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THE STRUGGLE TO ACHIEVE COOPERATIVE GOVERNANCE CONTINUES

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A discussion on the transitional provisions of the National Environmental Management Act (1998) and Mineral and Petroleum Resources Development Act (2002) Amendment Acts

Introduction

The environmental regulation of mining activities has been the subject of a long-running “turf battle” between the national Department of Environmental Affairs (DEA) and the Department of Mineral Resources (DMR). The DMR has traditionally adopted the stance that the obtaining of a mining right or permit (collectively referred to hereafter as “mining right”) trumped the need for any other authorisation required by any other law.

This mistaken belief was clarified by the Constitutional Court in the decision of *Maccsand*,^[1] where it was held that holding a mining right did not negate the need to obtain any further authorisations which may be triggered as a result of mining activities. More recently, it is accepted that various authorisations and permits may be required in addition to a mining right before mining activities may commence. It is for instance commonly accepted that, depending on the location, nature and extent of the activities, a water use licence under the National Water Act may be required and/or zoning approval is necessary where the zoning of the property does not permit mining. The position with regard to separate environmental authorisation under the National Environmental Management Act (NEMA) for mining activities, and activities associated with mining that are separately listed under NEMA, is less clear.

Perpetual lack of clarity

A consideration of the amendments to NEMA, the Mineral and Petroleum Resources Development Act (MPRDA) and Regulations issued under NEMA since June 2010 makes for interesting reading. While the objective of improving cooperative governance and streamlining or coordinating the environmental regulation of mining activities is clear, the implementation of these provisions has been pending over four years now. The result is a perpetuation of the lack of clarity regarding environmental regulation of mining activities, which is ultimately a disservice to the mining sector and a disincentive to investors.

When the activities specifically related to prospecting and mining were incorporated into the NEMA listing notices in GNR 544, 545 and 546 in Government Gazette 33306 of 18 June 2010 (listing those activities which required environmental authorisation) it was on the basis that these mining activities would only come into force and effect on a proclaimed date and after the transitional periods provided for in the NEMA and MPRDA Amendment Acts had been completed. The transitional provisions of the Amendment Acts provided that the amended provisions of NEMA regulating mining activities would take effect 18 months after the date on which the MPRDA Amendment Act took effect.

It is clear therefore that the Minerals Minister held the key to bringing these prospecting and mining specific activities into force under NEMA; yet five years passed without the MPRDA Amendment Act being promulgated.

A history of the Amendment Acts

The amendments to both NEMA and the MPRDA were passed by Parliament in 2009 with the intention of creating one system of environmental management in terms of NEMA and so removing all environmental-related authority from the DMR, making the DEA the competent authority to address the environmental impacts of mining activities. The NEMA Amendment Act came into effect in May 2009.

In June 2013, the MPRDA Amendment Act was finally brought into effect. As noted above, the coming into effect of this Amendment Act follows a five-year struggle between the DEA and the DMR to reach finality and agreement on the environmental regulation of mining activities.

In respect to the transitional provisions, there is an 18-month interim period of a *status quo*, where the DMR would remain the authorising body in respect of mining applications and the approval of mining Environmental Management Programmes.

After this period, environmental authorisations, as regulated by NEMA, would be required in respect of activities undertaken after 7 December 2014. However, the DMR would be the authorising body and not the DEA. The DMR would remain the relevant authority following another 18-month period. Following these two transitional 18-month periods, the DEA was to take over from the DMR as the authorising body in respect of environmental authorisations for mining activities.

The June 2013 amendments

With the coming into effect of the MPRDA Amendment Act, a number of amendments have already been effected on the main text of the MPRDA; specifically in

respect to environmental management requirements. These amendments took effect in June 2013 and are detailed below:

- Section 38 which previously regulated environmental management and the responsibility to remedy environmental impacts was repealed, with sections 38A and B (provided for in the MPRDA Amendment Act) set to replace it. Section 38A states that the DMR is the responsible authority for implementing the provisions of NEMA in respect to mining and that an environmental authorisation is a pre-condition to the granting of a mining right or permit. This section was to commence as per the 18-month transitional process, discussed above.
- Section 38B states that an environmental management plan or programme approved in terms of this Act before, and at the time of the coming into effect of NEMA, is deemed to be an environmental authorisation. However, this section was not subject to the 18-month transitional process and it is unclear as to when this section will take effect and how it will be implemented – particularly as NEMA came into effect before the MPRDA.
- Sections 39 to 42 – which regulated the environmental management programme and environmental management plan development, financial provision for rehabilitation, and residue and stockpile management – have been deleted without any replacement. This, and the fact that section 38A and B have not yet come into force, has resulted in there being no regulatory provisions currently in effect which regulate the development of environmental management plans and programmes. In practice, applicants are making application for environmental management plans and programmes as if the repealed sections are still in existence.
- Section 43 regulates the issuing of closure certificates and was amended to provide that the holder of a mining right, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance with the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued a closure certificate in terms of this Act to the holder or owner concerned.
- The Act also provides for collaboration between the DMR and various other authorities by stating that no closure certificate may be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment, have confirmed in writing that the provisions pertaining to health and safety and management of pollution to water resources, the pumping and treatment of extraneous water, and compliance to the conditions of the environmental authorisation, have been addressed.

