

MINING AND MINERALS ALERT

IN THIS ISSUE

ANOTHER HURDLE FOR COMMENCING FRACKING - SOUTH AFRICAN COURT DECLARES FRACKING REGULATIONS UNLAWFUL

The plans of companies seeking to commence with deep drilling or hydraulic fracturing (fracking) in parts of the Karoo exceeding 120,000km² hit a stumbling block after the Eastern Cape High Court declared the Regulations for Petroleum Exploration and Production (Fracking Regulations) invalid on 17 October 2017 in the case of *John Douglas Stern N.O. and Others v Minister of Mineral Resources*. The court held that the Minister of Mineral Resources lacked the authority to promulgate the Fracking Regulations and that they were not published in a procedurally fair manner.

ANOTHER HURDLE FOR COMMENCING FRACKING - SOUTH AFRICAN COURT DECLARES FRACKING REGULATIONS UNLAWFUL

The court held that the Minister of Mineral Resources lacked the authority to promulgate the Fracking Regulations and that they were not published in a procedurally fair manner.

Several farmers and farmers' organisations from the greater Karoo area sought an order reviewing and setting aside the Minerals Minister's decision to promulgate the Fracking Regulations.



The plans of companies seeking to commence with deep drilling or hydraulic fracturing (fracking) in parts of the Karoo exceeding 120,000km² hit a stumbling block after the Eastern Cape High Court declared the Regulations for Petroleum Exploration and Production (Fracking Regulations) invalid on 17 October 2017 in the case of *John Douglas Stern N.O. and Others v Minister of Mineral Resources*. The court held that the Minister of Mineral Resources (Minerals Minister) lacked the authority to promulgate the Fracking Regulations and that they were not published in a procedurally fair manner.

The applicants, which comprised several farmers and farmers' organisations from the greater Karoo area (Applicants) sought an order reviewing and setting aside the Minerals Minister's decision to promulgate the Fracking Regulations alternatively declaring his promulgation of the Fracking Regulations inconsistent with the Constitution alternatively the content of the Fracking Regulations inconsistent with the Constitution.

The Applicants' challenge to the Fracking Regulations' validity essentially was that:

- a) the Minerals Minister was not authorised under the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA) to promulgate the Fracking Regulations and therefore acted unlawfully, rendering them invalid;
- b) the Fracking Regulations' purpose was to regulate the environmental consequences of fracking. However, the authority to regulate the environmental aspects of fracking fell outside the Minerals Minister's powers, as this power was removed from the scope of his authority as part of the amendments made to the MPRDA during 2013; and
- c) the Fracking Regulations were not published in a procedurally fair manner, as its "Schedule 1" (which listed the substances prohibited from use as

additives to fracturing fluids during the fracking process) was not included in the draft Fracking Regulations when they were initially published for interested and affected parties to comment on.

The Fracking Regulations' purpose was to:

- a) conserve the environment;
- b) manage the environmental impacts of the production operations;
- c) rehabilitate disturbances of the surface of land where they take place due to fracking; and
- d) prevent, control and combat pollution of air, land, sea or other water (including groundwater).

Among other things, they also prescribed certain technical specifications and requirements in relation to:

- a) conducting environmental impact assessments;
- b) well design and construction;
- c) conductor casing, surface casing, intermediate casing and production casing requirements and compression strength tests;
- d) installation and pressure testing of blowout prevention equipment;
- e) permitted drilling fluids;

ANOTHER HURDLE FOR COMMENCING FRACKING - SOUTH AFRICAN COURT DECLARES FRACKING REGULATIONS UNLAWFUL

CONTINUED

The application for and the possible granting of any exploration or production rights will remain contentious, particularly prior to revised regulations being published.



- f) management of fracking operations;
- g) containment and management of fracturing fluids;
- h) management and storage of flowback and produced fluids and fracking fluids; and
- i) decommissioning and well closure.

Against this context, the court found that:

- the Minerals Minister was not authorised under the MPRDA's repealed provisions to promulgate the Fracking Regulations;
- under the National Environmental Management Act, No. 107 of 1998 (NEMA), the Minister of Environmental Affairs (Environmental Minister) is empowered by legislation to set the regulatory framework, and norms and standards for environmental matters. By contrast, the Minerals Minister is only empowered to implement provisions of NEMA and its subordinate legislation insofar as it relates to fracking;
- the Minerals Minister contravened NEMA by attempting to set the regulatory framework, and norms and standards governing the environmental-related aspects of fracking by promulgating the Fracking Regulations; and

- the Fracking Regulations were not published in a procedurally fair manner, due to the failure to attach "Schedule 1".

The court ruled that the Minerals Minister acted unlawfully in promulgating the Fracking Regulations and set them aside retrospectively. It also ordered that the matter be remitted to the Minerals Minister for reconsideration. The Minerals Minister has not yet confirmed whether the Department of Mineral Resources will appeal the court's ruling and it is also unclear whether and when the Environmental Minister and the Department of Environmental Affairs will be redrafting the Fracking Regulations under NEMA.

Whatever the outcome, it is nevertheless apparent that the application for and the possible granting of any exploration or production rights will remain contentious, particularly prior to revised regulations being published, and is likely to still give rise to numerous challenges in the future.

*Sandra Gore, Gareth Howard
and Neo Tshikalange*

Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.



OUR TEAM

For more information about our Mining and Minerals sector and services, please contact:



Allan Reid
Sector Head
Director
Corporate and Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com



Julian Jones
Sector Head
Business Rescue and Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1198
E julian.jones@cdhlegal.com



Sandra Gore
Director
Corporate and Commercial
T +27 (0)11 562 1433
E sandra.gore@cdhlegal.com



Giada Masina
Director
Corporate and Commercial
T +27 (0)11 562 1221
E giada.masina@cdhlegal.com



Mark Linington
Sector Head
Private Equity
Director: Tax and Exchange Control
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Fiona Leppan
Director
Employment
T +27 (0)11 562 1153
E fiona.leppan@cdhlegal.com



Emil Brincker
National Practice Head
Director
Tax and Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Deepa Vallabh
Head: Cross-border M&A, Africa and Asia
Director
Corporate and Commercial
T +27 (0)11 562 1188
E deepa.vallabh@cdhlegal.com



Banzi Malinga
Director
Corporate and Commercial
T +27 (0)11 562 1100
E banzi.malinga@cdhlegal.com



Willem Jacobs
National Practice Head
Director
Corporate and Commercial
T +27 (0)11 562 1555
E willem.jacobs@cdhlegal.com



Mmatiki Aphiri
Director
Corporate and Commercial
T +27 (0)11 562 1087
E mmatiki.aphiri@cdhlegal.com



Rishaban Moodley
Director
Dispute Resolution
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Aadil Patel
National Practice Head
Director
Employment
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Jackwell Feris
Director
Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com



Nonhla Mchunu
Director
Corporate and Commercial
T +27 (0)11 562 1228
E nonhla.mchunu@cdhlegal.com



Deon Wilken
National Practice Head
Director
Finance and Banking
T +27 (0)11 562 1096E
E deon.wilken@cdhlegal.com



Lilia Franca
Director
Corporate and Commercial
T +27 (0)11 562 1148
E lilia.franca@cdhlegal.com



Verushca Pillay
Director
Corporate and Commercial
T +27 (0)11 562 1800
E verushca.pillay@cdhlegal.com



Terry Winstanley
National Practice Head
Director
Environmental
T +27 (0)21 562 6332
E terry.winstanley@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1985/NOV

