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ENVIRONMENTAL LAW AND MINING & MINERALS **ALERT**

IN THIS **ISSUE**

Is the obligation to obtain landowner consent for environmental authorisation for mining activities a death knell for mining in South Africa?

On 11 June 2021, amendments to the National Environmental Management Act 107 of 1998 (NEMA) 2014 Environmental Impact Assessment Regulations (EIA Regulations) came into effect. One of the most consequential amendments is an amendment to the requirement for landowner consent in respect of applications for environmental authorisation (EA) for mining and mining related activities.

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On 11 June 2021, amendments to the National Environmental Management Act 107 of 1998 (NEMA) 2014 Environmental Impact Assessment Regulations (EIA Regulations) came into effect. One of the most consequential amendments is an amendment to the requirement for landowner consent in respect of applications for environmental authorisation (EA) for mining and mining related activities.

Prior to this amendment, landowner consent for an EA was not required for mining related activities. The now deleted Regulation 39(2)(b) exempted an applicant for an EA for mining activities from obtaining landowner consent. The deletion of Regulation 39(2)(b) therefore removes this exemption and any new applications for an EA for mining activities where an applicant for an EA is not the owner or the person in control of the land on which the activity is to be undertaken, must – before applying for the EA – obtain the written consent of the landowner or person in control of the land to undertake such activities. Such landowner consent is required to be attached to the application for the EA.

The amendment has created a contrast with the previous alignment between the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the EIA Regulations in respect of landowner consent. Landowner consent is not required in terms of the MPRDA prior to applications for mineral rights. The application process for mineral rights does, however, require engagement through a thorough public participation process whereby interested and affected parties, such as landowners and lawful occupiers, are consulted and informed about the extent of the activities to be undertaken.

While the applicant and an owner are encouraged to enter into an agreement for such purposes, the lack of an agreement will not bar the granting of a mineral right.

This approach emphasises a portion of the preamble of the MPRDA which says that the state is the custodian of the mineral and petroleum resources of the nation and the state is obliged to promote reform by ensuring equitable access to these resources. Exempting the requirement for consent from the landowner ensured that the final arbiter in the exploitation of the nation's resources was the state, and not the landowner. This was a departure from the state of affairs in pre-1994 South Africa whereby the owner of land was also the owner of the resources beneath the land and had the freedom to sell their rights to the resources to a third party, who in turn acquired a limited real right to explore and extract resources on another person's land. Nevertheless, despite the state being the custodian in our democratic dispensation, the public participation process was seen as a strong mechanism to ensure that the rights of landowners were heard, respected, and protected.

However, it seems that by deleting Regulation 39(2)(b) of the EIA Regulations, the Department of Forestry, Fisheries and the Environment (DFFE) has taken into consideration recent court judgments which have dealt with the consent from communities with informal rights in the land they occupy. These are the Constitutional Court judgment in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* and the High Court judgment in *Baleni and Others v Minister of Mineral Resources and Others*, which were decided in October and November 2018, respectively. Both cases centred around similar facts and had a similar outcome.

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The decision by the DFFE to delete Regulation 39(2)(b) is, therefore, in line with these judgments by requiring applicants of EAs for mining related activities to obtain the written consent from landowners prior to submitting applications.

Case outcomes

In *Maledu*, the Traditional Council of the Bakgatla-Ba-Kgafela community (Bakgatla community) formed a private company for the purpose of obtaining a prospecting permit. The prospecting permit was awarded under the MPRDA and a few years later the company was granted a mining right over the farm which was occupied by the Lesetlheng community, which formed part of the greater Bakgatla community. After the mining right was granted, a resolution was purportedly passed by the Lesetlheng community. The resolution authorised the Bakgatla community to enter into a surface lease agreement with the company and the Minister of Rural Development and Land Reform for the purpose of conducting mining activities. As the mining activities commenced and progressed, the applicants – members of the Lesetlheng community – obtained a spoilation order against the company to prevent it from continuing with its operations.

In the High Court, the company was successful in obtaining an eviction order against the members of the Lesetlheng community. The order was appealed in the Constitutional Court. The Constitutional Court set aside the eviction order. The appellants argued that they were the landowners of the farm concerned, rather than the greater Bakgatla community, and, as the landowners, they should have been consulted as required in section 2(1) of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). Section 2(1) states that, save as provided in the IPILRA, no persons may be deprived of any informal right to land without their consent.

The Constitutional Court held that the IPILRA had to be "*interpreted benevolently in order to afford holders of informal rights to land the fullest possible protection*" and the MPRDA should be read, as far as possible, in agreement with the IPILRA. The court concluded that the appellants were the lawful occupiers of the land in terms of the IPILRA and, as the lawful occupiers holding the land on a communal basis, the deprivation of their rights in the land by the granting of a mining right (and presumably, an EA for the said right) had to be granted with their consent and in accordance with sections 2(2) and 2(4) of the IPILRA.

Section 2(4) of the IPILRA states that a community can be deprived of its lawful right in the land by "*a decision to dispose of such right … taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal*". The resolution passed by the Lesetlheng community was therefore invalid because it did not meet the requirements of section 2(4) due to the lack of evidence showing that the appellants had participated in the meeting where the resolution was passed.

Consequences of the amendment

The decision by the DFFE to delete Regulation 39(2)(b) is, therefore, in line with these judgments by requiring applicants of EAs for mining related activities to obtain the written consent from landowners prior to submitting applications.

This amendment is likely to have a number of consequences. One such consequence is the creation of further hold-ups for applications for mineral rights, a process already associated with time delays.

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While the MPRDA makes provision for an internal remedy in relation to access to land, no internal remedies are currently provided for under the NEMA and MPRDA where landowner consent in relation to an EA is unreasonably withheld.

This is especially so if there are delays in negotiating and obtaining landowner consent for purposes of progressing with an application for an EA and the fact that mineral rights cannot be granted unless an EA has been granted. A further consequence is that the amendment may have the effect of rendering the internal remedy provided in section 54 of the MPRDA redundant. Section 54 provides that the holder of a right can approach the Department of Minerals Resources and Energy if the landowner or occupier prevents access to land or imposes unreasonable demands to allow access to the land.

With the latest amendment, it will be rare for a landowner who has given their written consent to an EA for a mineral right application, to deny the applicant access to the land after the application is successful. Section 54 serves as a means to allow a successful applicant, who has been granted a mineral right and an EA by the state as the custodian of the nation's resources, access to the land when a landowner remains opposed to the activities despite an extensive public participation process.

While the MPRDA makes provision for an internal remedy in relation to access to land, no internal remedies are currently provided for under the NEMA and MPRDA where landowner consent in relation to an EA is unreasonably withheld. The possible consequence of this amendment and lack of internal remedy is that large corporations that have extensive economic resources will exclude small- or medium-sized corporations from exploiting the nation's natural resources by either: (i) purchasing land to bypass obtaining landowner consent, (ii) purchasing land to deny its consent to other applicants even though it may not be conducting any operations on the land, or (iii) enticing landowners with financial offers that other corporations cannot compete against.

This amendment will likely have the effect of vesting considerable power in landowners which may defeat the MPRDA's goal of ensuring equitable access for all to mineral and petroleum resources in South Africa.

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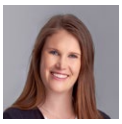

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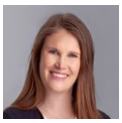

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