

OPINION

for

CENTRE FOR ENVIRONMENTAL RIGHTS

IN RE:

ELANDSFONTEIN EXPLORATION AND MINING (PTY) (LTD)

**IMPACT OF THE ONE ENVIRONMENTAL SYSTEM ON APPROVAL
OF ENVIRONMENTAL MANAGEMENT PROGRAMME AND
APPLICATION FOR ENVIRONMENTAL AUTHORISATION**

by

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instructed by

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INTRODUCTION

1. Consultant is the Centre for Environmental Rights (*“the CER”*).
2. Elandsfontein Exploration and Mining (Pty) Ltd. (*“EEM”*) is in the process of establishing a phosphate mine in the Buffer Zone of the West Coast National Park.
3. On 9 December 2013 EEM applied for the grant of a mining right in terms of section 22 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (*“MPRDA”*) and, on 12 August 2014, it applied to the Western Cape Government: Department of Environmental Affairs and Development Planning (*“DEADP”*) for an environmental authorisation in terms of the National Environmental Management Act, 107 of 1998 (*“NEMA”*) and the EIA Regulations 2010. EEM also submitted an Environmental Management Programme (*“EMPR”*) dated 17 September 2014 to the Department of Mineral Resources (*“DMR”*) for approval.¹
4. On 26 November 2014 the Director-General: Mining Regulation of the DMR granted EEM a mining right in terms of section 23(1) of the MPRDA. The mining right was executed on 30 January 2015 (*“the mining right”*).
5. The mining right, amongst other aspects, provides that:-

¹ The CER does not have copies of any of these applications or the EMPR submitted to the DMR for approval.

- 5.1. the effective date is 30 January 2015 “*being the date on which the environmental management programme is approved in terms of section 39(4) of the MPRDA*”;²
- 5.2. the mining right shall commence on 30 January 2015.³
6. It appears from a letter dated 6 February 2015 addressed to EEM by DEADP that on 3 February 2015 EEM requested DEADP to withdraw its application for environmental authorisation.
7. In that letter of 6 February 2015:-
- 7.1. DEADP notified EEM that, based on EEM’s request to withdraw its application for environmental authorisation, the application is hereby withdrawn;
- 7.2. DEADP noted that DMR issued a mining right to EEM on 30 January 2015 and informed EEM that EEM’s correspondence dated 3 February 2015 incorrectly indicates that the mining right approval, together with an EMPR obtained from the DMR, obviates the need for an environmental authorisation in terms of NEMA and that “*the mining right issued **does not** include authorisation of the listed activities in terms of the NEMA EIA Regulations, 2014 applicable to your proposed development.*”
- 7.3. DEADP further notified EEM that, based on the fact that the Minister responsible for mineral resources is the competent authority to consider

² Definition of “*effective date*”.

³ Clause 3.1.

applications for environmental authorisation in terms of NEMA for activities which relate to prospecting, exploration, mining or operations, EEM is required to obtain environmental authorisation from the competent authority (in this instance the DMR) to undertake the listed activities in terms of the NEMA EIA Regulations, 2014, which are triggered by the proposed development.

8. On 19 February 2015 Olivia Braaf of Braaf Environmental Practitioners sent an e-mail to an Interested and Affected Party, Mr Stegmann, in which it was contended on behalf of EEM that the One Environmental System came into effect on 8 December 2014 making the Minister of Mineral Resources the competent authority to approve NEMA applications for mining and *"In light of these transitional arrangements all Environmental Management Plans/ Programmes approved in terms of the MPRDA shall be deemed to be approved in terms of NEMA."*
9. The letter from the DMR approving the EMPR is dated 20 February 2015.⁴ The approval is purportedly in terms of section 39(4) of the MPRDA. The EMPR was approved subject to a number of conditions.

THE ONE ENVIRONMENTAL SYSTEM

10. The relevant principal features of the One Environmental System for purposes of this opinion are that, with respect to mining:-

⁴ The CER does not have a copy of the approved EMPR.

- 10.1. All environment related aspects are to be regulated through one environmental system under NEMA and all environmental provisions are to be repealed from the MPRDA;
 - 10.2. The Minister of Mineral Resources will issue environmental authorisations under NEMA.
11. The introduction of the One Environmental System required amendments to both the MPRDA and NEMA, including the EIA regulations and associated listing notices. Unfortunately, the enactment and coming into effect of the various amendments took place on a piecemeal basis over a number of years.

