HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 75622/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

AQUARIUS PLATINUM (SA) PTY LTD	Applicant
and	
MINISTER OF WATER AND SANITATION	First Respondent
DIRECTOR OF WATER-GENERAL: DEPARTMENT OF WATER AND SANITATION	Second Respondent
MINISTER OF MINERAL RESOURCES	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS	Fifth Respondent
DEPARTMENT OF ENVIRONMENTAL AFFAIRS	Sixth Respondent

J U D G M E N T

MAKGOKA, J:

[1] On 22 May 2015 I made the following order:

1. The publication by the fourth respondent (the President) of the National Environmental Laws Amendment Act 25 of 2014 in the Government Gazette 37713 dated 2 June 2014, without promulgating the regulations for the implementation of the amendments envisaged in the above-mentioned Act, is reviewed and set aside;
2. The relief sought by the applicant in prayer 4 of the amended notice of motion is dismissed;
3. The fifth and sixth respondents are jointly and severally ordered to pay 60% of the applicant's costs.

[2] The applicant (Aquarius) seeks, in the main, to review and set aside a decision of the second respondent to refuse Aquarius' application for a water use licence under the National Water Act 36 of 1998. At the hearing of the matter, Aquarius, the first and second respondents, agreed that the relief sought by Aquarius against the first and second respondents be postponed. However, the Minister of EA and the department, opposed the postponement, mainly on the ground that the postponement would result in unnecessary piece-meal adjudication of the matter. After hearing argument, I postponed that part of the application *sine die*, on the terms more fully set out in the order marked 'X'.

[3] I also granted Aquarius leave for a further amendment to its notice of motion, the details of which are not relevant to the issue I have to decide in this judgment. It suffices to mention that I was satisfied that the amendment will allow for the proper facilitation of a hearing of the dispute between Aquarius, the first and second applicants.

[4] What remains is the relief which Aquarius seeks against the fourth respondent (the President). Aquarius seeks to review and set aside the decision of the President to publish the National Environmental Laws Amendment Act 25 of 2014 (NEMLAA) on 2 June 2014 without the regulations envisaged in that Act. The publication brought into operation sections 19, 21, 22, 23, 24 and 25 of the NEMLAA.

[5] The applicant seeks such relief because NEMLAA amends the National Environmental Management: Waste Act 59 of 2008 (NEM: WA), which in turn, would be applicable to residues of mining operations such as the tailings into a storage facility at Kroondal mine, operated by the applicant. Aquarius' case against the President is therefore that the proclamation into law of NEMLAA has resulted in legal uncertainty, and NEMLAA, is to that extent, invalid and of no force. The relief sought therefore falls within a narrow compass.

[6] Alternatively, the applicant seeks a declaratory order that the third respondent, the Minister of Mineral Resources (Minister of MR) is obliged to exempt the applicant from the licensing provisions of NEM:WA, and an order that the Minister of MR so exempt the applicant from the provisions of NEM: WA. Further alternatively, the application seeks a declaratory order that the Minister of MR is empowered to exempt the applicant from the licensing provisions of NEM: WA, and order for the Minister of MR to consider whether to exempt the applicant from such provisions. No relief is sought against the fifth and sixth respondents – respectively the Minister of Environmental Affairs (Minister of EA) and her department. The two respondents were not originally cited. They were joined in the proceedings at their own application, ostensibly because of an interest they have in the issues raised by the application.

[7] The President is not opposing the relief sought against him. However, the Minister of EA and her department, oppose the relief sought by Aquarius on the basis that the legislation implicated in the relief sought by Aquarius is administered by them, and would impact on how that legislation would be implemented. In written submissions on their behalf, the following issues are said to be of concern to the Minister of EA and her department: the binding nature of the application of the licensing provisions; the validity of such provisions, and the scope of the application of the licensing provisions of the legislation and the subordinate legislation.

[8] A brief factual background is this. Aquarius conducts a mining operation in Kroondal in Northwest. The mine produces tailings which need to be deposited on tailings dams. It had become necessary for Aquarius to develop new sites to deposit tailings since its existing tailing dams were reaching their capacity. During or about 2008, a mined-out pit known as West-West Pit was identified as a new tailings storage facility. The legal process to obtain the necessary legislative approvals was initiated. This included an application for water use license in terms of the National Water Act 36 of 1998 (NWA). This was submitted to the relevant officials of the predecessor department of the first respondent on 4 September 2012.

