Western Cape Government
Environmental Affairs and Development Planning

Head of Department
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TO: ALL ORGANISATIONS AND PRIVATE ENTITIES INVOLVED IN THE ENVIRONMENTAL IMPACT ASSESSMENT SECTOR IN THE WESTERN CAPE

REGARDING: IMPLICATIONS OF *MINERAL SANDS RESOURCES (PTY) LTD V MAGISTRATE FOR THE DISTRICT OF VREDENDAL, KROUTZ NO AND OTHERS* (18701/16) [2017] ZAWCHC 25 (20 MARCH 2017) JUDGMENT

Background

1. The recent Western Cape High Court decision of *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz No and Others* (18701/16) [2017] ZAWCHC 25 (20 March 2017) concerned the validity of a search warrant issued by the Magistrate for the district of Vredendal on 26 September 2016 in which he authorised a search of the applicant's Tormin sand mine near Lutzville.

2. Among other issues, the litigation raised questions (i) about the interpretation of statutory provisions giving effect to the government's One Environmental System agreement, an arrangement intended to establish a single environmental system for assessing the environmental aspects of activities, including mining activities, and (ii) about the powers of the various kinds of inspectors appointed to monitor and enforce compliance with environmental legislation.

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3. The judgement provides guidance on these issues and the purpose of this circular is to communicate those findings so as to ensure they are uniformly applied within the Western Cape Province, where they are binding.

Requirements for both National Environmental Management Act (Act 107 of 1998) ("NEMA") Environmental Authorisations and Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") Environmental Management Programmes ("MPRDA EMPr")

4. The court noted that "*a company intending to embark on mining would typically have had to perform activities which were listed activities (eg establishing infrastructure for the bulk transportation of water; facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 ha etc) and would thus have needed environmental authorisation for those activities in terms of s 24 of NEMA*."[1]

5. The court held further that, prior to 8 December 2014, "*the Mining Minister's decision to approve an applicant's [MPRDA EMPr] and to grant the mining licence effectively constituted the environmental authorisation [in terms of the MPRDA] to conduct the mining activity*".[2] The court, however, also found that in addition to the MPRDA approvals (mining permit/right and EMPr) "*the applicant would typically have needed to obtain from the MEC or Environment Minister a NEMA environmental authorisation preceded by the approval of a NEMA EMP*."[3]

6. The judge pointed out that there were differences between the NEMA procedure and the mining procedure with regards to the environmental approvals required by the two Acts, with the "[NEMA Environmental Impact Assessment] *Regulations generally being more detailed*."[4]

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[1] *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz No and Others* (18701/16) [2017] ZAWCHC 25 (20 March 2017) at Para 8.
[2] Ibid at Para 17.
[3] Ibid at Para 17.
[4] Ibid at Para 20.

7. The judgment makes it clear that prior to 8 December 2014, both a NEMA environmental authorisation and MPRDA (EMPr) authorisation were required.

Environmental authorisation for mining which commenced on or after 8 December 2014

8. After 8 December 2014, the requirement for an MPRDA EMPr was removed but the Environmental Impact Assessment Regulations Listing Notices 1 and 2 of 2014 require an environmental authorisation together with an approved EMP in term of NEMA for an activity which requires a mining right (or similar authorisation) in terms of the MPRDA.

9. Accordingly, in terms of s 24F of the NEMA, from 8 December 2014, no person may commence with any of the mining related activities (e.g. an activity requiring a prospecting right, mining permit, mining right, exploration right or production right)[5] and a listed activity caused by mining (e.g. *clearing indigenous vegetation covering more than 1 ha*)[6] without a NEMA environmental authorisation and NEMA approved EMP for the activity.

MPRDA EMPr is deemed to be an Environmental Management Programme ("EMP") ito NEMA

10. The court assessed s 12(4) of the National Environmental Management Amendment Act, 2008 (Act 62 of 2008)] which provides:

    "An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002); immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act."

[5] Activities 20, 21, 22 of Listing Notice 1 and Activities 17, 18, 19, 20 and 21 of Listing Notice 2.
[6] e.g. Activity 27 of Listing Notice 1.

11. The court held, in this respect, that "*The effect of s 12(4) [of Act 62 of 2008] is that a [MPRDA EMPr] approved prior to 8 December 2014 is to be regarded as an EMP approved in terms of s 24N of NEMA*."[7]

EMPr's approved ito MPRDA and effect of s12(7) of Act 62 of 2008 on applications to amend an EMPr

12. Although not forming part of the binding part of the judgment, the court had the following to say in relation to the effect of s12(7) of Act 62 of 2008 on applications to amend an EMPr.

