DLA CLIFFE DEKKER HOFMEYR

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ENVIRONMENTAL MATTERS

IN THIS ISSUE

Damages claims under the Compensation for Occupational Injuries and Diseases Act and the Occupational Diseases in Mine and Works Act - how do they work together?

The Constitutional Court (Court) recently handed down a judgment with major implications for the mining sector. Mankayi v AngloGold Ashanti Ltd [2011] ZACC 3 concerned a claim for damages of R2,6 million by a Mr Mankayi, who had contracted a disease as a result of alleged exposure to an unsafe working environment on a mine owned by AngloGold. He claimed medical expenses, loss of income and general damages from his employer. He had already received compensation under the Occupational Diseases in Mines and Works Act, 78 of 1973 (ODMWA).

The issue the Court had to decide was whether the exclusion from claiming damages directly from employers contained in the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA), prevented an employee who had been compensated under ODMWA from claiming such damages. Section 35(1) of COIDA precludes an employee or any dependant of an employee from instituting a claim for damages against an employer relating to any disablement or death caused by an occupational injury or disease. Instead, the employee or the employee's dependant will only have a claim against the Compensation Board under COIDA.

AngloGold argued that a claim for damages against it was excluded by COIDA because an award had been made under ODMWA and the claim had to be dismissed. This argument was upheld by the High Court and Supreme Court of Appeal and was referred to the Court to determine whether this was an issue of constitutional importance. The Court, in its majority judgment, responded that a matter that inevitably impacted on the constitutional right to freedom and security of a person and the consideration of delictual remedies protecting such constitutional rights, was one that the Court had to address.

The Court held that legislation regulating compensation for occupational injuries provided for two categories of workers, the first primarily mineworkers (ODMWA), and the other, all employees (COIDA). Importantly, section 100 of ODMWA prohibits "double-dipping" and provides that where a person had received or is receiving compensation in terms of its provisions, a claim may not be made for additional compensation under another Act.

In considering the argument that the exemption in section 35(1) of COIDA prohibited Mankayi from claiming damages directly from AngloGold, the Court held that the definition of "employees" in COIDA referred only to those who were able to claim under COIDA and not those who were precluded from benefiting under the Act. Section 100 of ODMWA expressly excluded those who claimed under its provisions from claiming under COIDA; therefore section 35(1) of COIDA could not apply to those same excluded

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employees. It was also held that COIDA came into effect long after ODMWA and therefore, if the legislature had intended employees covered by ODMWA to be covered by the provisions of COIDA, it would have expressly stipulated so. It was further clear from the language of COIDA that its provisions only related to those employees that were covered by it. It was held that as ODMWA expressly excludes employees who claim for benefits under it from a claim under COIDA, those employees are not subject to the limitation imposed by section 35(1) of COIDA and retain their right to claim damages from their employers for any losses or expenses not compensated in terms of ODMWA.

Although this judgment is viewed by many as rendering mining company employers vulnerable to paying out large sums of money as compensation to employees who have been detrimentally affected by their work, it must be noted that a claimant employee must successfully prove negligence and substantiate the amount of his or her claim, which is often not easy in practice.

The Court recognised the contribution of mineworkers to the economic wealth of the country which, it stated, came at a great cost to their health and rendered them vulnerable members of society. The decision provides recognition of mineworkers who have, for a long time, received minimal compensation for occupational injuries. The important implication of the judgment is that mining companies are to prioritise the health and safety of their employees and ensure that the proper precautions are taken to reasonably prevent unnecessary exposure to the harmful effects of the working environment.

Sahndya Naidoo and Helen Dagut

When things go wrong

An Environmental Assessment Practitioner (EAP) was recently convicted of an offence for having submitted incorrect or misleading information as part of an Environmental Impact Assessment (EIA) conducted in terms of the National Environmental Management Act, 107 of 1998's EIA Regulations. He was also initially charged with fraud, but was not successfully prosecuted on this charge.

