DLA CLIFFE DEKKER HOFMEYR

ENVIRONMENTAL ALERT

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ENVIRONMENTAL AUTHORISATIONS FOR MINING, PROSPECTING AND RELATED ACTIVITIES IMMINENT

The environmental impact assessment process contained in the Environmental Impact Assessment Regulations published under the National Environmental Management Act, No107 of 1998 (NEMA) will soon apply to mining, prospecting, exploration and production (mineral activities).

The long awaited Mineral Petroleum Resources Amendment Act, No 49 of 2008 (MPRDA Amendment Act) commences on 7 June 2013 and will amend the Mineral Petroleum Resources Development Act, No 28 of 2002, (MPRDA) to disallow mineral activities commencing without an environmental authorisation issued under NEMA from 7 December 2014.

These amendments follow five years of protracted negotiation between the Department of Minerals Resources (DMR) and Department of Environmental Affairs (DEA) as to which Department should be the competent authority over environmental regulation for mineral activities, with the DEA arguing such regulation falls within its constitutional mandate. Presently no environmental authorisation is required for mineral activities, with only an environmental management programme or plan needing approval by the DMR under the MPRDA.

The MPRDA Amendment Act's commencement also comes more than four years after the National Environmental Amendment Act, No 62 of 2008 (NEMA Amendment Act) was enacted to provide for this very transition.

Transitional provisions

The MPRDA Amendment Act, read with the NEMA Amendment Act, allows for a status quo for 18 months, with approvals of environmental management programmes/plans still requiring the DMR's approval and no requirement for environmental authorisations for mineral activities. Commencement of the amendments requiring such environmental authorisations will take effect on 7 December 2014 (first transitional period). Thereafter, the requirements for environmental authorisations will be implemented in accordance with NEMA but under the Minister of Mineral Resource's competency (second transitional period). Only once this three year period has expired will further NEMA amendments become effective, requiring environmental regulation of mineral activities under NEMA, with the Minister of Environmental Affairs as the competent authority.

Further changes in pipeline

These recent amendments may be subject to additional changes. The Mineral and Petroleum Resources Development Draft Amendment Bill (draft Bill) was approved by Cabinet in December 2012 and will be submitted to Parliament shortly (pending Bill). It proposes further amendments to the MPRDA and the MPRDA Amendment Act.

The draft Bill's proposed amendments have been criticised, as they create more confusion than cohesion between the MPRDA and NEMA's environmental administrative processes. The Minster of Mineral Resources, Susan Shabangu, has indicated that the concerns raised by stakeholders were considered when finalising the pending Bill.

Problems in the draft Bill included a misalignment of the transitional arrangements of its own and the MPRDA Amendment Act's implementation. The draft Bill also appears to ignore the first transitional period and suggests immediate transition to the second transitional period.

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There are other issues such as contradictions between the MPRDA and NEMA Amendment Act as to relinquishment of environmental liability by the holder of a mineral right for any latent environmental damage or pollution upon obtaining a closure certificate; duplication of the DEA and DMRs' functions; and lack of clarity as to which Department will be responsible for existing rehabilitation provisions, including funds currently held by or financial guarantees issued to the DMR by financial institutions for rehabilitation liability.

The finalisation of the pending Bill will hopefully rectify these problems in the draft Bill.

Shabangu has noted in an explanatory note regarding the pending Bill, published on 31 May 2013, that "The Minister of Mineral Resources is the competent authority to implement mine environmental management in terms of NEMA, whereas the Minister of Environmental Affairs is the competent authority to develop, review and amend legislation, regulations and policies relating to mine environmental management." The explanatory note states "Processes are underway to give effect to this arrangement between the two Departments regarding the mine environmental management function which include further refinement of both pieces of legislation to ensure that there is no duplication of mandates."