13. The court noted that by 14 April 2015 s 39(6) of the MPRDA had been repealed. The effect of the above was, in Judge Rodgers' view, that unless the transitional provisions kept s 39 of the MPRDA in force, the Department of Mineral Resources ("DMR") has no statutory power in terms of the MPRDA to approve an amendment to an MPRDA EMPr.[8]

14. The DMR would, however, as from 8 December 2014, have had the statutory power to approve an amended NEMA EMP in terms of s 24N of NEMA read with regulation 37 the Environmental Impact Assessment Regulations, 2014 ("2014 EIA Regulations").[9]

15. As detailed above, the effect of s 12(4) of Act 62 of 2008 is that a MPRDA EMPr, in force as at 8 December 2014, would be deemed to be a NEMA EMP approved in terms of s 24N of NEMA.

16. Having regard to the above, the court was therefore of the opinion that any amendment of an EMP (or MPRDA EMPr deemed to be an EMP) after 8 December

[7] Ibid at Para 30.
[8] Ibid at Footnote 11.
[9] Ibid at Footnote 11.

2014 should take place in accordance with NEMA and the 2014 EIA Regulations.[10]

17. Section 12(7) of Act 62 of 2008, which commenced operation on 2 September 2014,[11] states:

> *"An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the Mineral and Petroleum Resources Development Act, 2002 that is pending on the date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, must be dispensed of [sic] in terms of that Act as if that Act had not been amended."*

18. In relation to the interpretation of this section, the judge noted that "*The expression 'that Act' in s 12(7) is a reference to the [MPRDA]. The 'date referred to in section 14(2)(b)' of Act 62 of 2008 is, on a literal interpretation, the date on which Act 49 of 2008 came into force, namely 7 June 2013, but I agree with the [Department of Environmental Affairs ("DEA") and DEA&DP's] submission that what was intended was a date 18 months after 7 June 2013, namely 8 December 2014.*"[12]

19. The court was furthermore of the view that section 12(7) of Act 62 of 2008 applies to an "application for a right or permit in relation to prospecting, exploration, mining or production in terms of the [MPRDA]".[13] An application to amend an MPRDA EMPr was not viewed as being an application for a right or permit as contemplated in s 12(7) of Act 62 of 2008.[14] The effect of the above is that the transitional provision, s 12(7) of Act 62 of 2008, does not apply to applications to amend an MPRDA EMPr.

20. It should be noted that the court went further than the above and also considered the effect, if any, of regulation 54 of the 2014 EIA Regulations.[15]

21. Regulation 54 of the 2014 EIA Regulations provides that:

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[10] Ibid at Footnote 11.
[11] Section 12(7) of Act 62 of 2008 was inserted by Act 25 of 2014 which was published by the President in *Government Gazette* No 37713 of 2 June 2014. In terms of s 32 of Act 25 of 2014, that Act came into effect three months from the date of publication, i.e. on 2 September 2014.
[12] Ibid at Para 31.
[13] Ibid at Footnote 11.
[14] Ibid at Footnote 11.
[15] Ibid at Footnote 11.

"*(1) An application submitted in terms of the previous MPRDA regulations and which is pending when these Regulations take effect must despite the repeal of those regulations be dispensed with in terms of those previous MPRDA regulations as if those previous MPRDA regulations were not repealed.*

(2) An application submitted after the commencement of these Regulations for an amendment of an Environmental Management Programme, issued in terms of the Mineral and Petroleum Resources Development Act, 2002, must be dealt with in terms of Part 1 or Part 2 of Chapter 5 of these Regulations.

(3) "Application" for the purpose of subregulation (1) means an application for a permit, right, approval of an Environmental Management Programme or amendment to such permit, right or Environmental Management Programmes."