The EAP was instructed to conduct the basic assessment required for rezoning the site on which the Pan African Parliament's new building was to be located. As part of that assessment, the Gauteng Department of Agriculture and Rural Development (GDARD) had specifically required him to conduct certain further studies, including wetland delineation. His client, the Department of Public Works, had also been advised that the proposed construction might affect a wetland system and so had asked the EAP to conduct the relevant studies. No wetland studies were done.

Instead, the EAP represented in the Basic Assessment Report (BAR) that no river, stream or wetland occurred within a 500 metre radius of the site. As part of his defence, he said he did not think a wetland study had been necessary based on the information and assumptions he had drawn from other studies commissioned.

Based on the information contained in the BAR, an environmental authorisation was granted. Construction commenced. However, seepage and other indications of the presence of a wetland caused the construction site project manager to seek the advice of another consultant. Construction was put on hold and investigations began.

In its judgment, the court deliberated extensively on expert evidence regarding what wetlands are and whether a wetland in fact existed on the site. It concluded that the assumptions made by the EAP regarding the non-existence of the wetland had not been confirmed by an appropriate expert. It further held that the EAP had not acted according to the requests made to him by the competent authority and the applicant.

The court dismissed the charge of fraud on the basis of the EAP not having unlawfully and intentionally made representations causing either actual or potential prejudice (although it remarked that the rehabilitation costs would result in prejudice to the state and the tax payer).

In convicting the EAP on the charges raised in terms of the EIA Regulations, the court held that the EAP had failed to comply with prescribed norms, that he had been negligent and had not properly applied his mind. Regulation 81(2) provides for a maximum sentence of two years or a fine not exceeding the amount prescribed in terms of the Adjustment of Fines Act, 101 of 1991.

The applicant in this matter was not charged. That potential does exist, however, and for that reason, (together with significant negative publicity that would arise in these circumstances) it is recommended that in appointing an EAP, an applicant carefully considers the EAP's track record and whether he or she is registered with the newly established Environmental Assessment Practitioners' Association of South Africa. The appointment and mandate should be made in writing. It would also be wise to stipulate in the contract, indemnity against the rehabilitation costs of damage negligently or fraudulently caused by the EAP's conduct.

Justine Sweet

The Consumer Protection Act protects the environment too

The Consumer Protection Act, 68 of 2008 (CPA) came into effect on 1 April 2011 and is to be implemented by the National Consumer Commission. Its primary purpose is to promote and advance the social and economic welfare of consumers in South Africa. The purpose will be achieved by, among other things, the establishment of a legal framework for a fair, accessible and responsible consumer market; protecting customers from improper trade practices and deceptive or misleading conduct and improving consumer awareness and information.

The CPA applies in general, and with some exceptions, in respect of the supply of goods and services in South Africa. It confers rights upon consumers which they may enforce, including: the consumer's right to choose; the right to disclosure and information, and the right to fair value, good quality and safety. The conferring of these rights upon consumers means that suppliers of goods and services have obligations to ensure realisation of the rights.

Goods and services subject to regulation under the CPA include those with actual or potential environmental and health impacts. Obligations imposed on suppliers of such goods and services include:

- The obligation to provide information in respect of potential or actual environmental or health impacts of goods or services. This would require that information which is accurate and not misleading or deceptive must be disclosed in plain language on product labels and in descriptions of goods (trade descriptions) and in the course of marketing goods and services, where appropriate.

- The obligation to provide customers with safe, good quality goods. Suppliers must alert consumers to potential risks associated with goods or services, which may include environmental or health risks. Where not labelled in terms of the requirements of other legislation, hazardous or "unsafe" goods (defined to include those which potentially present hazards or may be unsafe to people or property) must meet specified packing standards. Suppliers or installers of hazardous or unsafe goods (for example batteries or aerosols which have a risk of explosion) must supply information about the hazards to the consumer.

- The obligation not knowingly to take advantage of the fact that a consumer was unable to protect his or her own interests because of, among other things, ignorance of the true facts relating to a product. If a supplier behaves in this way, it is "unconscionable" as that term is defined in the CPA.

