows into the nearby Olifants River within the Kruger National Park.

### **Responsibility to take reasonable measures**

Taking reasonable measures is a critical aspect and duty placed on companies by NEMA expecting them to:

1. Prevent significant harm to the environment, or otherwise minimise and rectify such harm.
2. Take reasonable measures to rectify any harm caused by its activities.

Southern Sky therefore had the duty in terms of Section 28(1) of NEMA read together with Section 19(1) of the National Water Act 36 of 1998 (the NWA) to take reasonable measures to prevent the pollution or degradation caused by the sewage spillages from occurring, continuing or recurring. It was under a further duty in terms of section 16(1) of the National Environmental Management: Waste Act 59 of 2008 (NEMWA) to treat and dispose of the sewage waste in an environmentally sound manner and which duty it failed to uphold by allowing the ongoing discharge of the untreated sewage into the surrounding environment. These duties of care, amongst others, were cited in a compliance notice that was issued by the Department of Water and Sanitation directing Southern Sky to take reasonable steps to rectify the cause of the sewage spillages. Southern Sky and Rinderknecht elected to ignore the directives in the compliance notice and therefore failed to implement the required reasonable measures which resulted in, at the very least, the ongoing pollution of watercourses within the Kruger National Park.

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### Attracting director liability

Various offences in terms of the NEMA, NWA and NEMWA which are further listed as Schedule 3 offences in terms of NEMA, were committed by Southern Sky. This confirmation is important for present purposes as section 34(7) of NEMA states that a person such as Rinderknecht who held the position of sole director at the Southern Sky during the perpetration of crimes listed in Schedule 3, will be personally considered at fault and subject to the corresponding punishment upon conviction if the offences in question resulted from a failure by Rinderknecht to take all reasonable steps to prevent the commission of the offences by Southern Sky.

Criminal charges in the Phalaborwa Regional Court were brought against Southern Sky and Rinderknecht on the following counts:

- Count 1 – the expansion of the Hans Merensky Hotel, Golf and Spa without environmental authorisation in contravention of the provisions of NEMA;
- Count 2 – a failure to comply with the general duty of care provided for in terms of section 28(1) of NEMA;
- Count 3 – the unlawful disposal of untreated waste in contravention of the duty of care under NEMWA;
- Count 4 – the failure to manage waste in a manner that does not endanger the health or the environment in contravention of the duty of care under NEMWA;

Count 5 – the failure to comply with the general duty of care provided for in section 19(1) of the NWA; and

Count 6 – the failure to comply with the directives contained in a compliance notice issued in terms of NEMA.

Both accused pleaded not guilty and following a criminal trial during which the accused exercised their right to remain silent, Magistrate Nkuna found that the state had failed to prove the charges on counts 1 and 6 but that the charges on count 3 had been proven beyond all reasonable doubt. Magistrate Nkuna further ruled that the charges on counts 2, 4 and 5 were an undue duplication of charge 3 and held that the two accused could not be convicted of more than one offence where all offences arising out of the same unlawful act or omission, as is provided for under section 336 of the Criminal Procedure Act 51 of 1977.





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Cliffe Dekker Hofmeyr

As alluded to by Magistrate Nkuna, section 336 of the CPA has to be applied on a common sense, and case-by-case basis. While there is merit in concluding that count 4 is a duplication of count 3, we do note that the court failed to take into account that the penalty provisions under NEMWA expressly provide that any penalty imposed in terms of NEMWA is in addition to any other penalty or award that may be imposed or made in terms of NEMA. There are no similar provisions in respect of the NWA, however, it would have been preferable for the court to provide more detailed reasoning as to why it was of the view that there was a duplication under counts 3 and 5.

The court further appears to have failed to consider section 34(3) of NEMA, in terms of which it was competent to make an award for damages or compensation, or otherwise that certain remedial measures be undertaken.

Nevertheless, and of significance, Magistrate Nkuna determined that, based on the evidence before the court, Rinderknecht was the sole director of Southern Sky at the time of the commission of the charges on count 3 and therefore applied the director liability provisions provided for in section 34(7) of NEMA in also finding Rinderknecht guilty of the charges. Rinderknecht, as the director of Southern Sky, was ordered to pay a penalty of R5 million with R3 million suspended for a period of 5 years, while Southern Sky was ordered to pay a penalty of R3 million. The unlawful disposal of waste at the Hans Merensky Hotel, Golf and Spa therefore resulted in Magistrate Nkuna ordering the payment of a total amount of R5 million in penalties for the offence committed.

**Conclusion**

The above order marks a significant departure from orders made in previous criminal cases involving the application of the director liability provision of NEMA where the courts have generally adopted a rather lenient approach to sentencing. The previous most significant court order involving the application of section 34(7) was in the matter of the State v Blue Platinum Ventures (Pty) Ltd where the offending company and its director were convicted of an offence relating to the unlawful commencement of mining activities. The director was handed a suspended prison sentence without the option of a fine and which sentence was also linked to the rehabilitation of the area which Blue Platinum Ventures (Pty) Ltd had unlawfully mined.

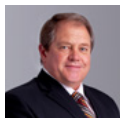
It remains to be seen whether the example that has been set by Magistrate Nkuna will be adopted in future criminal cases involving the application of section 34(7) of NEMA.

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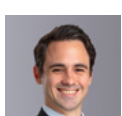
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