A further Amendment Act was published on 2 June 2014 (“the 2014 Amendment Act”) and comes into operation three months from the date of its publication in the Government Gazette, on 2 September 2014.

The Act amends NEMA to allow for the integration of environmental management with mining activities, including:

- For the Minister of Mineral Resources to be the competent authority for environmental matters in so far as they relate to prospecting, exploration, mining or production of mineral and petroleum resources. The Minister of Environmental Affairs may under certain circumstances take an environmental decision in so far as it relates to prospecting, exploration, mining or production, instead of the Minister of Mineral Resources.
- The amendment of the financial provisions of NEMA by requiring banks, insurance providers and trusts to include provision for rehabilitation,

decommissioning, and remediation of negative environmental impacts. This is an important development as the definition of “financial provision” in the MPRDA, which only contained a general requirement for financial provision for holders of mining authorisations to undertake rehabilitation of the affected areas, has been deleted. The new provision in NEMA is more onerous.

- Section 24(5)(b) of NEMA provides that the Minister or MEC may make regulations laying down certain procedures to be followed. The power to enact regulations in respect to certain wastes has been amended, allowing regulations to be enacted in respect of the management of all mine residue stockpiles and deposits.
- The empowerment of the Director-General of the DMR to issue section 28 directives in so far as they relate to prospecting, exploration, mining or production, and for the Minister of Mineral Resources to designate environmental mineral resource inspectors for compliance monitoring and enforcement of provisions in so far as they relate to prospecting, exploration, mining or production.
- To provide the Minister of Environmental Affairs with the power to direct environmental management inspectors to perform compliance monitoring and enforcement duties instead of mineral resource inspectors under certain circumstances.
- To provide for the criteria for condonation applications in the case of appeals that relate to prospecting, exploration, mining or production.

Importantly, section 28 of the 2014 Amendment Act repealed section 14(2) of the 2008 NEMA Amendment Act, deleting the provisions which provided for the 18-month transitional period after the commencement of the MPRDA Amendment Act, with effect from 1 September 2014.

Transitional time periods

The MPRDA Amendment Act makes express reference to the transitional time periods prescribed in section 14(2) of the 2008 NEMA Amendment Act. As noted above, the initial 18-month transitional arrangement resulted in the requirement for environmental authorisation being effective from 7 December 2014, with this requirement being implemented in accordance with the provisions of NEMA but under the administration of the DMR.

However, with the coming into effect of the 2014 Amendment Act, the transitional period to 7 December 2014 has been deleted with effect from 1 September 2014.

This, together with the amendments to the MPRDA detailed above, has simply served to perpetuate the lack of clarity and finality regarding when the requirement to obtain environmental authorisation for mining activities will, in fact, commence. It is therefore essential that all three Amendment Acts be read together.

As noted above, in terms of the 2008 Amendment Acts, the requirement to obtain environmental authorisation for mining activities would have been subject to the 18-month transitional period and would have come into effect 18 months after the commencement of the MPRDA Amendment Act on 7 June 2013 – resulting in the need for environmental authorisation becoming effective from 7 December 2014.

However, with the repeal of these transitional provisions as a result of the 2014 Amendment Act, the 18-month transitional period and need for environmental authorisation after 7 December 2014, would fall away.

Conclusion

The effect of the 2014 Amendment Act appears to therefore have the unintended consequence that it is no longer a requirement to obtain an environmental authorisation for listed prospecting and mining activities after 7 December 2014. Furthermore, the effect of the 2014 Amendment Act – read with the MPRDA Amendment Act – is that there are no regulatory provisions regarding the preparation of environmental management programmes or plans under the MPRDA. The amendments have therefore resulted in even greater lack of clarity regarding the environmental regulation and management of mining activities. Ultimately, this is a disservice to a mining industry desperate for legislative certainty and clarity, and a disincentive to investors.

We hope that this is a temporary state of affairs and a subsequent Amendment Act is therefore expected.

[1]2012 (4) SA 181 (CC)

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- Cape Town
- +27 21 405 5232
- +27 11 535 8593