

Environmental duty of care: realities for the real estate sector

Operators in the real estate sector routinely deal with a slew of challenges, relating but not limited to construction defects or delays, injuries to tenants and liability claims due to property damage. Landlords, landowners, and property managers, however, typically overlook their environmental duty of care (DoC) obligations in this respect, which attracts liability risks arising from environmental pollution or non-compliance events at their owned and or managed properties.



Gary Rapson and Tendai Bonga, Webber Wentzel

A common misconception is that the statutory DoC obligations, applicable in terms of both the National Environmental Management Act 107 of 1998 and the National Water Act 36 of 1998, do not extend to landowners, landlords and property managers, given that none of these parties is typically involved in the day-to-day running of their tenants' businesses and are naturally not involved in the management of potential and actual environmental pollution or non-compliance. However, the reality is that each of these actors carries a degree of legal responsibility, despite the arm's length relationship with tenants, due to the notoriously wide scope of the DoC statutory framework.

Enforcement action

Regulators frequently issue enforcement action, most commonly in the form of directives, to landowners, landlords and property managers for breach of DoC obligations, following an environmental contravention committed by a tenant. Failure to comply with a directive is a criminal offence, in which case regulators may elect to remediate the environmental harm and claim the related costs proportionally from the relevant party/ies. The material risk of (personal) director liability in this context presents a particularly strong case for landowners, landlords and property managers to comply with their respective DoC obligations, not to mention the associated reputational impacts, among other considerations.



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Take reasonable steps

Landowners, landlords and property managers must therefore take reasonable steps to discharge their respective DoC obligations and even more so in instances where tenants conduct high-risk business activities. These could include the production and or storage of hazardous substances, activities resulting in the generation of noxious discharges or atmospheric emissions, or the use of large quantities of harmful agrichemicals or fertilisers (in the case of agricultural tenants), all of which typically carry significant environmental pollution risks.

The manner and extent of the measures which must be employed by landowners, landlords and property managers in this context must be determined on a case-by-case basis. In each instance, they should consider the nature of the relationship between each of these parties (and the tenant), as well as the manner of the business activities conducted at the relevant property. This requires taking a balanced approach, combining both practical and contractual measures which are tailored to ensure that each party navigates and adequately complies with the relevant DoC landscape, while avoiding the associated and inherently significant environmental liability risks.