  Relying on this provision, a group of South African consumers has laid a complaint with the Consumer Commissioner concerning the treatment of pigs and chickens in factory farms, about which, they allege, the south african public is given insufficient information.

- Obligations are also imposed in respect of the recovery and safe disposal of particular goods (for example electronic goods) which cannot be disposed of along with other wastes. These are good, likely to include those with the potential to harm the environment, for example through leaching of toxic substances. Specifically, suppliers must accept their return (including of their parts or remnants) from the consumer, without charging the consumer, irrespective of whether the supplier supplied the particular returned object to that particular consumer. Producers, importers and distributors of such goods must accept their return from the suppliers. These provisions are consistent with those requiring extended producer responsibilities under the National Environmental Management: Waste Act, 59 of 2008.

The producer, importer, distributor or retailer of goods is liable for harm, including damage to property, caused by the supply of unsafe goods, hazards in any goods or inadequate instructions or warnings provided to the consumer in respect of hazards arising from the goods. This applies irrespective of whether the harm resulted from any negligence on the producer, importer, distributor or retailer. Claims for damages under this section prescribe after three years in specified circumstances.

The promulgation of the CPA results in an additional layer of obligations being imposed for goods or services with potential or actual hazards or risks to consumers and the environment. These obligations must be complied with in addition to other obligations for environmental protection prescribed under environmental laws. Consumers may enforce their rights, and have begun to do so, where producers and suppliers are failing to do so.

Helen Dagut

Better late than never for Acid Mine Drainage

Acid Mine Drainage (AMD) has been the subject of much discussion on the Witwatersrand recently. There was talk of the downtown Standard Bank offices being flooded and flora and fauna being destroyed in what may be somewhat ironically called the Cradle of Humankind.

Government has been viewed as inadequately dealing with what may be a major environmental disaster and is under pressure to find a solution. South Africa's stringent environmental laws have been seen by many to have no teeth as far as mining companies are concerned when it comes to addressing AMD. There have been calls for political intervention.

AMD is particularly widespread in historical gold and coal mining areas, such as the three separate basins in the Witwatersrand, which have been identified as priority areas. Rock exposed during mining activities contains pyrite (a mineral consisting of iron sulphide), which is oxidised to form iron oxide when it comes into contact with oxygen. Old mine shafts and tunnels collect water underground and when that water comes into contact with iron oxide, sulphuric acid is formed. Where no pumping or treatment occurs (as is frequently the case where now-closed mines are concerned), the acidic water containing salts, iron and other heavy metals completely fills the shafts and tunnels. After that, it starts to decant into the surface environment, creating what is known as AMD.

The highly anticipated AMD Report was finally published by the Department of Water Affairs on 24 February 2011. Prepared for a so-called Inter-Ministerial Committee on AMD, the report was compiled by a team of experts chaired by the Directors General of Mineral Resources and Water Affairs.

The Report notes various risks and concerns relating to AMD, including those directly relating to flooding of mines, and to the environment generally. In particular, mine flooding may result in contamination of shallow groundwater resources required for agricultural use and human consumption. It may also result in geotechnical impacts, such as the flooding of underground infrastructure in areas where water rises close to urban areas, and to increased seismic activity, which could have a moderate localised effect on property and infrastructure.

Potential environmental impacts include serious negative ecological impacts, regional impacts on major river systems and localised flooding in low-lying areas. The Report proposes various solutions. Their effectiveness will need to be determined.

The Report notes that AMD has been reported from a number of areas within South Africa, including the Witwatersrand Gold Fields, Mpumalanga, KwaZulu-Natal Coal Fields and the O'Kiep Copper District.

The Western, Central and Eastern Basins were identified in the Report as "priority areas requiring immediate action because of the lack of adequate measures to manage and control the problems related to AMD, the urgency of implementing intervention measures before problems become more critical and their proximity to densely populated areas."

A generic approach to the management of AMD risks is suggested in the Report, with decant prevention and management listed as one of the ways to manage AMD.

