BAREKI & ANOTHER V GENCOR LTD & OTHERS 2006 (1) SA 432 (T)

Importance	This case is notorious in environmental circles for being the judgment that failed to confirm the retrospective application of s 28 of the National Environmental Management Act 107 of 1998 (NEMA). The basis for the court's finding was the common law presumption against retrospectivity, linked to the nature of the obligations set out in s 28. The court found that the obligation to take reasonable corrective measures in relation to pollution were strict (i.e. fault in the form of negligence or intention was not a requirement to establish liability) and possibly even absolute (lawfulness was not a requirement). For this reason the court held that the legislature could not have intended the obligations to apply retrospectively. This ratio, however, has been largely rendered obsolete by legislative amendments to NEMA by Act 14 of 2009. A new s 28(1A) has been inserted which indicates that the duty defined in s 28(1) – which applies to the actual polluter- applies to significant pollution and degradation of the environment that occurred before the commencement of NEMA; that arises or is likely to arise at a different time from the actual activity that caused the contamination; or that arises through an act or activity of a person that results in a change to pre-existing contamination. This can be taken as an expression of clear legislative intent that s 28(1) apply retrospectively. There is no such express qualification attached to s 28(2) (which indicates that the owner or person in control of the land on which the pollution or degradation occurred also has a duty to take reasonable corrective measures), however, which could suggest that the obligation does not apply retrospectively in this instance. There is also a new s 28(14) and (15) which criminalize an act or omission that causes significant pollution or degradation or is likely to affect the environment in a significant manner. Unlawfulness and fault (in the form of negligence or intention) are clearly specified as requirements here. It is not clear whether the nature of the offence defined here also means that the duty s 28(1) requires fault. The reasoning in the *Bareki* case, however, suggests that it would. What is less well-known and possibly more important about this case are the court's findings regarding the continuity of legal obligations pertaining to rehabilitation of the environment. Statutory prescriptions defining obligations in this regard have been on the books since the early 1980s, but have been 'interrupted' by the repeal first of the Mining and Works Act, 1957 and its attendant regulations and then the Minerals Act, 1991. This allows the mining companies to claim that the obligations are no longer applicable since the statutes or regulations in terms of which they were prescribed are no longer in effect. In this case the plaintiffs succeeded in establishing the continuity of such legal obligations by referring to s 12(2)(c) and (e) of the Interpretation Act, 1957. However the court's ratio on the effect of

	s 12(c) of the Interpretation Act is problematic and does not clearly indicate that the obligations are continuous. The court also rejected a 'continuity by content' argument advanced by the plaintiff – which holds that the obligations applicable to mining companies have been largely similar across the various regulatory regimes. This should be a topic for further research. Finally, this case is relevant for showing the importance of absolute accuracy in the pleadings put forward by those wishing to protect the environment. In at least three instances the court's decision was based on technical inconsistencies or inaccuracies regarding the plaintiff's pleadings – see for instance the discussion on the linkage of s 49(b) to the nature of the duty in s 28(1) and (2), and the manner in which the court dealt with the plaintiff's third and fourth claims.
Parties	**First plaintiff:** A traditional leader who brought the action in his own interest, and in the interest of the Bareki tribe and the inhabitants of the Heuninglvei community of the North West Province. **Second plaintiff:** A group concerned with the protection of the environment (unspecified). **First defendant:** Gencor Ltd (majority shareholder of Gefco) **Second defendant:** Griqualand Exploration and Finance Co (Pty) Ltd (Gefco, undertook operations at Bute mine through its subsidiary Griqualand Chrysolite Mines (Pty) Ltd between 1976 and 1981) **Third defendant:** Hanova Mining Holdings (Pty) Ltd **Fourth defendant:** Government of the Republic of South Africa (owner of the land on which the Bute mine was situated) **Fifth defendant:** Minister of Minerals and Energy **Sixth defendant:** Minister of Environmental Affairs and Tourism
Facts	Between 1976 and 1981, the Griqualand Exploration and Finance Co (Pty) Ltd (Gefco, the majority shareholder of which was Gencor) undertook operations to mine asbestos at the Bute Asbestos Mine. Mining activities were discontinued sometime between 1981 and 1985. The plaintiffs alleged that over this time Gefco and Gencor caused significant pollution in the mining and surrounding areas by the distribution of asbestos fibres. The remains of mining were still present in the form of asbestos dumps, a beneficiation plant, a mill and a haul road between the mill and beneficiation plant. The plaintiffs alleged that this pollution constituted a serious health risk to residents and occupiers of the areas concerned, and a significant threat to the environmental integrity of the region. The plaintiffs claimed that Gefco/Gencor and the Government (as the owner of the land), were responsible for rectifying the pollution and/or degradation. Their estimated cost of rehabilitation was put at R64 million, whereas Gefco, Gencor and the Government estimated the costs to be in the region of R18 – 24 million. Using the s 28(12) procedure in NEMA the plaintiffs had requested the Director-General of the Department of Environmental Affairs and