22. The court noted that "*There can be no doubt that the framer of regulation 54 intended that its provisions should apply inter alia to pending applications for the amendment of [MPRDA EMPr's]*."[16] Judge Rodgers found that it was "*difficult to see how regulation 54 could have any legal effect in relation to pending applications to amend [MPRDA EMPr's]*." His reason for this was that the MPRDA Regulations did not deal with applications to amend MPRDA EMPr's[17] and the MPRDA Regulations were not repealed. Accordingly, the court found that a deemed continuance of the MPRDA Regulations could have no legal effect on pending applications to amend MPRDA EMPr's.[18]

23. The court considered the effect should DMR have granted an amendment of an MPRDA EMPr without the necessary statutory foundation to do so. While it was noted that such an approval would stand unless set aside on review, the court pointed out that if a mining company requires an approval of an amended EMP in terms of s 24N of the NEMA read with the 2014 EIA Regulations in order to legitimise its intended departures from the previous MPRDA EMPr, the amended MPRDA EMPr purportedly approved in terms of the repealed s 39(6) would be irrelevant and without legal

[16] Ibid at Footnote 11.
[17] This was regulated directly by s 36(9) read with s 102 of the MPRDA.
[18] This was regulated directly by s 36(9) read with s 102 of the MPRDA.

consequence. It should be noted that the latest amendments[19] to the 2014 EIA Regulations do not affect the court's interpretation.

24. A further transitional provision has, however, been added to these 2014 EIA Regulations[20], which applies when:
    - an application submitted in terms of the previous NEMA regulations was granted prior to 8 December 2014 for listed activities directly related to prospecting or exploration of a mineral or petroleum resource or extraction and primary processing of a mineral or petroleum resource;
    - a right, permit or exemption in terms of the MPRDA has been similarly granted prior to 8 December 2014; and
    - commencement of these activities occurred after 8 December 2014.

25. In such circumstances, the holder would ordinarily have been required to amend its environmental authorisation or seek a new environmental authorisation for any of the newly identified activities in the Environmental Impact Assessment Regulations Listing Notices of 2014 not identified and authorised under the existing environmental authorisation. The new transitional provision negates the need for such an amendment or new authorisation and regards the existing environmental authorisation as fulfilling the requirements of the NEMA.

26. The provisio to this subregulation is that if an application for an environmental authorisation was refused or not obtained in terms of the NEMA for activities directly

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[19] Government Notice No. 326 in Gazette No. 40772 of 7 April 2017.

[20] "54A. Transitional Provisions

(1) Where, prior to 8 December 2014—

(a) environmental authorisation was required for activities directly related to—

(i) prospecting or exploration of a mineral or petroleum resource; or

(ii) extraction and primary processing of a mineral or petroleum resource;

and such environmental authorisation has been obtained; and

(b) a right, permit or exemption was required in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for—

(i) prospecting or exploration of a mineral or petroleum resource; or

(ii) extraction and primary processing of a mineral or petroleum resource;

and such right, permit or exemption has been obtained, and activities authorised in such environmental authorisation, right, permit or exemption commenced after 8 December 2014, such environmental authorisation, right, permit or exemption is regarded as fulfilling the requirements of the Act: Provided that where an application for an environmental authorisation was refused or not obtained in terms of the Act for activities directly related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, this subregulation does not apply."

related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, the transitional provision does not apply. Thus, the intention of this subregulation is merely to deal with those holders of authorisations who had all the required authorisations to conduct the intended activity/development prior to 8 December 2014 but failed to commence with the activities prior to the introduction of certain newly listed activities. Any holders of environmental authorisations who:

- were refused an environmental authorisation;
- failed to obtain the required authorisations for all applicable listed activities, in force prior to 8 December 2014; or
- changed the scope of the activity/development or increased the level or nature of the impact, which impact was initially assessed and authorised, and required an amendment of an EA,

would not be covered by the transitional provision.

Amendment of an EA and amendment of EMP

27. In determining whether an amendment of an environmental authorisation or an EMP is required in specific circumstances, the court noted that, while it had not been fully addressed on the issue in argument, it was of the view that, "*the answer must lie in a proper appreciation of the function of an EMP and of the reason for the more rigorous processes required for environmental authorisations*."[21]

28. The judgment accordingly does not depart from nor contradict DEA&DP's previously stated position that an amendment of an EMP or MPRDA EMPr is not appropriate in instances where such an amendment will change the scope of the activity/development or increase the level or nature of the impact, which impact was initially assessed and authorised.

