DLA CLIFFE DEKKER HOFMEYR

ENVIRONMENTAL

ALERT

18 SEPTEMBER 2014

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APPEALS TO SUSPEND ENVIRONMENTAL AUTHORISATIONS: A BARRIER TO DEVELOPMENT OR PROPER PROTECTION OF THE ENVIRONMENT?

From 2 September 2014, environmental authorisations issued by the Department of Environmental Affairs will be suspended if an appeal is submitted, having the unfortunate potential consequence of delaying much-needed developments.

This is in terms of an amendment to the National Environmental Management Act, No 107 of 1998 ('NEMA').

This is particularly as appeals to environmental authorisations are often lodged without any basis, with appellants relying on minor environmental impacts and not balancing the socio-economic elements of sustainable development under NEMA's provisions.

However, prior to the amendment, the law required that where local communities or other interested and affected parties identified a serious environmental or socio-economic impact associated with a development,

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such parties were obliged to resort to the very costly route of instituting interdict proceedings in a High Court to stop the development, whilst they awaited the outcome of their appeal (and possibly also review proceedings if the appeal was dismissed). In the interim, whilst an appeal to an environmental authorisation was being considered by the competent authority, it was possible that significant environmental damage could result.

If interdict proceedings were not immediately instituted and the development had commenced, it was often difficult to obtain an interdict, as the party opposing it could not show that irreparable harm would be caused and the balance of convenience favoured them, which is necessary to prove in an interdict. If an interdict was not granted, the development generally proceeded and there was little value to the appeal, particularly given the long period generally taken by the authorities to finalise them.

This amendment to NEMA also brings it in line with other environmental legislation, for example the National Water Act, No 36 of 1998, which also suspends a water use licence when an appeal is lodged.

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THE ENVIRONMENTAL LAW RUBICON REGULATING MINERAL OPERATIONS – LATEST DEVELOPMENTS

From 2 September 2014, the environmental regulation of prospecting, mining, exploration or production activities ('mineral activities') has been transferred from the Minerals and Petroleum Resources Development Act, No 28 of 2002 ('MPRDA') to the National Environmental Management Act, No 107 of 1998 ('NEMA'). There are various new requirements relating to residue deposit and stockpile licensing and rehabilitation liability. Requirements for environmental authorisations ('EAs') for mineral activities remain unclear, as well as the position regarding pending applications for approval of environmental management programmes and plans ('EMPs') under the MPRDA. Once the requirements to obtain EAs for mineral activities commence, appeals to EAs will result in entities not being able to commence with such activities until the appeal is resolved.

This follows the enactment of the National Environmental Management Laws Amendment Act, No 25 of 2014 ('NEMLAA').

NEMLAA has resulted in an unexpected U-turn. For the last six years, it was envisaged that the primary competency for environmental regulation of mineral activities would be transferred from the Minister of Mineral Resources under the MPRDA to the Minister of Environmental Affairs under NEMA ('Initial Transitional Arrangements'). The Minister of Mineral Resources will now retain his competency, but under NEMA.

Some integration of the regulatory framework has been achieved, although several gaps remain.

Residue stockpiles and deposits

Waste management licences are now required from the Department of Mineral Resources ('DMR') for residue stockpiles and deposits under the National Environmental Management: Waste Act, No 59 of 2008 ('Waste Act'). A separate alert is available on our website regarding this.

Rehabilitation and closure costs

A mineral right holder previously remained liable for rehabilitation and cost closure liability until the DMR issued a closure certificate. From 2 September 2014, notwithstanding the issue of such certificate, a holder now remains responsible for any residual environmental liability and closure costs.

EAs and EMPs

Interpreting the wave of amendments and proposed amendments to NEMA and the MPRDA is baffling. NEMLAA's enactment has caused further uncertainties, as not all the necessary amendments have commenced.

No EAs were required under NEMA for mineral activities; and the DMR was authorised to approve EMPs under the MPRDA for such activities.

The majority of the MPRDA's environmental regulation requirements were deleted by the MPRDA Amendment Act, No 49 of 2008 (which commenced in June 2013) ('MPRDA 2013'), including the EMP provisions. This was intended to give effect to the Initial Transitional

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Arrangements, whereby EAs would be required for mineral activities as from December 2014, under the NEMA Amendment Act, No 62 of 2008 ('NEMA 2008').

This caused confusion whether EMP approval was still required. The DMR relies on the Interpretation Act, No 33 of 1957 namely that, until the EA requirements commence, the deleted provisions remain in force. This position is arguable and EMP approval would still be necessary until the EA requirements commence.

The NEMLAA however deletes the NEMA 2008's transitional provisions and the December 2014 date is now irrelevant. The NEMLAA has no provisions regarding the date from which EAs will be required and is now undetermined. Mineral activities are however listed under NEMA as requiring EAs, however a commencement date has not yet been proclaimed. Until this takes place, it appears that the EMP requirements must be regulated by the MPRDA's deleted provisions.

The MPRDA has no transitional arrangements for pending EMP applications. The MPRDA Amendment Bill B15B-2013 ('MPRDA Amendment Bill') proposes that pending applications lodged under the MPRDA before the NEMLAA comes into force will be processed under the MPRDA. The commencement date of EA requirements for mineral activities and the enactment of provisions for pending EMPs need to coincide. If this does not occur, there would be further delays to mining operations, as they would need to obtain EAs. The MPRDA Amendment Bill is however unlikely to come into force during 2014 and the future position is therefore unclear.

Appeals to suspend EAs

As is set out above, when EAs for mineral activities are required, they will be suspended if an appeal is submitted. This will delay the commencement of a mineral operation until the appeal is resolved.

One environmental system?

Investors into South Africa's mining sector say that it is one of the most environmentally-regulated countries, with a need to streamline applications for environmental consents.

An agreement was signed this year between the Ministers of Mineral Resources, Environmental Affairs and Water Affairs – *'One Environmental System for the Country'* ('Agreement'). NEMLAA and the National Water Act, No 36 of 1998 ('NWA') were amended to refer to this Agreement, giving it legal force. It provides that the Ministers will agree on fixed time frames for considering and issuing the various authorisations in their respective governing legislation and align the applicable time frames and processes.

The Department of Environmental Affairs ('DEA') announced recently that, despite the NEMLAA coming into effect, the *'One Environmental System for the Country'* will not be implemented until December 2014. From the announcement, it is anticipated that certain related secondary legislation will be promulgated between now and December 2014:

- the National Appeal Regulations;
- the National Exemption Regulations;
- new Environmental Impact Assessment Regulations and Listing Notices (gazetted in draft form at the beginning of September 2014 for comment); and
- financial provisioning and mine closure regulations under NEMA.

The legislature has also recently hinted that new regulations under the NWA, and for residue stockpiles and deposits management under the Waste Act, are in the pipeline as well as amendments to the MPRDA Regulations 'relating to the environment'.

The DEA further announced that the commencement of 'certain sections' of the MPRDA Amendment Bill is crucial to the implementation of this Agreement. As it appears that the MPRDA Amendment Bill will not be enacted by December 2014, this could delay the implementation of the Agreement and the EA requirement for mineral activities.

This integration and the change from the Initial Transitional Arrangements should result in a smoother transition, subject to the simultaneous enactment of the various outstanding amendments. Environmental groups have however questioned whether the Minister of Mineral Resources should retain the environmental regulation competency, as it equates to the 'lion protecting the lamb'.

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