	Tourism to carry out rehabilitation of the affected areas and to later claim such costs from Gefco, Gencor and/or the Government but the D-G had failed to comply with the notice. The plaintiffs accordingly sought an order against Gefco, Gencor and the Government directing them to determine, commence and continue with reasonable measures to rehabilitate the area concerned. The plaintiffs articulated six different claims (of which claims 5 and 6 were not excepted to and were therefore irrelevant to the proceedings), which were distinguished on the basis of the legal authority grounding the overarching request for an order that rehabilitation be effected. The claims were as follows: • Claim 1 was based on s 28 of NEMA. The defendants excepted to this claim on the basis that NEMA was not retrospective in operation and did not apply to pollution that occurred prior to 29 January 1999 (the date NEMA commenced). • Claims 2 – 4 were premised on a finding that NEMA was not applicable to the case. The applicants' further claims were therefore based on a combination of reliance on provisions of the Mines and Works Act 27 of 1956, Regulations promulgated in terms of this Act (published in the *Government Gazette* Regulation 992 of 26 June 1970); the Minerals Act 50 of 1991 and the Interpretation Act 33 of 1957. The obligations had primarily been defined in the Mines and Works Regulations of which the most important provisions were reg 2.11; 5.10; 5.12.2; and 5.13.3 (the original text of each of these regulations is set out at the end of the factsheet). The plaintiffs wished to argued for the continuity of the environmental obligations defined in these former, but repealed[2] pieces of legislation. Critical to this argument was s 68(2) of the Minerals Act, 1991 (which provided that the regulations in force prior to the commencement of the Act remained in force) and s 12(2) of the Interpretation Act, 1957 which provides that: 'Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not …*(c)* affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or . . . *(e)* affect any . . . legal proceeding or remedy in respect of any such right, privilege, obligation, liability . . . as is in this subsection mentioned, and any such . . . legal proceeding or remedy may be instituted, continued and enforced . . . as if the repealing law had not been passed.' • The basis for the defendants' exception to Claims 2 – 4 was generally that the Minerals Act, 1991 (and thereby also the Regulations in terms of the Mines and Works Act, 1967) had been repealed by the Mineral and Petroleum Resources Act 28 of 2002 since 1 May 2004. They disputed that the obligations

	defined in the Regulations remained enforceable by virtue of s 12(2) of the Interpretation Act, 1957.
Relief Sought	Judgment on **exceptions** to the plaintiff's particulars of claim.
Legal Issues & Judgment	***Issue 1:*** Were the provisions of s 28 of NEMA retrospective? In this regard, would there be unfairness to Gencor, or an encroachment on the rule of law if the provision was interpreted as having retrospective effect? In order to answer this it was necessary to determine what was the nature of the duty or obligation created by s 28. ***Judgment:*** The court first held that there is a *prima facie*[3] common law presumption against holding that legislation has retrospective effect (at 438J). Elementary considerations of fairness – the opportunity to know what the law is and to conform one's conduct accordingly – form the basis of this presumption (at 439B – C). The ability to arrange one's affairs in the shadow of the law is also an essential requirement to the rule of law (at 439C). The court noted that the duty created by s 28(1) (which the judge framed as a 'duty to take reasonable corrective measures') flowed merely from the fact of causing significant pollution or degradation of the environment; i.e. it appears to exclude fault. Based on this, the court agreed with the defendants that ss 28(1) and (2) created strict liability (i.e. liability without fault). The judge remarked *obiter* that because this duty could be imposed on owners without their knowledge or consent, the duty was possibly even 'absolute' (i.e. excluding wrongfulness and fault) (at 440H). In finding that ss 28(1) and (2) excluded fault, the court held that s 49(b) of NEMA (which provides that a person is only liable for damages for failure to perform a duty in terms of NEMA where there has been wrongfulness or negligence, i.e. a form of fault) was irrelevant to the proceedings because the plaintiffs were not asking the court to award damages, but to order reasonable corrective measures (at 440B – D). In deciding that ss 28(1) and (2) established strict (and possibly absolute) liability the court also found it relevant that there was no monetary limit to the liability established by this section and that the liability could accordingly be very heavy (at 440I), and that NEMA created no statutory defences in favour of the person who had caused the pollution (at 440J – 441B). If the legislature had intended to attach new legal consequences to past conduct, one would have expected their intention to be clear (at 441I). However, the unfairness of retrospective effect being given to s 28(1) and (2) is so great that it is unlikely that the legislature could ever have intended it (at 442C).
	Issue 2: Were the acts of pollution completed before NEMA commenced, or was the pollution still ongoing? ***Judgment:*** After distinguishing retrospective legislation from retroactive legislation (the former attaches new consequences to past conduct, the latter changes the law from a previous date) (at 442H –

