

Transfer of environmental licences in a sale

By Peggy Schoeman

Associate, Warburton Attorneys

April 2019

In a sale of a business, there is often a transfer of the operational licences to the new owner or operator. In an environmental law context, this may require a transfer of the existing environmental authorisations, water use licences, waste management licences or atmospheric emission licences.

This article sets out the statutorily prescribed processes for transferring these key licences to a new owner or operator, as well as some of the possible risks inherent in these transfers, such as processing delays and appeals. Note that in all cases, the licence itself may impose additional transfer obligations.

Environmental authorisations

Section 24 of the National Environmental Management Act provides that an environmental authorisation must be obtained before one may lawfully commence with so-called 'listed activities'. By way of example, this may be the construction of a road, the storage of hazardous substances or the development of a mine.

In order to effect a change of ownership, or otherwise transfer the rights and obligations contained in an environmental authorisation, a so-called 'Part 1' amendment application must be undertaken. This process is set out in regulations under the National Environmental Management Act. As a change in the holder of an environmental authorisation should not result in an increased environmental impact, in that it shouldn't increase the impacts of the authorised listed activity, the Part 1 amendment process does not require the applicant to undertake any environmental impact assessments (although these specialist studies would have been required in the initial application for the environmental authorisation). Additionally, a Part 1 amendment does not mandate a public participation process in terms of which external, affected parties are notified of and consulted on the application. Consequently, it is generally unlikely that a Part 1 amendment decision would be appealed. The Department of Environmental Affairs, or in the case of a mining-related environmental authorisation, the Department of Mineral Resources, is statutorily mandated to take a decision within 30 days after submission of the Part 1 amendment application.

Water use licences

Where a person intends to undertake a specified water use as set out in section 21 of the National Water Act, such as commercial water abstraction or storage, a water use licence may be required. Companies commonly requiring a water use licence include mining companies, manufacturing plants, farming operations and power plants.

Section 50 of the National Water Act provides for a water use licence amendment in terms of which successors-in-title may be reflected on the water use licence as new licensees. The Department of Water and Sanitation may require the written consent of any affected person in this amendment process, whether it be a landowner, lawful occupiers, neighbours or the surrounding community. As such, the Department has a discretion in this regard, which would in all likelihood be informed by the factual context, such as whether there has historically been opposition by external parties to the particular operation's water use. There is no specified timeframe in which the Department must decide on an amendment to a water use licence, with the result that an amendment application may take a long time to finalise. In this respect, it should be noted that the Department of Water and Sanitation has a particularly poor track record in issuing decisions timeously. In terms of an appeal, the National Water Act does not expressly provide for an appeal of this kind of amendment decision to the Water Tribunal. As such, it is unlikely (although not impossible) that the Department's water use licence amendment decision would be appealed by a third party affected by the water use licence transfer.

Waste management licences

Before conducting a listed waste management activity, such as the recycling, treatment or disposal of general or hazardous waste, a waste management licence must be obtained in terms of section 20 of the National Environmental Management: Waste Act. This licensing requirement would therefore apply to various organisations across the waste sector.

Section 52 of the Waste Act mandates that an application be submitted to the Department of Environmental Affairs for the transfer of a waste management licence (in the case of a mining-related waste management licence, the competent authority is the Department of Mineral Resources). If the environment or the rights or interests of other parties are likely to be adversely affected, the Department must direct the applicant to undertake a consultation process with all interested and affected parties. If so directed, affected parties must be notified of the transfer application and provided with an opportunity to comment on the application. All of these comments must then be compiled and submitted to the licensing authority as part of the transfer

application. Moreover, once a decision has been reached, interested and affected parties may appeal this decision. An appeal should take a total of 90 days, during which time the decision on the transfer of the waste management licence would be suspended.

Atmospheric emission licences

In terms of section 22 of the National Environmental Management: Air Quality Act, an atmospheric emission licence is required before one can lawfully conduct a listed activity which results in atmospheric emissions. Companies typically requiring this licence included power plants, cement producers, waste incinerators and fertiliser producers.

The process for transferring an atmospheric emission licence is set out in section 44 of the Air Quality Act and includes a public participation process. In the result, interested and affected parties must be informed of the transfer application and provided with an opportunity to comment on, or object to, the application to transfer the atmospheric emission licence. While not set out in the Air Quality Act itself, a departmental user guide states that a transfer of an atmospheric emission licence takes 210 days. Once a decision has been reached by the municipal licensing authority to either grant or refuse the transfer of the atmospheric emission licence, interested and affected parties are then also entitled to lodge an appeal against this decision. To the extent an appeal is lodged, the relevant municipality's Air Quality Officer must take a decision on the appeal within a 'reasonable amount of time'. As such, there is no set timeframe in which one can expect an appeal decision. It is therefore recommended that the relevant municipality be contacted to ascertain the time periods in which appeal decisions for that municipality are usually issued.

In all cases, it is important to factor in the time it may take to transfer the existing environmental licences in the applicable sale agreement, as well as to cater for possible delays and appeals. Parties should also consider the likelihood of a negative transfer decision from the regulatory authority in a worst-case scenario. In this event, a new licence application would most probably have to be applied for by the new owner or operator, which may have a material impact on the sale.