This latest statement regarding implementation of environmental management by the DMR appears contrary to the MPRDA Amendment Act and 2008 Agreement, by implying that the DMR still wishes to retain control of the implementation of environmental management at mines, despite the MPRDA Amendment Act clearly transferring this authority to the Minister of Environmental Affairs in three years.

It is also contrary to what was stated by the DEA at representations to the Parliamentary Committee in February 2013, where it reiterated its on-going desire to create unified legislation to cater for both the DEA and DMRs' needs, as recorded in the 2008 Agreement and conveyed the draft Bill should be processed speedily to meet this end.

Until the proposed Bill is released, it is not clear whether the tug of war for control of implementation of environmental management at mines by the DEA and DMR has been resolved. Mining companies should closely follow the progress of the contents of the pending Bill and any further amendments to it, to ensure appropriate environmental planning and compliance.

Sandra Gore and Tracy-Lee Erasmus

'AVALANCHE' OF NEW LAND CLAIMS EXPECTED

The Restitution of Land Rights Amendment Bill, 2013 (the Bill) was published for comment on 23 May 2013.

The Bill proposes certain significant amendments to the Restitution of Land Rights Act, No 22 of 1994 (Act), most notably allowing for land claims to again be submitted, despite the current cut-off date having long expired almost 15 years ago. The new period for lodging claims will be until 31 December 2018.

The proposed amendment has been timed to mark the centenary of the Natives Land Act, No 27 of 1913 (NLA), which proclaimed 87% of South Africa's land for white ownership only.

Current land restitution process

Section 25(7) of the Constitution provides any person or community dispossessed of property after 19 June 1913, due to past racially discriminatory laws or practices, is entitled to restitution of that property or equitable redress. The Act contains the enabling framework for this constitutional right, entitling the following parties to submit land claims for dispossession of rights in land in the circumstances set out in the Constitution, if it was lodged before 31 December 1998:

- a person, community or part of a community;
- a deceased estate; or
- a direct descendant of a deceased person dispossessed of a right, if the claimant has no ascendant, who is a direct descendant of the deceased, that lodged a restitution claim.

Problems with the restitution process

According to the Department of Rural Development and Land Reform's (Department) Strategic Plan (2010–2013), 96% of the 79, 696 land claims that were lodged by the cut-off date have been settled. The Strategic Plan conveyed land acquired by the State for the restitution of land rights, since the inception of the programme, is 1,443 million hectares. A total of R16 billion has been spent on the programme thus far for settling 77,148 claims (R10 billion for land acquisition and R6 billion for 71,292 financial compensation claims).

Despite a notable success rate at settling land claims, the Department has identified numerous limitations in the process. These included poor research methodology that informed the land claims process; inadequate verification systems of the Commission on Restitution of Land Rights and insufficient procedures used to inform affected citizens about requirements to lodge claims. From an institutional perspective, the Land Reform Policy Document, compiled by the African National Congress in 2012, highlighted the process is plagued by issues such as an ineffective monitoring system and inadequate advertising of claims and response to complaints.

The Department has indicated these limitations resulted in several claimants being unable to submit land claims by the original cut-off date of 31 December 1998 and thus being excluded from the process. This has led to the proposed extension of the period within which to submit a claim. Claims will also need to be advertised nationally and not just in the district of the property.

The Deputy Minister of the Department, Lechesa Tsenoli has acknowledged that during the previous land claims process non-legitimate claims were processed based on false information. The Special Investigation Unit is therefore currently investigating fraudulent claims. The Bill also includes a proposed amendment that lodging fraudulent claims will be an offence under the Act.

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Tsenoli has announced a memorandum of understanding would be signed with the Human Sciences Research Council. It is intended that the Council will assist in enhancing the system by making it more accurate and expedient than previously. It is also planned that claimants will be given handbooks which outline requirements of claiming land.

Productive use of property and costs of restoration

Under the Act, a successful claimant may be granted either return of the dispossessed land (referred to as restoration) or equitable redress (which includes the granting of an appropriate right in alternative state-owned land; or payment of compensation). If restoration is claimed, the Act currently provides the feasibility of such restoration must be considered.

