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Important Legislative Developments in Environmental Law in South African during 2009

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Introduction

2009 was a year of serious concerns about several environmental issues, including mining impacts – particularly acid mine drainage - and widespread contamination of fresh water by sewage throughout the country. These and other environmental concerns are, for the most part, issues that are addressed on paper by South Africa's environmental laws. It is clear that there are serious problems with the implementation and enforcement of environmental laws in South Africa, yet the legislature nevertheless was rather busy in enacting new environmental legislation. In addition, there were several interesting environmental law cases, although none of these were what one would describe as 'landmark' decisions. This piece will provide a brief overview of the most important new legislation, with the text of the new Acts available on the Academy's website. Although several of these new laws are dated as 2008 Acts, they were all enacted during 2009. They are discussed in chronological order.

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National Environmental Management; Integrated Coastal Management Act 24 of 2008

The objects of this Act are:

- to determine the coastal zone of the Republic;
- to provide, within the framework of the National Environmental Management Act (107 of 1998), for the coordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of co-operative governance;
- to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations;
- to secure equitable access to the opportunities and benefits of coastal public property: and
- to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.[1]

One of the central concepts in the Act is 'coastal public property', which consists primarily of coastal waters and the seashore, which was (largely) previously regulated by the Sea-Shore Act.[2] The new Act deals with the determination of this and other new coastal 'zones' established by the Act (such as coastal set-back lines), which may impact on privately-owned property. The Act also deals with coastal zone planning and environmental protection of the coastal zones and estuaries.

The Dumping at Sea Control Act,[3] which gave domestic effect to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, is also repealed by the new Act. The repeal is to give effect to the 1996 Protocol to the London Convention, which came into force in 2006. The new Act contains detailed provisions relating to marine and coastal pollution control. Authorisation is required for the disposal of effluent into coastal waters; and there is a

[1] Section 2.
[2] Act 21 of 1935.
[3] Act 73 of 1980.

prohibition on incineration or dumping at sea, unless authorised by dumping permits. Schedule 2 of the Act contains the waste assessment guidelines, for assessing wastes or other material for dumping at sea.

Not much has yet been written about the Act, but some of the concerns expressed relate to the complexity of the Act, which is exacerbated by the lack of clarity on the levels of authority of different spheres and branches of government which are responsible for implementation of the Act.[4] Another major concern, which applies to most current and new environmental legislation in South Africa, relates to the capacity and the political will of the relevant authorities to implement and enforce the Act effectively. It does, unfortunately, seem that many of South Africa's environmental Acts are unrealistically complex and consequently difficult to enforce by government agencies lacking the necessary human resources (both numbers and skills) to do the job properly.

National Environmental Management: Waste Act 59 of 2008

Waste management has been regulated on a piecemeal basis by numerous enactments, primarily the Environment Conservation Act.[5] The *White Paper on Integrated Pollution and Waste Management*[6] was published in March 2000. The *White Paper* focused more on integration of control and management of waste and pollution in the ordinarily understood way,[7] than on the minimization of waste: the *White Paper* was subtitled 'A Policy on Pollution Prevention, Waste Minimisation, Impact Management and Remediation'. Work on producing an Act to give effect to the policy commenced during 2000. After a long gestation (the draft Bill was published in January 2007), the Act was assented to on 6 March 2009. Most of the subject matter covered by the Act was not (directly) covered by the Environment Conservation Act, which essentially just dealt with disposal sites and litter, although the regulatory powers in that Act could potentially have been used for any issue relating to waste management.

[4] See, for example, J. Gibson 'The Development of Integrated Coastal Management Legislation in South Africa' (2007) 18 *Water Law* 1.

[5] Act 73 of 1989.
[6] GN 227 in *GG* 20978 of 17 March 2000.
[7] See M. Kidd 'Integrated Pollution Control in South Africa: How Easy a Task?' (1995) 2 *SAJELP* 37.

In the preamble to the Act, the internationally recognised hierarchy of waste management is explicitly recognised: 'sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of'.[8] The objects of the Act reflect the hierarchy and include also effective delivery of waste services and remediation of contaminated land.

Broadly, the Act deals with the following aspects: the prescription of a national waste management strategy, norms and standards; institutional and planning matters; waste management measures (which contains most of the 'meat' of the Act); licensing of waste management measures; waste information; compliance and enforcement; and the technical and administrative matters found in most Acts.

A comprehensive Act such as this one is long overdue, but its very thoroughness is also a potential drawback, since the question of whether the country has the capacity to implement such ambitious legislation has to be asked, given the track record of impressive environmental legislation on paper that suffers considerably in the implementation.

