DLA CLIFFE DEKKER HOFMEYR

ENVIRONMENTAL

ALERT

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IN THIS ISSUE

THE CONSTITUTIONAL COURT RECENTLY MADE A DECISION THAT WILL POTENTIALLY HAVE SIGNIFICANT IMPLICATIONS FOR THE MINING INDUSTRY

In the case of *Harmony Gold Mining Company Limited v Regional Director: Free State Department of Water Affairs & 6 Others* SCA 971/2012, the Supreme Court of Appeal held that a directive issued under the National Water Act, No 36 of 1998 regarding the pumping and treatment of acid mine drainage remained binding on the owner of land after it had sold the land, notwithstanding the fact that a new entity now mines that area but does not contribute to the costs of pumping and treating.

Harmony applied to the Supreme Court of Appeal (SCA) on the grounds that, firstly, the plain text of the National Water Act does not permit that interpretation, and secondly, if it would not be valid to issue the directive against Harmony today, because it is no longer owner of the land, then the underlying reason for the validity of the directive originally issued must fall away.

The Constitutional Court dismissed the application for leave to appeal against the SCA's judgement.

The net effect of this is that mining companies which are the recipients of directives may, depending on their terms, remain liable for the costs of remediation including the pumping and treatment of groundwater even if they are no longer mining there; a chilling prospect in a sector already beleaguered by labour difficulties.

Terry Winstanley

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AMENDMENTS TO THE LISTED ACTIVITIES THAT REQUIRE A WASTE MANAGEMENT LICENCE IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE ACT, NO 59 OF 2008

In recent months, the Department of Environmental Affairs (DEA) has made it clear that it intends to streamline and align legislation and step up enforcement of the requirements to hold environmental authorisations under the National Environmental Management Act, No 107 of 1998 (NEMA) and waste management licences under the National Environmental Management: Waste Act, No 59 of 2008 (Waste Act).

As part of this trend, the DEA has amended the list of waste management activities that require a waste management licence under the Waste Act (in the 'amended Schedule'), repealing the list published in July 2009. The amended Schedule, which was published in November 2013, distinguishes between three different categories of activity (in contrast to the two categories previously listed under the Waste Act). Category A requires that a basic assessment report (BAR) supports the licence application and Category B, a complete scoping and environmental impact assessment report (EIAR).

The newly-introduced Category C does not require either of these procedures or that persons apply for a licence for listed activities, but rather that those who commence, undertake or conduct waste management activities listed in this category comply with specific norms and standards as identified by the Minister of Environmental Affairs (Minister). Activities identified in Category C include the storage of general and hazardous waste under specified thresholds excluding temporary storage and storage in excavations and the recycling and recovery of motor vehicles and landfill gas, which previously were listed in Category A.

The amended Schedule also revises some of the descriptions of listed activities and adjusts thresholds above which waste management licences are required. For example, recycling of general waste now only requires a waste management licence where it takes place at a facility that has an operational area in excess of 500m2 and which doesn't take place as an 'integral part of an internal manufacturing process within the same premises'.

And it is only the treatment of hazardous waste in excess of one ton per day calculated as a monthly average (excluding the treatment of effluent, wastewater or sewage), which requires a waste management licence.

The Transitional Provisions of the amended Schedule provide that waste management activities lawfully conducted on the date the amended Schedule came into effect may be continued without a waste management licence, until the Minister requires a licence to be obtained. The Transitional Provisions also deal in some detail with applications for waste management licences which were pending when the amended Schedule came into force and prescribe procedures for those applications to be dealt with. An example of this is where a pending application relates to an activity that is no longer listed under the Waste Act consequent on the amended Schedule. In such cases the application is deemed withdrawn. Or, if the listed activity applied for now falls in Category C, where it previously fell under Category A, the application is also deemed withdrawn, and the applicant need only comply with the norms and standards imposed by the Minister.

Other changes in the amended Schedule include new definitions of terms. For example, a 'facility' at which a waste management activity takes place is defined to be a 'containment of any kind including associated structures or infrastructure' and 'construction' is defined only to occur where a facility for a waste management activity is built or established and not where it is modified and there is to be no change to the nature of the waste management activity being undertaken or an increase in outputs.

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A person who fails to obtain a waste management licence is guilty of committing an offence both in terms of the Waste Act and the National Environmental Management Act, No 107 of 1998 (NEMA). Notably the courts have been reluctant to impose maximum sentences, but following a recent decision of the Naphuno Regional Court it has become apparent that courts will no longer shy away from this. In this specific instance a director pleaded guilty to contravening s24F of NEMA. In response the court imposed the maximum imprisonment period of five years. The sentence was however suspended on condition that the environmental damage be rehabilitated within three months. The implications of this in the context of waste management licences are severe. Transgressors could be fined up to R10 million and/or face 10 years imprisonment under the Waste Act. NEMA expands on this by identifying operating without a waste management licence as an offence listed in Schedule 3. The effect of this is that person could be held accountable for the costs associated with damage to the environment, all rehabilitation costs, the costs incurred by the National Prosecuting Authority in prosecuting the offence as well as be deprived of any monetary advantage gained through the illegal conduct.

The publication of the amended Schedule is thought to be an important step to enable the DEA to refine the regulation of waste management activities and to align the Waste Act with the other environmental legislation with which it applies. It is hoped that stringent penalties and consistent enforcement will be an effective deterrent to would-be transgressors.

Helen Dagut and Ernst Muller

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