Reflections on key environmental legal developments over the past year for the mining sector

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The most significant development for the mining sector during the course of 2018 came in the form of the Third *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018*, which came into effect on 27 September 2018 and about which much has been published. There were also a few noteworthy developments relating to environmental regulatory issues for mines in South Africa.

The Minister of Mineral Resources' announcement that the controversial Mineral and Petroleum Resources Act (MPRDA) Amendment Bill would be scrapped was met with jubilation in most quarters. However, this does have an important implication for the interplay between the National Environmental Management Act (NEMA) and the MPRDA environmental management provisions. To complete the transition to the One Environmental System, various amendments to the MPRDA and NEMA were necessary. Unfortunately, some key amendments have not yet taken effect, with specific reference to section 38B(1) of the MPRDA in terms of which an Environmental Management Programme (EMP), previously issued under the MPRDA, is 'deemed' to be an approved environmental authorisation in terms of NEMA. Section 38B(1) was, in terms of a NEMA Amendment Act, only set to come into effect on the date of the promulgation of the MPRDA Amendment Bill. The fact that the MPRDA Amendment Bill will not come into effect has created a *lacuna* in this mining and environmental regime that will need to be addressed.

On the whole, the practical implementation of the One Environmental System in relation to new mining applications seems to be working in a more synchronised and integrated manner.

The same cannot be said regarding environmental authorisation applications for the closure of mines. In these instances regulatory officials seem confused about how applications under NEMA operate *in tandem* with the requirements of the MPRDA. In particular, there is some confusion regarding the timing and effect of the various applications that are required under these statutes for closure, since the advent of the One Environmental System. Section 43 of the MPRDA is referred to in Listed Activity 22 of the Environmental Impact Assessment (EIA) Regulations under NEMA, which requires an environmental authorisation before commencement of "*the decommissioning of any activity requiring … a closure certificate in terms of section 43 of the [MPRDA]); or …. a prospecting right, mining right, mining permit, production right or exploration right, where the throughput of the activity has reduced by 90%*

or more over a period of 5 years excluding where the competent authority has in writing agreed that such reduction in throughput does not constitute closure…" "Decommissioning" is defined as follows in Listing Notice 1 - "*to take out of active service permanently or dismantle partly or wholly, or closure of a facility to the extent that it cannot be readily re-commissioned*". Thus the activity can include partial or full closure and the authorisation must be obtained prior to commencement of the activity. On the contrary, the application for a closure certificate in terms of section 43 of the MPRDA can be made at different stages, according to section 43(3), as long as it is within 180 days of one of these stages or trigger events. Closure applications may also need to be accompanied by water use and waste management licence applications and therefore the careful timing of these applications is essential. The need for intergovernmental co-operation in the processing of these applications is also crucial and still requires much improvement, particularly from the Department of Water and Sanitation. It is regrettable that we can expect many more closure-related applications in South Africa due to challenging economic conditions.

Certain of these closures may occur prior to the obligation to comply with the Financial Provisioning Regulations becoming effective, as this date has been delayed further until 19 February 2020. This delay will allow operational mines additional time to implement systems and management measures to ensure compliance with these requirements.

More flexibility is provided in amendments to the Regulations regarding the Planning and Management of Residue Stockpiles and Residue Deposits of 2015, which amendments were published on 21 September 2018. These amendments essentially provide for pollution control measures for any new mine residue stockpiles or residue deposits to be determined through a risk analysis as part of the EIA process under NEMA, by a competent person, on a case by case basis. Existing mine residue stockpiles and residue deposits must be managed in accordance with the mine's EMP.

The balance between creating certainty in law and flexibility in implementation in order to work towards sustainable outcomes, remains as important as ever in the South African mining context.

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