Amendments to the MPRDA

12. The MPRDA was amended by the MPRDA Amendment Act, 49 of 2008 (“*the MPRDA Amendment Act*”) which came into effect on 7 June 2013,⁵ save for a number of provisions, which includes sections 38A and 38B.
13. The provisions in the MPRDA governing approval of environmental management programmes and associated provisions (sections 39 - 42) were repealed by the MPRDA Amendment Act with effect from 7 June 2013.
14. Section 38A deals with environmental authorisations:

⁵ Proclamation No 14, 2013 *Government Gazette* 31 May 2013 No. 36512.

- 14.1. Section 38A(1): the Minister of Mineral Resources is the responsible authority for implementing environmental provisions in terms of NEMA as it relates to prospecting, mining, exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area;
- 14.2. Section 38A(2): an environmental authorisation⁶ issued by the Minister of Mineral Resources shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act (the MPRDA).
15. Section 38A was to come into effect on the date contemplated in section 14(2) of the National Environmental Management Act, 62 of 2008⁷ namely 18 months after the date of commencement of the MPRDA Amendment Act, i.e. 8 December 2014.
16. Section 38B deals with EMPRs. It provides:-
- (1) An environmental management plan or environmental management programme approved in terms of the MPRDA before, and at the time of coming into effect of the National Environmental Management Act, 1998, shall be deemed to have been approved and an environmental authorisation issued in terms of the National Environmental Management Act, 1998.
- (2) Notwithstanding subsection (1), the Minister may direct the holder of a right, permit, or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations is likely to result in unacceptable pollution, ecological degradation or damage to the environment, to take any action to

⁶ Defined in section 1(g) as having the meaning assigned to it in terms of NEMA.

⁷ In terms of section 94(2) of the MPRDA Amendment Act.

upgrade the environmental management plan or environmental management programme to address the deficiencies in the plan or programme.

- (3) The Minister must issue an environmental authorisation if he or she is satisfied that the deficiencies in the environmental management plan or programme in subsection (2) have been addressed and that the requirements in Chapter 5 of NEMA have been met.

17. The coming into operation of Section 38B has been suspended indefinitely.⁸

Amendments to NEMA

18. NEMA was amended by the National Environment Management Amendment Act, 62 of 2008, *inter alia*, to give effect to the One Environmental System (“NEMAA”).

19. NEMAA commenced on 9 May 2009, save that in terms of section 14(2), any provision relating to prospecting, mining, exploration and production and related activities comes into operation on a date 18 months after the commencement of the MPRDA Amendment Act.

20. NEMAA includes transitional provisions, including that:-

- 20.1. An application for authorisation of an activity that is submitted in terms of Chapter 5 of the principal Act (i.e. NEMA) that is pending when this Act (NEMAA) takes effect, must despite the amendment of NEMA by NEMAA, be

⁸ Proclamation 14 of 2013 was amended on 6 June 2013 so as to exclude a number of provisions from coming into effect on 7 June 2013, including section 38B.

dispensed with in terms of Chapter 5 of NEMA as if Chapter 5 had not been amended (12(2));

- 20.2. An environmental management plan or programme approved in terms of the MPRDA immediately before the date on which this Act came into operation (i.e. NEMAA) must be regarded as having been approved in terms of NEMA as amended by NEMAA (12(4));
 - 20.3. Notwithstanding subsection 12(4), the Minister of Mineral Resources may direct any holder or any holder of an old order right, if he or she is of the opinion that the prospecting, mining, exploration or production operations in question are likely to result in unacceptable pollution, ecological degradation, or damage to the environment, to take such action to upgrade the environmental management plan or programme to address the deficiencies in the plan or programme as the Minister may direct in terms of NEMA as amended by NEMAA.
21. NEMA was further amended by the National Environmental Management Laws Amendment Act, 2014 (“*NEMLA*”). The amendments included that:-
- 21.1. Section 12 of NEMAA was amended by insertion of subsection (7): An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the MPRDA which is pending on the date referred to in section 14(2)(b) of the National Environmental Management Act, 2008 must be dispensed with in terms of that Act as if that Act had not been amended;

- 21.2. Section 14 of NEMAA was amended by the deletion of subsection (2) one day immediately before the commencement of NEMLA. i.e. one day before 2 September 2014.
22. The new NEMA EIA Regulations (“*EIA Regulations 2014*”) and listing notices were published on 4 December 2014 and came into effect on 8 December 2014.⁹ The EIA Regulations also include transitional arrangements, amongst others:-
- 22.1. An application submitted in terms of the previous NEMA regulations and which is pending when these Regulations take effect, including pending applications for auxiliary activities directly related to -
- (a) prospecting or exploration of a mineral or petroleum resource; or
 - (b) extraction and primary processing of a mineral or petroleum resource;
- must despite the repeal of these Regulations be dispensed with in terms of those previous NEMA regulations as if those previous NEMA regulations were not repealed.
- 22.2. Where an application submitted in terms of the previous NEMA regulations is pending in relation to an activity of which a component of the same activity was not identified under the previous NEMA notices, but is now identified in terms of section 24((2) of the Act (i.e. NEMA) the competent authority must dispense with such application in terms of the previous NEMA regulations and may authorise the activity identified in terms of section 24(2) as if it was