The Minister of the Department, Gugile Nkwinti, notes many claimants had chosen financial compensation over land restoration, being a reflection of poverty and unemployment. Where restoration did occur, another significant problem identified was that successful claimants were unable to sustainably utilise the land. Tsenoli has stated that many 'farms fell apart soon after being returned to their previous owners'.

Government recognises for restoration (or the granting of an appropriate right in alternative state-owned land) to be successful, land claimants must be able to productively use the property. The Land Reform Policy Document notes an important purpose of restoration is to give land to those who can use it for residential and productive uses, thereby ensuring land is sustainably utilised. Due to these problems, the Bill proposes an amendment that for land restoration to occur, a claimant's ability to use the land productively must be established. The Bill also proposes an extended definition of feasibility of restoration to include the costs of such restoration. These amendments are in line with previous case law.

Mhlanganisweni Community case

In the case of *Mhlanganisweni Community v the Minister of Rural Development and Land Reform and Others LCC156/2009,* land restoration was refused. The Land Claims Court considered the equitable compensation the landowners might be entitled to on expropriation of the property. The purpose of compensation is to give a landowner monetary equivalent of the expropriated property and an important factor in deciding what is just and equitable is the property's market value, which was about R791 million. Market value is however not the only factor in determining just and equitable compensation. The following other factors did not justify compensation to the landowner for restoration of the property below market value:

- Current property use: the property had been restored to its pristine; wilderness condition and used as one of South Africa's foremost eco-tourism destinations. The claimants only lost grazing and cropping land;
- History of acquisition: at the time of dispossession of the property, the claimants and/or their ancestors were labour tenants, rent paying squatters or illegal inhabitants. The landowners were not responsible for dispossession of the claimants' property.

The fair and equitable compensation was therefore found to be the market value of the property, which was considerably higher than what was feasible for the State to pay to the Landowners if the property was expropriated. It was held restoration would be a substantial overcompensation at public expense.

The court also considered whether the claimant community would be in a position to manage the claimed land in a sustainable manner and maintain its present conservation status if restored to it, as well as the benefits which the claimant community could derive. The claimants recognised they do not have the capacity to manage the property or business themselves. A co-operation agreement with an operator was presented to the court, but was found insufficient to ensure the land's conservation and eco-tourism business would continue if the property was restored. It was held the agreement would provide the claimants with an income that would constitute a very low yield on the capital which would have to be expended by the State.

The community has proceeded to the Constitutional Court. A ruling on the matter would determine the extent to which a court could deviate from market value in determining just and equitable compensation.

Exclusion of pre-1913 claims

The Constitution excludes dispossessions that occurred before 19 June 1913. This cut-off date was chosen as it is the date when the NLA was promulgated, which legally sanctioned removals of persons from their land. There has been continuous pressure on Government to amend this cut-off date to include pre-1913 claims. Zuma has publicly announced that the 1913 date would be amended to an earlier date, so that descendants of the Khoi and San could claim for their land dispossessed in the 1800's. Such extension would, however, require an amendment to s25(7) of the Constitution. Constitutional amendments are a protracted process requiring a supporting vote of at least two thirds of the National Assembly members and six provinces in the National Council of Provinces. The Department has indicated that research is currently being undertaken to determine the numbers of persons dispossessed prior to 19 June 1913.

Overall effect of the Bill

If enacted, the additional period for submission of claims may create a possible resurgence of new land claims, with the Department expecting an 'avalanche' of new claims. Restoration of land is, however, likely to be limited by the proposed requirement that claimants must be able to use the land productively, with the feasibility of restoration being dependent on the costs. Due to the possibility of a further period for lodging claims, developers seeking to acquire and develop property should ensure proper investigations are undertaken to establish whether potential land claims exist over the property.

The comment period for to the Bill expires on 23 June 2013.

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