"Experience in the Western Basin has shown the severe impacts that can be expected if the mine void is allowed to flood completely and decant. For this reason it is recommended that the water levels in the basins be held at or below the relevant environmental critical levels by pumping of water. In the Western Basin this will require pumping to lower the water level that is already at surface," the Report notes.

In addition to considering individual solutions for the different basins affected, the Report urgently proposes the implementation of ingress control measures aimed at reducing the rate of flooding and the eventual decanting and pumping volume. It is anticipated this will assist in reducing the volume of water that needs to be treated and will consequently reduce the operational costs of AMD management.

A study completed in June by the Mine Water Research Group at the University of the North West disagreed with the Report, and concluded there was no risk of mine water flooding. The study was commissioned by Absa and Standard Bank.

According to this study, "using the pile levels of the Absa Tower East as the deepest of the bank buildings considered in the Johannesburg CBD, it was calculated that the maximum elevation to which the mine water table can rise in the Central Basin mine void is 90 metres below the base of these piles."

The study also calls for "a more sustainable, low-cost, low-energy solution" to the problem "as opposed to the currently proposed high-cost, high-energy, pump-and-treatment-option likely to be subsidised ad infinitum by society".

The study says decanting mine water should be seen as an opportunity, suggesting that the decanted water could be used in sewage works in Johannesburg.

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Many would argue that it is too little too late and that government has failed to act in a manner consistent with its constitutional obligations, which require it to afford every person an environment that is not harmful to their health or wellbeing. If AMD has the impacts predicted, there can be no guarantee of an environment which is not harmful to health and wellbeing.

Who will foot the bill?

Considerable costs will be incurred in addressing the AMD problem. Finance Minister Pravin Gordhan allocated R3,6 billion for water infrastructure and services for the 2011/2012 financial year including "funding for the acid water drainage threat associated with abandoned underground mines." A further environmental levy for operating mines has also been proposed for investigation, as has the establishment of a fund similar to the US Superfund.

While it is so that AMD is a serious issue requiring significant intervention, the potential impacts (particularly for investors) of an environmental levy on existing mining companies already required to pay royalties, must be carefully considered. This levy is apparently proposed, despite the retrospective liability imposed by the duty of care contained in the National Environmental Management Act. Could the practical difficulties attached to implementing that liability (such as tracking down and seeking recompense from the operators of historical mines, aside from the profits they gained), not fail its application?

In applying environmental law, the Minister of Water Affairs has indicated that her department will issue a notice to previous and extant mining companies in the Central and Eastern basins preventing them from polluting water resources through their activities.

Ultimately, improved water quality management is crucial as AMD is an ongoing problem. It is necessary to develop and implement measures to treat the acid mine water to a quality that will be fit for a predetermined use or for discharge into surface streams. This is seen as part of a long-term solution to AMD.

In late June, representatives from various mining companies participated in parliamentary discussions on AMD. Their participation is welcomed. At these public hearings, some mines outlined their solutions to the Parliamentary Portfolio Committee on Water and the Environment, while others accepted no liability.

It was decided at these discussions that the Department of Water Affairs would report back to the Committee in August 2010 on the possibilities and feasibility of solutions discussed. The Committee suggested that the directives given to the mines were excellently drafted and noted that if the "Department was strong enough to follow up on recalcitrant mines, it would find strong support from the Committee."

The Chairman of the Committee said at the public hearings, "Mines not taking environmental responsibility... should be stopped from operating....The Chamber of Mines could assist by getting mines to implement the directives given to them and that the industry should be sensitive about opposing the directives. The report concluded that the Department had to make its enforcement stronger. If mines could not meet the standards set by the Department, they should not mine."

A solution to the AMD problem is being seriously discussed - certainly a matter of better late than never. It has taken a long time to get to this point and the question remains as to how long it will ultimately take to reach an environmentally sustainable solution.

Justine Sweet and Cara Gilmour

Making the National Environmental Management: Waste Act more effective?