⁹ *Government Gazette* No. 38282 of 4 December 2014, regulation 57.

applied for, on condition that all impacts of the newly identified activity and requirements of these Regulations have also been considered and adequately addressed.

- 22.3. An application submitted in terms of the previous MPRDA regulations and which is pending when these Regulations take effect must despite the repeal of these regulations be dispensed with as if those previous MPRDA regulations were not dispensed with.
23. For purposes of this opinion, the most significant change to the EIA listing notices is the inclusion of a listed activity pertaining to mining as follows:
 - 23.1. Any activity, including the operation of that activity which requires a mining right as contemplated in section 22 of the MPRDA including associated infrastructure, structures, and earthworks, directly related to the extraction of a mineral resource, including activities for which an exemption has been issued in terms of section 106 of the MPRDA;
 - 23.2. “Activity” is defined in the EIA Regulations 2014 as an activity identified in any notice published by the Minister or the MEC in terms of section 24(D)(1)(a) of NEMA as a listed activity or specified activity.
 24. Although NEMAA came into effect on 2 September 2014, government only commenced the implementation of the One Environment System with effect from 8 December 2014 when the EIA Regulations 2014 and listing notices commenced.

INTERPRETATION

25. NEMA is legislation enacted in terms of section 24(b) of the Constitution. Courts are enjoined in terms of section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights in interpreting any legislation. Constitutional and statutory provisions must be interpreted on a purposive basis, with due regard to the context of the relevant statute.¹⁰ Legislation premised upon constitutional dictates must also be interpreted holistically and within the relevant framework of applicable constitutional norms and standards. Legislation should be read purposively and contextually to reach a plausible, constitutionally compliant interpretation.¹¹
26. The principles in section 2 of NEMA guide the interpretation, administration and implementation of NEMA.¹²
27. Because of the piecemeal manner in which the amendments to the MPRDA and NEMA were introduced, there are a number of complexities which arise, particularly in respect of transitional arrangements. One of the aspects of the presumption against retrospectivity is that, in the absence of express provisions to the contrary, statutes should be considered as affecting future matters only.¹³ Where substantive rights are affected, laws are presumed not to apply retrospectively.
28. In the light of those interpretive principles, as far as reasonably plausible and practicable, the provisions in the different pieces of legislation giving effect to the One Environmental System should:-

¹⁰ *Nkabinde and Another v JSC and Others* 2015 (1) SA 279 (GJ) at [76].

¹¹ *Ex Parte MS and Others* 2014 (3) SA 415 (GP) at [36].

¹² Section 2(1)(e).

¹³ *Nkabinde* as above at [80]-[82].

28.1. all be interpreted as coming into force together on 8 December 2014, save for provisions such as section 38B of the MPRDA Amendment Act which has expressly been suspended indefinitely;

28.2. be read together.

29. This means that all the amendments to NEMA and section 38A of the MPRDA¹⁴ came into effect on 8 December 2014.

APPROVAL OF EMPR UNDER MPRDA DOES NOT OBTIATE NEED FOR ENVIRONMENTAL AUTHORISATION IN TERMS OF NEMA

30. As outlined above, EEM contends that the approval of its EMPR by the DMR obviates the requirement for environmental authorisation under NEMA. Its contentions are fundamentally flawed for a number of reasons. I deal with those in turn below.

Approval by the DMR of the EMPR was unlawful

31. Under the “old regime” an applicant for a mining right in terms of section 22 of the MPRDA was required, in terms of the now repealed 39(1) of the MPRDA, to submit an EMPR. It was not a requirement that an EMPR be approved in terms of the now repealed section 39(4) of the MPRDA before the mining right was granted. In terms of

¹⁴ Section 38A is reflected as in force on Jutstat. On SAFLII, there is a note prepared by the University of Pretoria reflecting the following “Please note that section 14(2) of the Act 62 of 2008 has been deleted by section 28 of Act 25 of 2014 with effect from 1 September 2014. We are of the opinion that despite the deletion of section 14(2), the amendments effected by section 94(2) of Act 49 of 2008 should still commence on 7 December 2014.”

the then applicable section 23(5), a mining right which was granted in terms of section 23(1) came into effect on which the EMPR was approved in terms of section 39(4). Section 39 was repealed with effect from 7 June 2013.