29. In this regard, it should be noted that Regulations 29 and 31 of the 2014 EIA Regulations deal with the circumstances under which an EA may be amended,

[21] Ibid at Para 170.

depending on the scope of the intended change:

"*29. An environmental authorisation may be amended by following the process prescribed in this Part if the amendment-*

(a) will not change the scope of a valid environmental authorisation, nor increase the level or nature of the impact, which impact was initially assessed and considered when application was made for an environmental authorisation;…"

"*31. An environmental authorisation may be amended by following the process prescribed in this Part if the amendment will result in a change to the scope of a valid environmental authorisation where such change will result in an increased level or change in the nature of impact where such level or change in nature of impact was not-*

(a) assessed and included in the initial application for environmental authorisation; or

(b) taken into consideration in the initial environmental authorisation;

and the change does not, on its own, constitute a listed or specified activity."

30. The above Regulations make it clear that an amendment of the environmental authorisation is required under specified circumstances. This may, depending on the facts, also necessitate the amendment of the EMP.

Pending application for mining right or permit

31. The view expressed by the court in relation to the application of s 12(7) of Act 62 of 2008 was not regarded as applying to a pending application, as at 8 December 2014, for a mining right. The finalisation of that mining right application would, as contemplated in s 12(7) of Act 62 of 2008, need to be dealt with in terms of the unamended provisions of the MPRDA. This means that the Mining Minister could approve an MPRDA EMPr in terms of s 39 as part of the process of granting the mining right.

32. As detailed above, it is important to note in this respect that, even if such approval is granted, it does not (in terms of the current legislative framework) negate the need

for an environmental authorisation in terms of the NEMA. An EMPr approved in terms of the MPRDA, even if deemed to have been approved in terms of the NEMA, does not constitute an environmental authorisation in terms of NEMA.

33. A further issue for noting is that an application submitted in terms of the previous Environmental Impact Assessment Regulations 2010 ("2010 EIA Regulations") and which was pending when the Environmental Impact Assessment Regulations Listing Notices 1, 2 and 3 of 2014 took effect (8 December 2014) must be dispensed with in terms of the 2010 EIA Regulations. In addition, this may validly seek the authorisation of 2014 listed activities as if they were applied for, on condition that all the impacts of the 2014 listed activity and requirements of the 2014 EIA Regulations have also been considered and adequately assessed.[22]

<u>The effect, if any, of section 38B of the MPRDA</u>

34. Section 38B of the MPRDA, inserted by the Mineral and Petroleum Resources Development Amendment Act (Act 49 of 2008), contains a further transitional provisions but it has not yet come into operation. Subsection (1) reads as follows:

    "*(1) An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of [NEMA], shall be deemed to have been approved and an environmental authorisation been issued in terms of [NEMA]*."

35. The court considered this section and noted that the provision is nonsensical.[23] The judge's reasoning, in this respect, was that the NEMA came into effect on 21 January 1999, while the MPRDA only came into force on 1 May 2004. "*Accordingly it would be impossible for there to have been any [EMPr's] approved in terms of the [MPRDA] as at 21 January 1999*."[24]

36. The court was further of the view that if the legislature had intended to refer to NEMA

[22] Regulation 53 of the 2014 EIA Regulations.
[23] Ibid at Para 37.
[24] Ibid at Para 37.

as amended with effect from 8 December 2014, section 38B(1) would merely be a repetition of s 12(4) of Act 62 of 2008.[25] In other words, *a MPRDA EMPr approved prior to 8 December 2014 would be regarded as an EMP approved in terms of s 24N of NEMA*.

37. It is important to note that this section has not come into operation and, even if it does, the above interpretation is still relevant.[26]

Requirement for NEMA environmental authorisation despite having an MPRDA EMPr

38. The court made it clear that obtaining an approval under the MPRDA does not make it unnecessary for a mining company to obtain environmental authorisation in terms of the NEMA for any listed activities which a mining company would be undertaking.[27] The court stated, in this regard, that any suggestion to that effect would be unsound.[28] This, it was found, was clear from the judgment of the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 (4) SA 181 (CC).[29] The judge even went so far as to state that an "*analysis of the need for amended or additional environmental authorisations is sufficiently straightforward*" and there is "*no plausible case to be made that the approval of the amended [MPRDA EMPr] in itself legitimised the activities in question prospectively*." [30]

39. Therefore, even though the Mining Minister may have become the competent authority to grant the NEMA environmental authorisations, the DMR's approval of an amended MPRDA EMPr does not simultaneously constitute an environmental authorisation.[31]

