



ENVIRONMENTAL ALERT

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CONSTITUTIONAL COURT HANDS DOWN JUDGMENT IN THE AQUARIUS PLATINUM CASE

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The High Court held that the decision of the President to publish NEMLAA, when there were no regulations to give effect to the amendments, was premature and irrational and so declared the proclamation as invalid.



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MATTER IN THE HIGH COURT

NEMLAA, which gives effect to the One Environmental Law System, provides for residue stockpiles and residue deposits to be managed under the National Environmental Management Waste Act, No 59 of 2008 (NEMWA). NEMLAA also introduced s43A into NEMWA; it requires that residue stockpiles and deposits be managed in the prescribed manner. The word 'prescribed' is defined in NEMWA to mean by way regulations published under NEMWA.

When the President assented to and signed into force NEMLAA, the regulations relating to the management of residue stockpiles and residue deposits were still in draft form and could not be implemented. The High Court held that the decision of the President to publish NEMLAA, when there were no regulations to give effect to the amendments, was premature and irrational and so declared the proclamation as invalid. The Constitution requires an order of invalidity to be confirmed by the Constitutional Court. (Subsequently and before the Constitutional Court heard the matter, the regulations were promulgated.)

CONSTITUTIONAL COURT

The Constitutional Court found that the President's decision to sign NEMLAA into force in the absence of regulations

that give effect to it was not irrational. The Court held that the Constitution did not require the President to ascertain whether the regulations were already made before he assented to and signed the Bill into law because the operation of NEMLAA was delayed for three months after its proclamation to allow the Minister of Environmental Affairs to publish the relevant regulations. The fact that the regulations were not published during this time, creating a vacuum in the law, was a separate issue. The Court therefore declined to confirm the High Court's order of invalidity. (Subsequent to the hearing of the High Court case and in GNR 632 of 24 July 2015, the regulations regarding the planning and management of residue stockpiles and deposits were promulgated.)

This judgment confirms that the amendments brought about by NEMLAA are in force. Anyone who wishes to construct facilities or treat and recover residue stockpiles and residue deposits will have to do so in accordance with regulations under NEMWA and may be required to have a waste management licence and/or environmental authorisation for those activities.

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