32. In terms of section 12(7) of NEMAA an application for a mining right that is pending when the One Environment System comes into force must be dispensed with as if the MPRDA was not amended. In terms of regulation 54(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.
33. Those provisions are not applicable in this instance because EEM's application for a mining right was granted on 26 November 2014. There was therefore no pending application for a mining right when the One Environmental System came into force. Accordingly, at the time when the EMPR was purportedly approved by the DMR in terms of section 39 of the MPRDA, there was no applicable provision empowering the DMR to apply that repealed section of the MPRDA.
34. Furthermore, the transitional provision in section 12(4) of NEMAA discussed below reinforces an interpretation that after 8 December 2014 the DMR is no longer empowered to approve EMPRs under the former section 39(4) of the MPRDA.

Environmental authorisation under NEMA still required

35. In any event, EEM's contention that it no longer requires environmental authorisation because it has an approved EMPR is incorrect.
36. Firstly, in terms of section 12(4) of NEMAA it is only an EMPR approved in terms of the MPRDA immediately before the date on which NEMAA came into operation that must be "*regarded as having been approved*" in terms of NEMA as amended by NEMAA. EEM's EMPR was only approved after NEMAA came into operation and the One Environmental System was implemented.
37. Secondly, even if EEM's EMPR had been approved before 8 December 2014, it would be "*regarded as having been approved in term of NEMA*". That does not mean that environmental authorisation was granted under NEMA.
38. In terms of section 24N(1) of NEMA (as amended) an EMPR may be required before considering an application for environmental authorisation. There is no provision for an EMPR to be approved. An environmental authorisation must still be obtained.
39. If EEM had not withdrawn its application for environmental authorisation in terms of NEMA and the 2010 EIA Regulations (i.e. which it had submitted in terms of the "*old regime*") and which was pending when the One Environmental System came into force:-
 - 39.1. in terms of section 12(2) of NEMAA, together with regulation 53(1) of the 2014 EIA regulations, the application would have had to be dispensed with in terms of the 2010 NEMA EIA regulations as if they had not been repealed.

- 39.2. in terms of section 12(2) of NEMAA, together with regulation 53(3) of the 2014 EIA regulations, to the extent that there is a new component in the 2014 EIA regulations which was not an activity identified under 2010 NEMA notices, the application would still have had to be dispensed with in terms of the 2010 NEMA EIA regulations, but on condition that all impacts of the newly identified activity and requirements of the 2014 NEMA EIA Regulations have also been considered and adequately addressed.
40. In terms of section 24(4) of NEMA, a competent authority empowered under Chapter 5 of NEMA to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24(4)(a) and, where applicable, (b) to be an environmental authorisation in terms of that Chapter.
41. On the face of it, this provision is not applicable. Approval of an EMPR under the now repealed section 39(4) is not an “*authorisation*” in terms of other legislation. Furthermore, this provision was inserted by NEMAA which included the specific transitional provisions dealing with the MPRDA and approval of EMPRs discussed above and therefore falls to be dealt with in terms of those provisions.

CONCLUSION

42. EEM's mining right was granted on 26 November 2014.
43. When the One Environmental System came into force on 8 December 2014, EEM had been granted a mining right, did not have an approved EMPR in terms of the MPRDA

and had a pending application for environmental authorisation under NEMA and the 2010 EIA regulations.

44. On 3 February 2015 EEM withdrew its application for environmental authorisation in terms of NEMA and the 2010 EIA regulations.
45. The DMR approved the EMPR on 20 February 2015 (after it had executed the mining right on 30 January 2015 on the basis that the EMPR was approved on 30 January 2015).
46. The approval of the EMPR by the DMR does not obviate the need for EEM to obtain an environmental authorisation in terms of NEMA for the following reasons: -
 - 46.1. the approval of an EMPR by the DMR after the mining right application had been granted, and the One Environmental system had commenced, is unlawful because there are no legislative provisions empowering the DMR to act in terms of section 39(4) of the MPRDA which was repealed with effect from 7 June 2013 in such circumstances;
 - 46.2. because the EMPR was not approved before the One Environmental system came into force it cannot be "*regarded as having been approved in terms of NEMA*";
 - 46.3. even if the EMPR could be "*regarded as having been approved in terms of NEMA*" that does not mean that an environmental authorisation has been obtained in terms of NEMA.

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Chambers
Cape Town
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