

Act will provide final solution to mining regulation overlap

ENVIRONMENTAL ENFORCEMENT

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IN THE past few months, the unresolved conflict over jurisdiction over the environmental impacts of mining between the Department of Environmental Affairs (DEA) and the Department of Mineral Resources (DMR) has spilled out of boardrooms and parliamentary portfolio committee meetings into the courts.

Just last week, the Sekuruwe community brought an urgent application for an interdict to stop Anglo Platinum's Potgietersrust Platinum mine near Mokopane in Limpopo from dumping mine waste and continuing with the construction of a tailings dam until it has an environmental authorisation under the National Environmental Management Act (Nema).

As Australian mining company Coal of Africa has argued in the Vele case, and as empowerment mining company Maccsand had argued in the case brought against it by the City of Cape Town, Potgietersrust Platinum contends that it does not require authorisations under Nema, and that "the environmental impacts of its mining activities are regulated in terms of the mining right" granted to it under the Minerals and Petroleum Resources Development Act (MPRDA).

At least four authorities (the DEA, the Western Cape and Mpumalanga environment departments and the City of Cape Town) disagree, and have taken enforcement action against mines for non-compliance with Nema. They are supported in their views by the Western Cape High Court: earlier this year Judge Dennis Davis held in the Maccsand case that mines do in fact need authorisations under Nema and local planning legislation. That case is now on its way to the Supreme Court of Appeal, and perhaps there we will have the final judicial word on this matter.

But it is clearly undesirable to have a situation where provincial and local authorities, and local communities, have to appeal to the courts to decide which department's legislation takes precedence. Mining firms quite correctly argue that they need regulatory certainty, and the government does have a positive obligation to provide clear rules. The current situation is untenable, and threatens the international reputation of both the government and the mining industry as a whole.

So it appears that the mining sector itself, now so aggrieved by this regulatory 'uncertainty', was instrumental in stopping the solution in its tracks.

So how did we get into such a debacle?

In 2008, after many years of painstaking work, an agreement was finally reached between the ministers of mineral resources and environmental affairs: the departments would start a process of legislative reform to ensure that mines would have to comply with the same environmental impact assessment requirements as all other industries. There would be no more confusion; there would be a single statute applicable to all impact assessments, and one environmental authorisation for all industries.

Both departments duly prepared draft legislation to implement this agreement, and both Parliament and the president approved amendment acts that would trigger a transitional period to allow all parties to prepare for the full transfer of functions.

The last piece of law was assented to by the president in April 2009, and the stage was set for the long-overdue reform of the environmental regulation of mines.

Then nothing happened.

Question after question to the minister and the DMR regarding a commencement date for the MPRDA Amendment Act,

including questions by the DEA itself, went unanswered. Eventually, almost a year later, the minister told Parliament that "several concerns" had been raised by mining sector stakeholders and government departments related to the implementation of the act. The DMR, she said, "deemed it prudent to first consult and further endeavour to address the concerns raised by stakeholders before the amendment act take [sic] effect."

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And which mining firm would not prefer to keep the current regime? First, Nema would require mining groups to do a proper environmental impact assessment with public participation that entails somewhat more effort than, in the case of prospecting rights applications, putting up a notice at the local magistrates' court and making a few phone calls to local landowners.

Second, the new regime may actually entail compliance monitoring and enforcement against mines who fail to comply with their environmental obligations.

The recently published third annual

National Environmental Compliance and Enforcement Report for 2009/10, recording the results of the entire environmental management inspectorate (the so-called Green Scorpions) in national and provincial government, records 2 380 compliance inspections, 1 260 directives and court applications and 673 criminal convictions secured by environmental management inspectors (EMIs) in the past year. According to this report, there are 291 EMIs outside of national parks, all of whom have completed a comprehensive training course.

Compare this with the 84 positions in the DMR dedicated to environmental protection and monitoring at mines, of which, as at September 2010, only 67 were filled. It is indicative of the low priority given to environmental enforcement in the DMR that 43 of the 84 positions were at environmental officer (entry) level, and none were higher than deputy director level.

To date, Minister Susan Shabangu has refused to provide details of enforcement action taken by the DMR against mines that fail to comply with their environmental obligations. Right now, we have no real evidence that any such enforcement action has taken place in recent years.

The Outcome 10 Delivery Agreement, recently signed by the government, sets target dates for a new "joint proposal" between the ministers, a new law reform process, and finally a new "integrated and co-ordinated regulatory system for environmental management of mines" to be in place by June 2012. Assuming that this deadline for the long-resisted regulatory change can be met, that still leaves another 18 months of public spats between mining companies and environment authorities, costing mining companies and the government – not to mention the courts – precious time and resources that could far better be spent on preparing for regulatory change.

If the mines really want "certainty" about the regulation of their environmental impacts, they should consider withdrawing their "several concerns" and ask the minister to bring the MPRDA Amendment Act into effect at once. In this way, the 18-month transitional period can start running, and the mining sector can prepare to join the rest of industry in South Africa.

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