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[25] Ibid at Para 37.
[26] According to Proclamation No. 14 of 2013 issued on 31 May 2013, the Act 49 of 2008 would have come into operation on 7 June 2013, but in terms of Proclamation No. 17 of 2013 issued on 6 June 2013, Proclamation No. 14 of 2013 was amended so that certain sections of the Act would not come into operation on 7 June 2013. Section 38B was one of the sections which did not come into operation on 7 June 2013 (or since then).
[27] Ibid at Para 171.
[28] Ibid at Para 171.
[29] Ibid at Para 171.
[30] Ibid at Para 181
[31] Ibid at Para 161 & 181. The judge stated the following in respect of EMPs "*Of course, one would expect the EMP accurately to set out the scope of the activities for which the applicant is seeking authorisation since*

40. Accordingly, if a mining company plans to undertake any NEMA listed activities beyond the scope of the activities for which it obtained prior NEMA authorisation, it requires an amended or additional environmental authorisation prior to commencement of such activities.[32] If no such approval was obtained prior to commencing with such activities, the court has pronounced that "*to the extent that a mining company has undertaken those [NEMA] activities without obtaining a [NEMA] environmental authorisation, the process it would need to follow is that laid down in s 24G rather than s 24 [of the NEMA]*."[33]

41. The DEA&DP's long standing position has therefore been confirmed by the court. A MPRDA EMPr, even if deemed to be a NEMA EMP, is not a NEMA environmental authorisation. Thus, regardless of what authorisations are obtained in terms of the MPRDA, a NEMA environmental authorisation is required in order to undertake any of the NEMA listed activities.

42. The court, accordingly, held that obtaining authorisation for activities under other laws, even if it includes the investigation, assessment and communication of the potential impacts or consequences of the activities, does not absolve the holders of those authorisations from obtaining environmental authorisation under NEMA, if the activities are listed or specified under NEMA.

<u>Interpretation of existing environmental authorisations</u>

43. The court criticised the DMR's interpretation of an existing environmental authorisation granted by the DEA&DP. The DMR had previously interpreted this authorisation as entitling the holder to do anything falling within the limits of the promulgated listed activities which triggered the need for an environmental authorisation.[34] The court

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otherwise the EMP would not properly be addressing the activities to be undertaken but this does not mean that it is the EMP itself which constitutes the environmental authorisation." Ibid at Para 171.
[32] Ibid at Para 173.
[33] Ibid at Para 173.
[34] Ibid at Para 161.

made it clear that this is not correct.

44. In order to determine what is authorised, one should have regard to the quoted promulgated listed activities relevant to the proposed operations recorded in the environmental authorisation, the description of the operations which triggered the need for authorisation and the EMP (which the holder is obliged to implement as a condition of the authorisation).[35] The environmental authorisation does not permit the holder to do whatever it likes within the scope of the promulgated listed activities.[36] It was furthermore noted, in this regard, that it was "*not the function of the EMP to determine the activities which the applicant is authorised to undertake. That must be determined with reference to the environmental authorisation read with the application*."[37]

45. The court accordingly held that "*A person who applies for an environmental authorisation to clear 2 ha of indigenous vegetation self-evidently cannot proceed to clear 20 ha of indigenous vegetation without obtaining a further environmental authorisation. A person who has been authorised to construct one road wider than 4m self-evidently cannot proceed to develop five such roads*."[38]

46. Accordingly, read as a whole, an environmental authorisation does not authorise a recipient of an environmental authorisation to do anything which falls within the ambit of any listed activities quoted in the environmental authorisation. The things which are in fact authorised are described in the narrative part of environmental authorisation. The conditions of authorisation further constrain what is authorised. Those conditions include the requirement that the NEMA EMP must be implemented.

47. To interpret an environmental authorisation as authorising things which had never been contemplated in the application and assessment would be absurd. It would furthermore render the environmental authorisation invalid and *ultra vires* NEMA which requires, among other things, that the social, economic and environmental impacts of

[35] Ibid at Para 162.
[36] Ibid at Para 169.
[37] Ibid at Para 170.
[38] Ibid at Para 169.

activities to be considered, assessed and evaluated and for decisions to be appropriate in light of such consideration and assessment (s 2(4)(i)); that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them (s 23(2)(c)); that there must be an investigation of the potential consequences or impacts on the environment of the activity and assessment of the significance of those potential consequences or impacts (s 24(4)(a)(iv)).