Many would argue that the National Environmental Management: Waste Act, 59 of 2008 (NEMWA) is more trouble than it is worth and not fulfilling its purpose. Some go so far as to say it as an impediment to implementing the waste hierarchy effectively. To some extent, sustainable re-use and recycling is actually hampered by the red tape created by this Act.

NEMWA provides for a number of mechanisms aimed at fulfilling its purpose, including the introduction of standards and regulations. Draft standards and regulations were published for comment in July 2011. It remains to be seen whether, once finalised, these standards and regulations will clarify and address some of the inherent interpretative and administrative difficulties associated with NEMWA. What follows is a brief summary of some of the more generally applicable draft standards and the Draft Waste Classification and Management Regulations released for comment.

The Draft National Standards for Disposal of Waste to Landfill impose requirements for future, not yet authorised landfill sites and classifications, as well as criteria for landfill and cell containment barrier designs. They also stipulate the class of landfill sites at which different waste types (such as high risk or inert waste) may be disposed.

The Draft Standard for Assessment of Waste for Landfill Disposal requires that the level of risk associated with the disposal of waste

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to landfill be assessed by classification and assessment of the waste in accordance with parameters outlined in those standards. Like their name, the Draft National Norms and Standards for the Storage of Waste aim to regulate the life cycle of waste storage facilities from location, design, construction, operation and management of waste storage facilities.

The various draft standards must be read in conjunction with the Draft Waste Classification and Management Regulations. The Regulations prescribe measures for the classification and management of waste, procedures for listing waste management activities that do not require licensing, requirements for the assessment of environmental risk associated with the disposal of waste to landfill, requirements and timeframes for the implementation of waste management obligations and general duties of waste generators, transporters and managers.

Waste generators will be required to classify prescribed waste streams within 90 days of generation. Where changes to the waste generating process take place (including changes to raw materials or other inputs), waste will need to be re-classified. Waste not previously classified prior to the Regulations commencing, must be classified and assessed within 90 days of the Regulations coming into force.

Waste generators will be obliged to ensure that waste is re-used, recycled, recovered, treated and disposed of within 18 months. Subject to certain exceptions, waste generators are required to ensure that waste is assessed and disposed of according to the relevant standards. Waste managers will not be permitted to store waste for more than 10 consecutive months from generation.

Waste management procedures (including obligations to prepare and maintain records and conduct audits) are also to be regulated. Although to some extent these procedures are already taking place in practice, the requirement to implement these procedures is now to be explicitly included in the draft Regulations. Generators of hazardous and other listed wastes will be required to prepare material safety data sheets. Holders of hazardous waste will be required to possess material safety data sheets for the waste. In addition, waste manifest documentation will be required to be prepared, completed, possessed and retained throughout the life cycle of the hazardous waste disposal process (ie from generator to transporter to manager) and for five more years. Copies of that documentation will have to be available to the Department on request. Hazardous waste containers or storage facilities will need to be appropriately labelled.

As the saying goes, "dilution is not the solution to pollution." The Regulations prohibit the dilution of waste to reduce the concentration of its constituents for purposes of its classification or assessment. Mixing or other treatment of waste is prohibited where it would reduce its potential for re-use, recycling or recovery or the result of the treatment is not controlled and permanent. However, it may be blended or pre-treated to improve the potential for re-use, recycling, recovery or treatment; or reduce the risk associated with the management of the waste.

Anyone will be able to submit a motivation to the Minister to list a specific waste management activity as one which does not require a licence. Motivations must demonstrate that the activity can be implemented and conducted consistently and repeatedly in a controlled manner without unacceptable impact on, or risk to, the environment or health. As currently drafted, the Regulations do not make it clear whether such applications will apply to specific or generic activities. Again, it is hoped that this will be clarified during the finalisation of the draft Regulations.

Regardless of these drafts, there remain unanswered questions and interpretive difficulties attaching to NEMWA which, in our view and experience, frequently result in impediments to sustainable development and business growth. These relate, for example, to issues such as a lack of clarity about what are "by-products", since storage and handling of those do not require waste management licences, so the incentive to reuse and possibly sell by-products (thereby reducing the consumption of airspace in landfill sites) is significant.

