

Asbestos

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Liability to Remedy Asbestos Pollution.

This court decision provides a specific interpretation of environmental protection legislation in South Africa. It is unlikely to set a wider precedent but will be of interest to those with South African exposures. It finds that there is no liability to clean up contamination which was caused before the environmental protection legislation came into effect in 1999.

The High Court of South Africa passed judgement relating to historic pollution of an asbestos mining area and surrounding lands. The mining area had been worked by a number of private companies and government institutions and the degree of contamination was and is considerable. A new owner of the mining land was invited to contribute to the clean-up costs, the action being brought under the National Environmental Management Act 107 (1998) (NEMA).

The active clause:

Section 28 of NEMA provides as follows:

(1) 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.

(2) Without limiting the generality of the duty in ss (1), the persons on whom ss (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which

(a) any activity or process is or was performed or undertaken; or

(b) any other situation exists,

which causes, has caused or is likely to cause significant pollution or degradation of the environment.

At issue was 1) whether a new owner, during who's period of tenure there was no mining or related activity, should be included among those with a duty to remediate? 2) whether those who caused pollution prior to the date of the NEMA would be required to pay for remediation.

The judge conclude that this was a strict liability and that if the legislature had intended retrospective liability they would have explicitly said so, it being contrary to the usual standards of law. They did not say so, so the law would not have retrospective effect.

32 In my view, the unfairness of retrospective effect being given to sections 28(1) and (2) is so great that it is unlikely that the Legislature could have intended it.

40...The words in the past tense [ss (1) and (2)] were probably intended to refer merely to a person who at some stage after the commencement of NEMA had caused pollution but was no longer doing so.

Only those who cause contamination after the date of effect of the NEMA would be expected to pay the costs of remediation.

The decision may be appealed.

Comment

Part 11A of the UK Environment Act 1990 and 1995 circumvents this problem, to some extent, by adding "knowingly permits" to the causal term. In the UK the aim is to ensure that the party who caused or allowed the pollutants to be in on or under the land pays for the remediation work. If that party or parties cannot accept 100% of the costs (e.g. they are in liquidation) then the current owner/occupier will take the place of the missing cover. A new owner who did not cause the pollution but who knowingly permits contamination to continue would be liable for a share of the clean-up costs or, at least, the costs of interrupting the pathway between source and receptor to the degree that ensures the land is fit for purpose. Contamination, responsible parties and degree of clean-up required are decided by the local authority.