Duty of care – no decision made by court on mandate

48. It should be noted that no decision was made by the court in relation to the powers of the DEA and DEA&DP officials in respect of the duty of care provision[39] in the NEMA and the associated criminal offence.[40]

49. The court made the following *obiter* statements relating to environmental management inspectors and environmental management resource inspectors:

- *"In regard to provincial inspectors, s 31D(2) provides that such inspectors may only be appointed for the enforcement of those provisions of NEMA or other specific Acts as are administered by the province or in respect of which the province exercises or performs assigned or delegated powers or duties. Subject to this limitation, their mandates can apply to all the provisions of NEMA and specific Acts."*[41]
- *"As with provincial inspectors, mining inspectors cannot be appointed with*

[39] 28. Duty of care and remediation of environmental damage
"(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment."
49A. Offences
"(1) A person is guilty of an offence if that person—…
(e) unlawfully and intentionally or negligently commits any act or omission which causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment;
(f) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to detrimentally affect the environment;"
[40] Ibid at Para 91.
[41] Ibid at Para 94.

unlimited mandates. In terms of s 31D(2A) the Mining Minister can only appoint mining inspectors to monitor and enforce environmental legislation in respect of which powers are conferred on the Mining Minister. Powers are conferred on the Mining Minister as the competent authority to grant environmental authorisations in respect of listed activities directly relating to mining (s 24C(2A)). Mining inspectors can thus monitor and enforce compliance with the terms of environmental authorisations issued in respect of mining activities and can monitor and enforce compliance with those statutory provisions which are applicable where a person unlawfully engages in an activity for which an environmental authorisation from the Mining Minister should have been obtained (particularly ss 24F and 24G)."[42]

- *"However, the view that national inspectors and water inspectors have concurrent jurisdiction with mining inspectors over mining matters makes a mockery of ss 31D(4)-(9)."*[43]

50. The court was of the view that although the mandates of national EMIs, water inspectors and provincial DEA&DP inspectors may overlap, the efficient administration is generally better served by non-overlapping mandates.[44] This the judge considered could be achieved by interpreting s 31D of the NEMA so as to give mining inspectors exclusive jurisdiction to monitor and enforce environmental legislation relating to mining except when sub-sections 31D(4)-(9) applied.[45] The judge considered section 38A of the MPRDA as lending some support to this interpretation. He, however, also noted that there was no comparable provision in the case of the Provincial Minister.[46] It should be noted, in this regard, that the parties were not called on to addressed this issue and the impact on the administration of monitoring and enforcing environmental legislation should exclusive jurisdiction be granted to mining inspectors. Accordingly, these statements are obiter and are not considered to be part of the binding effect of the judgment.

51. The court did, however, find that the "Mining Minister's competence in NEMA is not

[42] Ibid at Para 94.
[43] Ibid at Para 96.
[44] Ibid at Para 98.
[45] Ibid at Para 98.
[46] Ibid at Para 99.

defined territorially (i.e. with reference to conduct occurring within a mining area) but with reference to listed activities for which he is the competent authority."[47] The contrary is similarly applicable and DEA and DEA&DP's competence in NEMA is also not defined territorially. This means that in respect of those activities for which the Mining Minister is not the competent authority (i.e. where the listed or specified activity is not directly related to:

- prospecting or exploration of a mineral or petroleum resource; or
- extraction and primary processing of a mineral or petroleum resource),

DEA and DEA&DP must continue to monitor and enforce environmental legislation even if occurring within a mining area.

52. Further to the above, in order to comply with its constitutional obligation to ensure that the environment is protected for present and future generations, DEA&DP will continue to monitor and enforce the duty of care provisions in the NEMA. DEA&DP will, however, comply with its co-operative governance obligations and responsibilities and, where possible, co-operate and co-ordinate its actions with DEA and DMR.

Coastal Act not affected by One Environmental System amendments

53. A further issue for noting is that the court confirmed that the National Environmental Management: Integrated Coastal Management Act (Act 24 of 2008) (the "Coastal Act") is not affected by the amendments made to NEMA and the MPRDA.[48] It was viewed as being "*common cause that the mining inspectors appointed by the Mining Minister in terms of s 31D(2A) of NEMA do not have powers to monitor compliance with, and enforce, the Coastal Act*"[49]

We trust the above is clear and that the actions of everyone affected by the judgment will now be better guided in relation to the subject matter of this judgment.

Kind regards

[47] Ibid at Para 89.
[48] Ibid at Para 38.
[49] Ibid at Para 41.

PIET VAN ZYL
HEAD OF DEPARTMENT
DATE: *7 April 2017*