[9] The first and second respondents have not approved Aquarius' application in this regard. Because the application involving Aquarius, the first and second respondents has been postponed, I need not set out in any detail the nature of the dispute between them. Suffice it to say that the dispute concerns the efficacy of the proposed measures to limit the pollution which may be caused by the deposition of tailings. The first and second respondents insist that for that purpose, Aquarius must include a type C barrier in the West-West pit before its water license application is

approved. Aquarius, on the other hand, contends that the inclusion of such a barrier is not a legal requirement for issuing of a water license, and further that the proposals and design it submitted to limit pollution are more effective that the installation of the barrier insisted upon by the first and second respondents.

[10] On 27 March 2013 Aquarius obtained environmental authorization in terms of NEMA for listed activities provided for in NEMA that will be triggered by the implementation of the West-West pit project. On 11 June 2013 it obtained, from the Minister of MR, consent to implement the West-West pit project without a type C barrier, to include the construction and operation of the project.

[11] On 2 June 2014 the President published NEMLAA in terms of s 81 of the Constitution of the Republic of South Africa, 1996 (the Constitution) in Government Gazette 37713. Section 81 provides that a Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act. Section 32 of NEMLAA provided for the amendments to come into effect three months from date of publication of the Act by the President in the Gazette. The effective date was therefore 2 September 2014.

[12] It appears that the purpose of the amendments brought about by NEMLAA was to rationalize the different and often contradicting legislative requirements relating to the environmental impacts of prospecting and mining. I accept, and adopt, the following summary by counsel for Aquarius as to the overall intention of these amendments, in so far as they are relevant to this application:

(a) the provisions of the MPRDA which regulated the environmental impacts and the management of the environmental impacts of mining (including the management

of mine residues) would be removed from the MPRDA and be governed under the provisions of NEMA;

(b) although NEMA would apply to mining, the provisions of NEMA would be implemented by the Department of Mineral Resources (DMR) and the power to grant environmental authorisations in respect of prospecting and mining activities under NEMA will vest in the Minister of MR;

(c) the provisions of NEM:WA (which were, as made applicable to mining but, as in the case of NEMA, the powers under NEM:WA vesting in the Minister of EA, would, as from the date when NEM:WA became applicable to mining, vest in the Minister of MR.

[13] Section 43A of NEMLAA was inserted into NEM:WA which provides that, what is referred to as 'residue stockpiles and residue deposits' must be managed in the prescribed manner on a site demarcated for that purpose in the environmental management plan or environmental management programme. The word 'prescribed' is defined in section 1 of NEM:WA as meaning '...prescribe by regulation under this Act'. It is common cause that the regulations envisaged in the newly-inserted s 43A, which are required for the implementation of its provisions, had not been promulgated by 2 September 2014, the date on which NEMLAA became effective.

[14] The practical effect of the President publishing NEMLAA on 2 June 2014 to become effective on 2 September 2014, can be summarized as follows. First, in terms of s 18 thereof, NEM:WA became applicable to mining (by deleting section 4(1)(b) of the latter Act. Second, in terms of s 21, s 43(1A) was inserted into NEM:WA, thereby making Minister of MR the licensing authority where a waste

management licence is required to authorize a waste management activity which is related to mine residues.

[15] Third, s 43(1B) was inserted into NEM:WA which made the Minister of MR responsible for the implementation of NEM:WA to the extent it relates to mining and mine residues. Fourth, the definition of 'residue stockpiles' and 'residue deposits' were inserted into section 1 of NEM:WA by s 18(b) of NEMLAA, which inserted the definitions with effect from 2 September, 2014. However, these definitions were deleted by section 1 (b) of the National Environmental Management: Waste Amendment Act 26 of 2014 with effect from 2 June 2014, that is, before their insertion became effective on 2 September 2014.

[16] As a result of the non-promulgation of the regulations contemplated in s 43A of NEMLAA by the date on which NEMLAA became effective, the Ministers of EA and of MR, were prompted to issue a long press statement on 4 September 2014. The net effect of that statement is the following:

> 'NEMLA (sic) and its associated regulations will be implemented with effect from 8 December 2014.'.... Government took a decision that the 'One Environmental System' will only be implemented from 8 December 2014, when the whole suite of legislation and subordinate legislation necessary for the implementation of the One Environmental System will be in effect.'

