

Transitional Conundrums in the Mining and Environmental Legal Regime

By Peggy Schoeman

Associate, Warburton Attorneys

February 2019

On 8 December 2014 mining environmental regulation was brought within the ambit of the National Environmental Management Act, 1998 ("**NEMA**") through a series of legislative amendments known as the 'One Environmental System'. This article looks at some of the challenges faced in the transition to this new regime.

Before December 2014, a mine had to apply to the Department of Mineral Resources for approval of its environmental management programme ("**EMPr**") in terms of the Mineral and Petroleum Resources Development Act, 2002 ("**MPRDA**"). To the extent there were listed activities under NEMA also triggered (such as building a road or the storage of hazardous substances), the mining company also applied to the Provincial Department of Environmental Affairs for an environmental authorisation in terms of NEMA. Post December 2014, a mining company only has to apply to the Department of Mineral Resources for one environmental approval: a consolidated environmental authorisation for both the (now-listed) mining activity as well as other non-mining listed activities under NEMA.

In order to transition to the One Environmental System, various amendments to the MPRDA and NEMA were necessary. Unfortunately, some of these still remain outstanding – notably section 38B(1) of the MPRDA which 'converts' the EMPr (under the MPRDA) into an environmental authorisation (under NEMA). In this respect, section 38B(1) hasn't yet taken effect due to the non-promulgation of the MPRDA Amendment Bill, which is certainly not assisted by the Minister of Mineral Resources' recent announcement that this Bill should be scrapped in its entirety (although this decision is welcome for other reasons). The net result is that there are still some legislative gaps in this new mining and environmental regime.

Flowing from incomplete (and at times confusing) transitional provisions, some mines have incorrectly assumed that their previously-approved EMPr (under the MPRDA) not only authorises the mining activity but also other NEMA listed activities at their mine. This is simply not the case: an approved EMPr does not, and cannot, authorise other listed activities under NEMA. Rather, a separate environmental authorisation in terms of NEMA may still be required.

Given the various teething problems with this new regime, it is prudent to determine with absolute certainty, aided by specialist advice, what authorisations are required in order to lawfully continue or commence with your mining operation. And make no mistake, whether it be raised by an environmental NGO in the area or a community concerned about environmental impacts, non-compliances are likely to come to the fore.