Although the purpose of that Act is admirable and to be applauded, it is hoped that the finalisation of the drafts and the introduction of further mechanisms will address some of the day to day difficulties associated with the implementation of the Act.

Justine Sweet

New toolkit explains the public participation process for mining

South African legislation requires public participation and consultation in any new prospecting and mining applications. But many South Africans struggle to understand this complex process and their rights within it. To address this, the Endangered Wildlife Trust (EWT) Law and Policy Programme, in partnership with Cliffe Dekker Hofmeyr, has developed the Mining Toolkit.

The toolkit takes the form of a website, available at www.miningtoolkit.ewt.org.za, which explains the mining process in simpler terms. This is the EWT's second toolkit, built in response to an identified need to help the public understand and participate in the public participation process for various developments. The first online interactive guide, the EIA Toolkit, was launched in 2006. It was based on the Environmental Impact Assessment (EIA) Regulations drafted in terms of the National Environmental Management Act, 107 of 1998. This toolkit is available at www.eiatoolkit.ewt.org.za.

The Mining Toolkit is sponsored by the National Lotteries Distribution Trust Fund.

Justine Sweet

Greening the corporate environment

Sustainable development has been a global area of concern since the 1980's. In 1987, the Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." South Africa has adopted various environmental laws which support the principle and increasingly, in its governing statutes and codes, the corporate sphere is being required to follow suit.

The King I and II Reports first emphasised "the triple bottom line": people, planet and prosperity. By implication, these three concepts have been incorporated into the Companies Act, 71 of 2008 (Act). The King III Report, which was updated, among other things, to align with the Act, furthers these concepts and in so doing, reiterates a holistic approach to business strategy requiring business decisionmakers to consider and, where possible, to address economic, social and environmental issues.

The Act further cements the elements of social and environmental responsibility by requiring every stateowned or public company, as well as any other unlisted public, private or non-profit company that scored above 500 points in terms of its calculated public interest score in any two of the past five calendar years, to establish a Social and Ethics Committee. This Committee is responsible for monitoring a company's activities in terms of the prevailing codes of best practice, one of which is the United Nations Global Compact. The Compact, which is a strategy policy initiative for businesses, outlines the need for companies to have, among other things, a strategy for the delivery of long-term value in the areas of finance, social aspects, the environment and ethics.

The Committee is also responsible for monitoring a company's activities in terms of applicable environmental, health and public safety legislation. The Committee is also required to monitor the impact of the company's activities and the company's products and services on society and the environment. Public and stateowned companies are required to appoint a company secretary who is obliged, among other obligations, to notify the directors of the company of any legislation relevant to the company and its activities. It is not yet clear to what extent these monitoring obligations will result in a duplication of monitoring and potentially also reporting requirements under environmental law.

From an environmental law perspective, it is interesting to consider whether a more thorough understanding of environmental legal obligations may potentially render a director or individual more susceptible to criminal prosecution. The prevailing circumstances would be where that director or individual is aware of statutory obligations and potential failures to comply with those obligations, yet fails to act appropriately to address the non-compliance.

It is also worth noting that the Act also provides whistle-blower protection similar to that already contained in the National Environmental Management Act. Individuals who disclose information about environmentally or socially unsound practices, or non-compliances with environmental and health and safety obligations, are protected from civil, criminal or administrative liability for that disclosure.

Investing and lending is also being influenced by the principle of sustainable development. The triple bottom line, as well as ethical business practice (finance, social, environmental and ethics) are reiterated in the JSE SRI Index criteria. The criteria play an important role in assisting investors to gauge and identify companies that subscribe to the sustainable development principles. Akin to the Equator Principles adopted by many financial institutions worldwide, codes such as the Code for Responsible Investing in South Africa (published on 20 July 2011) and the Code of Ethics and Standards of Professional Conduct applicable to sponsors, designated advisors and debt sponsors and their approved executives (published on 29 June 2011), demonstrate an increased responsibility to implement responsible lending practices.