[17] As it turned out, by 8 December 2014, the regulations for the implementation of the amendments brought about by NEMLAA were not in place, despite the assurance of the two Ministers. As of the date of hearing of this application, the regulations were yet to be promulgated.

[18] That fact forms the basis of Aquarius' complaint. It contends that the application of the amendments brought about by NEMLAA without the envisaged

regulations has brought uncertainty for it and other stake holders in the mining sector. On behalf of Aquarius, it was contended that although the President cannot veto legislation which has been duly passed by Parliament, or block its implementation, he had a duty to ensure that the Act is capable of being implemented before exercising the power granted to him by Parliament to fix the date on which such legislation will become operative. Counsel for Aquarius argued that the manner in which s 32 of NEMLAA was worded did, by reference to s 81 of the Constitution, give the President a discretion to determine the date upon which the enactments would come into operation.

[19] The upshot of the argument on behalf of Aquarius is that the decision of the President to publish NEMLAA at a stage where nothing had been done to formulate the regulations required under NEM:WA to regulate mine residues, was not objectively rational having regard to the powers given to the President in ss 79 and 81 of the Constitution to cause legislation to become effective. The President should have exercised the power in a responsible and considered manner, having assessed the progress that had been made to promulgate the related regulations required to implement the amendments to various legislation as a result of NEMLAA.

[20] Counsel for the Minister of EA and her department, submitted that the President had neither a discretionary power nor a power delegated to him by Parliament as to whether or not to publish NEMLAA after he had assented thereto. He was in fact constitutionally obliged or compelled to publish the Act under the circumstances. Counsel argued, with reference to *Ex Parte Minister of Safety and Security: In re S v Walters*[1] that the President had no option, once the Bill had been

---

[1] 2002 (7) BCLR 663 (CC) para 69

passed by Parliament and assented to by him, he was constitutionally obliged to promptly publish NEMLAA in terms of s 237 of the Constitution. The President had no discretion and no decision to take after assenting and signing the said Bill.

[21] Relying on s 81 of the Constitution, counsel further submitted that the only instance when the President could refer the Bill back to Parliament for reconsideration is if he has reservation about the constitutionality of the Bill, which is not the case in the present matter. Other than that, so submitted counsel, the President had to sign the Bill passed by parliament and publish its coming into effect.

[22] The upshot of the above submissions cannot, in principle, be faulted. But with respect to counsel, the legislative process he refers to is not in issue here. What is in issue is the decision of the President, to publish the Act, and thus bringing the Act into operation. This occurred after the legislative process counsel refers to, had been complied with. The legislative process had therefore moved past the stage of passing the Bill by Parliament and the President signing it into law. There is no challenge to that process. It is not Aquarius' case that that the relevant Bill passed by Parliament and signed into law by the President is unconstitutional for want of compliance with the legislative process, either in the passing of the law or signature thereof by the President. The complaint concerns the final stage of that legislative process, namely the publication or the proclamation of the law for it to become operative.

[23] The President's publication of an Act, and thus bring it into force, constitutes part of the legislative scheme. It must be rational. It is judicially reviewable if it is not. As explained by the Constitutional Court in *Pharmaceutical Manufacturers*

Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others[2] para 79:

> '[W]hen he purported to exercise the power the President was neither making the law, nor administering it. Parliament had made the law, and the Executive would administer it once it had been brought into force. The power vested in the President thus lies between the law-making process and the administrative process. The exercise of that power requires a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. In substance the exercise of the power is closer to the legislative process than the administrative process. If regard is had to the nature and subject-matter of the power, and the considerations referred to above, it would be wrong to characterise the President's decision to bring the law into operation as administrative action within the meaning of item 23(2)(b) of the Sixth Schedule of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently with the provisions of the Constitution insofar as they may be applicable to the exercise of such power.' (Footnote omitted.)

[24] In the present case, the results of premature proclamation of NEMLAA without the necessary regulations, which the Act itself envisaged, are glaring. NEMLAA amended a number of statutes. However, for the present purposes, it suffices to state that it made NEM:WA applicable to mining by deleting section 4(1)(b). It also inserted into NEM:WA the following:

(a) s 43(1A) – designating the Minister of MR the Licensing authority where a waste management activity is related to prospecting or mining;

(b) s 43(1B) - designating the Minister of MR to be responsible for the implementation of the provisions of NEM:WA that relate to prospecting and mining;

(c) s 43A which provides that, what is referred to as 'residue stockpiles and residue deposits' must be managed in the 'prescribed manner' on a site

---

[2] [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)

demarcated for that purpose in the environmental management plan or environmental management programme; and

(d) the definitions of 'residue stockpiles' and 'residue deposits' into section 1 of NEM:WA.

