DLA CLIFFE DEKKER HOFMEYR

ENVIRONMENTAL ALERT

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THE BROADENING LANDSCAPE OF RECTIFICATION APPLICATIONS TO INCLUDE LISTED AIR EMISSION AND WASTE MANAGEMENT ACTIVITIES AND SIGNIFICANTLY INCREASED PENALTIES

Section 24G of the National Environmental Management Act, No 107 of 1998 (NEMA) provides an administrative process to rectify the unlawful commencement of listed activities which require environmental authorisation under NEMA (listed activities). Its application has however long been draped in a measure of uncertainty.

Bills have recently been published which propose amendments to not only address the uncertainty regarding s24G's application to the National Environmental Management: Waste Act, No 59 of 2008 (Waste Act) but also introduce a similar administrative mechanism to rectify the unlawful commencement of activities which require air emission licences under the National Environmental Management: Air Quality Act, No 39 of 2004 (NEM:AQA). Both Bills propose an administrative fine of five million rand, being a significant increase from the maximum one million rand fine currently imposed under s24G.

While legal scholars and professionals agree to a large extent that NEMA clearly restricts s24G's application to rectification of the unlawful commencement of listed activities, an overly-broad interpretation of the section has seen many provincial environmental authorities requiring s24G application be submitted to rectify the unlawful commencement of waste management activities under the Waste Act. This view has been perpetuated further by a recent contentious South Gauteng High Court judgement *(Interwaste (Pty) Ltd and others v Ian Coetzee and others*, case number 23921/2012) which held the s24G rectification procedure finds equal application to the Waste Act and must be used to rectify the unlawful commencement of waste management activities.

Proposed amendments to NEMA and NEM:AQA

Bill 13 of 2013 would amend s24G to extend its scope to specifically allow for rectification of the unlawful commencement of waste management activities identified under the Waste Act.

Similarly, proposed amendment to NEM:AQA under Bill 27 of 2013 would introduce s22A to the NEM:AQA to allow the rectification of the unlawful commencement of activities requiring an air emission licence.

The proposed amendments make it clear that criminal prosecution may still occur, even if s24G or s22A applications have been submitted. It is also proposed that a decision under s24G may be deferred by the environmental authorities until the criminal process has been finalised.

The commenting period to the Bills ends on 19 September 2013.

Other developments – section 24G not applicable if developers not guilty of an offence

While the recent South Gauteng High Court judgment has been met with an overwhelming degree of criticism, a recent North Gauteng High Court decision *(Supersize Investments 11 CC v The MEC of Economic Development and Tourism Limpopo and others (the "Department")* published under case number 70853/2011) has provided more welcomed precedent, although interpretation of s24G in the judgment appears to be flawed.

In this case a fraudulent environmental authorisation was issued by a third party to Supersize Investments, who then relied on it and commenced a listed activity. Supersize Investments ceased the listed activity as soon as it became aware the environmental authorisation was fraudulent to allow the Department to approve or reject the environmental authorisation application based upon its review of the final environmental impact assessment report submitted by Supersize Investments. The Department then indicated in August 2009 that the matter could not be processed further without Supersize Investments submitting a s24G application, as the development had already commenced. Supersize approached the Court to review this decision.

The court limited s24G applications to the unlawful commencement of listed activities where the applicant was charged with a criminal offence under s24F of NEMA. More specifically the court found the intention of the legislature was not to force innocent applicants to admit to a crime, in order to fall within the ambit of s24G, where they *bona fide* commenced an activity without an environmental authorisation. Instead in these circumstances, applicants should be allowed to apply for an environmental authorisation under the ordinary provisions of the Act.

Whether NEMA's current wording allows for such an interpretation has however been questioned. Under s24F it is a criminal offence to "commence or continue a listed activity without authorisation". S24G refers to a person "who has committed an offence under s24F" and not a person who has been 'charged and/or convicted of an offence' under that section. Fault on the part of the person undertaking the requirement is not a prerequisite of either s24G or s24F.

To exclude liability under s24G of innocent parties, such as Supersize Investments it therefore appears an amendment to s24G would be required.

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