National Environmental Management Amendment Act 62 of 2008

The Act contains several amending and new provisions, primarily affecting Chapter 5 of the principal Act (NEMA) (which deals with environmental authorisations) and contains several controversial provisions relating to the authorisation of mining activities. One of the central – and very controversial - aspects of the Act is the designation of the Minister of Minerals and Energy as the 'competent authority' (ie the authorizing authority) in respect of authorisations of mining and mining-related activities. It is understood that the reason for this is that there are capacity limitations within the Department of Environmental Affairs and Tourism (DEAT) which would compromise that Department's ability to deal with the authorisation of these activities. The proposed solution (in this Act) of conferring the authority on the Department of Minerals and Energy (DME) would presuppose that there is capacity within that department, something with which many people would react with incredulity, given

[8] See M. Kidd *Environmental Law* (2008) Juta and Co (Ltd), Cape Town, at 129.

the widespread illegal mining activity happening in the country at present. Another concern would be the understandable unease at the DME's playing (in essence) the role of both referee and player in respect of these authorisations. One safeguard is that appeals against environmental authorisations granted by the DME are to be decided by the Minister of Environmental Affairs. Whilst this is desirable from the perspective of environmental integrity, if one of the overall objectives behind the amendments is increased administrative efficiency, this is a potential bottleneck – the appeals against environmental authorisations are currently, in my view, one of the major causes of delays and this is likely to be exacerbated under the new system.

National Environmental Laws Amendment Act 14 of 2009

This Act amends provisions in several different environmental Acts. The most noteworthy amendments in this Act are those to section 28 of NEMA. The section's retrospective application is made perfectly clear by the insertion of section 28(1A), which reads:

'Subsection (1) also applies to a significant pollution or degradation that –

(a) occurred before the commencement of this Act;

(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or

(c) arises through an act or activity of a person that results in a change to pre-existing contamination.'

There is also a new subsection (14) which provides for the following criminal offences:

- Unlawfully and intentionally or negligently committing any act or omission which causes significant or is likely to cause significant pollution or degradation of the environment;
- Unlawfully and intentionally or negligently committing any act or omission which detrimentally affects or is likely to detrimentally affect the environment in a significant manner; or
- Refusal to comply with a directive issued under section 28.

The penalty for these offences is a fine of not more than one million rand and/or one year imprisonment.

The addition of s 28(1A) is welcome insofar as it makes it abundantly clear that section 28 applies retrospectively. The case of *Bareki v Gencor Ltd*[9] held that section 28 did not apply retrospectively, and is widely regarded as incorrectly decided because the wording of section 28 already provided for retrospective application. The amendment, however, makes retrospectivity unequivocal.

One of the major weaknesses of section 28 has been that it is essentially unenforceable because it is not an offence to fail to comply with a directive under the section, but the new section 28(14) remedies this (although it is not certain whether a person who *fails* to comply with such a directive will be regarded as having *refused* to comply therewith, as the offence is couched). The other two offences are cause for some concern and may infringe the *nullum crimen sine lege* principle, as it appears that the acts or omissions which are prohibited are insufficiently delineated – how does one determine whether one's actions cause *significant* damage or detrimentally affect the environment in a significant manner? Certain industry sectors are apparently concerned about these sections because of the lack of clarity of the subsection.

National Environmental Management: Protected Areas Amendment Act 15 of 2009

The most interesting amendment in this Act is to section 38, which deals with management authorities of protected areas. The section currently requires that the Minister *must* assign the management of a special nature reserve or a nature reserve to a suitable person, organisation or organ of state;[10] and must assign the management of a national park to South African National Parks (SANP) or another suitable person, organisation or organ of state.[11] Subsection 1(a) is changed to read: '*may* assign the management of any kind of protected area listed in section 9 to a

[9] 2006 (1) SA 432 (T).
[10] Section 38(1(a).
[11] Section 38(1)(aA).

suitable person, organisation or organ of state'. It is not clear why this is now discretionary. The most interesting aspect, though, is subsection 38(1)(aA), which is amended to delete reference to 'another suitable person, organisation or organ of state'. When the Act was originally mooted, there was great concern that the Act would be used to 'cherry pick' protected areas which were then (and still are) under the management of provincial conservation bodies (particularly in KwaZulu-Natal) and declare them to be national parks. This would have the effect (if management were taken away from the erstwhile management authorities) of severely reducing the revenue stream of the provincial conservation bodies concerned, which have considerable responsibilities outside of protected areas. The concern was assuaged by the provision allowing national parks to be managed by bodies other than SANP. If, for example, Hluhluwe-Umfolozi were to be declared to be a national park (which it could be as it meets the criteria for declaration as such), it could (under s 38 as originally provided) continue to be managed by KZN Wildlife. This possibility is now removed by the amendment. Whilst there is nothing that suggests that the Minister is planning on declaring provincial protected areas to be national parks in the near future, this is a provision the amendment of which is likely to be of some concern to provincial conservation bodies.