The Code for Responsible Investing aims to encourage institutional investors and their service providers to integrate environmental, social and governance issues into their investment decisions. This measure further entrenches the need for the application and consideration of the social, environmental and governance aspects in all facets of business. The Code of Ethics and Standards of Professional Conduct aims to address the enforcement and the maintenance of ethical investment practices. Imposing a standard of reasonable care on sponsors and executives, it also obliges them to be up to date and aware of, and to comply with all applicable laws, rules and regulations and codes that apply to them.

Environmental and social considerations are no longer purely the domain of good public relations and marketing. These considerations are now integral to sustainable business operations.

Justine Sweet and Alessia Fowler

Access to environmental information: no place for companies to hide

Companies, particularly those whose operations and products have potential or actual environmental impacts, may be party to information about environmental risks. For example, to comply with its duties of care prescribed under environmental legislation, an oil company is likely to undertake testing or investigations for possible impacts of its products on air or water, and to record the findings. It may also be aware of pollution attributable to its products, which it is liable to remediate.

The State may wish to access such information in order to monitor and enforce obligations under environmental laws. Private parties may wish to obtain the information, among other things, to protect their constitutionally-entrenched right to an environment not harmful to health or wellbeing. Increasingly, environmental watchdogs are requesting information from companies to enable them to assess environmental risks, for example from mining companies which they suspect may not be taking their environmental obligations seriously enough. To do so, they may rely upon legislative provisions which enable access to environmental information, including those contained in the Promotion of Access to Information Act, 2 of 2002 (PAIA).

PAIA requires private parties, like companies, to compile a manual that contains details of the company and facilitates requests for information. Certain documents held by companies will also be in the public domain, such as environmental authorisations, because they have been issued by government departments. Where information is not available without a request having to be made under PAIA, public or private parties may request information held by a private party (in our example, an oil company) in terms of the procedure outlined in section 50 of PAIA, where the information is needed for the exercise or protection of a right. The information must be provided when requested in terms of the applicable procedure, except in circumstances, outlined in PAIA, in which private parties are exempted from disclosure.

Companies may refuse to disclose commercial information, being that which contains trade secrets or financial, commercial, scientific or technical information, the disclosure of which is likely to cause harm to the commercial or financial interests of a company. However, a request for information about any product or environmental testing or other investigation, for examples studies of impacts on the environment, the disclosure of which would reveal an environmental risk, may not be refused (s68).

It must be noted that a request for environmental information under PAIA may also not be refused where the disclosure of information would reveal evidence of an imminent and serious public safety or environmental risk and the public interest in the disclosure outweighs the harm of disclosure (s70). Although companies may not be willing to disclose evidence of serious risks or dangers, failure to do so would be an offence under PAIA.

As PAIA is currently drafted, reference is made to records of private bodies which may be requested under the National Environmental Management Act, 107 of 1998 (NEMA) as well as under PAIA (section 6 read with part 2 of the Schedule to PAIA). Prior to amendment in 2009, in terms of the National Environment Laws Amendment Act 14, of 2009, NEMA contained a procedure for access to environmental information which could, for example, be requested from a company by a person wishing to protect their environmental rights (s31(1) - (3) of NEMA). Those provisions of NEMA have now been deleted and the Act no longer contains a procedure for requests for access to environmental information.

Suggested amendments to PAIA published in GNR 43 in Government Gazette 33960 of 24 January 2011, will amend the section of PAIA which refers to other legislation which provides access to information. The amendment will delete the reference to NEMA and replace it with a more general reference to "any legislation" that provides for access to information in a manner which is "not materially more onerous" than the manner of access provided in PAIA. Because NEMA no longer contains provisions dealing with procedure for access to environmental information, the proposed changes to PAIA will reflect that access to environmental information is appropriately made under PAIA, or under other environmental legislation that provides for access to information in a manner that is not more onerous to the requestor than the procedure contained in PAIA.

Companies should be familiar with the circumstances in which environmental information may be requested and refused under PAIA and respond appropriately to requests for environmental information they produce or hold.

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