	443C), the judge found that the plaintiffs had themselves relied on the claim that the acts of pollution were caused between 1976 and 1981and were thus not entitled to also claim that the acts of pollution were continuing (at 444F – G).
	Issue 3: Were the legal obligations defined in terms of the regulations to the Mines and Works Act, 1956 enforceable by virtue of the provisions of s 12(2)(c) and (e) of the Interpretation Act, 1957? ***Judgment:*** It is difficult to determine what is the court's ratio on this position. It seemed that he accepted the plaintiffs' argument to the effect that legal proceedings launched before a law is repealed must be continued as if such law was still in force – this relates to s 12(2)(e) of the Interpretation Act, 1957 (at 449H – J). On this basis the exception to the second claim was dismissed (at 449J). However the more critical issue – whether the obligations defined by the Mines and Works Regulations – continued to impose an obligation by virtue of s 12(2)(c) of the Interpretation Act seemed to be affirmed much more tentatively, if at all (at 449F, and it is not clear from this passage whether the judge is stating his own position or summarizing the arguments of the client). The court also dismissed Gencor's argument that it was not the owner of the land to be rehabilitated and could therefore not gain access to the land to effect rehabilitation (at 450E – F). The exceptions to the second claim were therefore dismissed.
	Issue 4: Were the legal obligations defined in reg 5.12.2. (which set out a duty to rehabilitate as an integral part of mining operations similar to s 38 of the Minerals Act, 1991 and s 38 of the current MPRDA) enforceable by virtue of the obligations being 'continued' by s 38 of the Minerals Act? ***Judgment:*** The judge held that s 38 of the Minerals Act was entirely irrelevant to the submission (at 452B). In terms of this claim the applicants had argued that the Mines and Works regulations had been repealed by s 63 of the Minerals Act, 1991 and replaced in their content by s 38. The court found that because the plaintiffs had averred that the regulations had been repealed, and because they had not pleaded the continuity of those regulations in terms of s 12(c) and (e) of the Interpretation Act, 1957, the regulations had no force of law. The 'continuity through content' argument therefore did not hold sway. The exceptions to the third claim were therefore upheld (at 452I).
	Issue 5: Were the legal obligations set out in regs 2.11 and 15.13.3 (which set out a duty to rehabilitate the environment a close as possible to its natural state) enforceable by virtue of the obligations being 'continued' by s 38 of the Minerals Act? ***Judgment:*** The exception to this claim was upheld on the same basis as that outlined for Issue 4 above.

Outcome	The exceptions to the first, third and fourth of the plaintiffs' claims were upheld, the exception to the second claim was dismissed. The matter however seems to have never subsequently gone to trial.

TEXT OF REGULATIONS IN TERMS OF THE MINES AND WORKS ACT, 1967

Regulation 2.11

'When the operations at any mine or works are discontinued or abandoned, the owner or the person acting as the manager of such mine and works at the time of its discontinuance or abandonment shall continue to be responsible for compliance with the requirements of these regulations so far as the protection of the surface and the furnishing of plans and returns are concerned until the Inspector of Mines shall have issued to him a certificate that such requirements have been complied with.'

Regulation 5.10

'Any dump, as the Inspector of Mines may direct, shall be covered with a sludge or soil or otherwise dealt with in a manner satisfactory to the Inspector, so as to prevent the dissemination of dust or sand therefrom.'

Regulation 5.12.2

'Rehabilitation of the surface at any opencast mine shall form an integral part of the mining operations and shall, as far as practicable, be conducted concurrently with such operations and where applicable in accordance with a programme laid down by the Inspector of Mines after consultation with the manager and approved by the Government Mining Engineer.'

Regulation 5.13.3

'When prospecting for or recovery of a mineral finally ceases and when the operations finally cease at any works or the prospecting rights or mining titles or contracts held cease to exist, the owner or manager shall cause to be demolished all buildings, walls, foundations, dams, swimming-pools, posts or other structures and installations, including pipelines and private railway lines laid on the surface of the land where such operations were conducted and shall ensure the removal or the disposal of the rubble resulting from the demolition thereof and the rehabilitation of the surface to as near to its natural state as is practicable to the satisfaction of the Inspector of Mines. . . .'

The term 'Inspector of Mines' referred to in regs 5.10; 5.12.2; and 5.13.3 had been amended from time to time and the designation of the current position was the 'Principal Inspector of Mines'. The designation of 'Inspector of Mines in reg 2.11 was amended from time to time and now would refer to the Director: Mineral Development.