[25] Aquarius complains about the alleged legislative and regulatory vacuum caused by the premature promulgation of NEMLAA. For example, although NEMLAA inserted definitions of 'residue stockpiles' and 'residue deposits' into s 1 of NEM:WA with effect from 2 September 2014, those very same definitions were again deleted, purportedly with effect from 2 June 2014, by section 1(b) of the amended NEM:WA.

[26] Quite apart from the absurdity inherent in the fact that the definitions were deleted before they were inserted into NEM:WA, it resulted in a vacuum with regard to what 'residue stockpiles and residue deposits' are and how they to be managed in terms of s 43A of NEM:WA. What is more, at the same time, the similar provision in section 42 of the MPRDA has been repealed, albeit regulation 73 of the MPRDA regulations remains in place. The result is that there is legislation vacuum with regards to the management of residue stockpiles and residue deposits.

[27] The other consideration is the uncertainty posed to the holders of environmental management programmes. The President has failed to cause the provisions of the MPRDAA, which inserts section 38B into the MPRDA, to come into effect, at least on the same day as when the repeal of the provisions of the MPRDA governing environmental management programmes comes into effect. It was intended that section 38B of the MPRDA would ensure the continued validity of all EMPs approved under the MPRDA as if they were environmental authorisations approved under NEMA.

[28] If the repeal of section 14(2) of NEMAA had the result that all the provisions of the MPRDA relating to environmental management programmes were deleted with effect from 2 September 2014 while the deeming provisions of section 38B have not come into effect, there is a legislative vacuum as to how holders of prospecting or mining rights must implement the provisions of their environmental management programmes since the provisions of the MPRDA that require such holders to implement the provisions of the MPRDA have been deleted while the amended provisions of NEMA with regard to environmental authorisations do not apply to those holders.

[29] The above simply demonstrate the irrationality of the President's decision to put into effect the amendments without the proper regulations for implementation. To that extent the proclamation is invalid and should be set aside.

[30] I turn now to Aquarius' prayer for exemption from the licensing provisions of NEM:WA. Aquarius seeks an order that the licensing provisions of NEM:WA, as amended by NEMLA do not apply to its West-West pit project. Alternatively, if it applies, there must be an order that the Minister of MR is authorised to exempt the implementation and operation of the West-West pit project from the provisions of the NEM:WA, and the Minister is obliged to so exempt the applicant within 10 days of the service of the court order on him. Alternatively, Aquarius seeks an order in terms of which the Minister of MR is ordered to consider and make a decision in respect of its application for exemption from the licensing provisions of NEM:WA within 10 days of the service of the order on him.

[31] What Aquarius seeks, in essence, is a declaratory that its tailings storage facility is not and will not at any stage in future be subject to the existing or future

licensing provisions of the Waste Act 59 of 2008 or alternatively that Aquarius' tailing storage facility is entitled to be exempted by the Minister of MR from the licensing provisions of the Waste Act.

[32] The power of exemption has been entrusted to the executive branch of government. It is not for a court to prescribe to the executive how that power has to be exercised by the executive. As a result I would give deference to the executive in this regard, lest I offend the doctrine of separation of powers by assuming the power so clearly entrusted to the executive. In any event, it is by no means clear that it is the Minister of MR who has to exempt as sought by Aquarius. There is a debatable case that that power vests with the Minister of EA. But on any consideration, I do not think that the relief sought by Aquarius in this regard can be competently granted by this court. There might well be instances where by way of *mandamus*, the executive could well be compelled to do what it is enjoined by law to do. This is not one of those. It is not Aquarius' case that any of the concerned Ministers has failed or refused to perform their duties. Aquarius' case in this regard falls to fail.

[33] I must finally determine the reach of the order of invalidity. Aquarius has sought a narrowly tailored relief of constitutional invalidity of NEMLAA so that the publication of NEMLAA be reviewed and set aside only insofar as NEMLAA made NEM:WA applicable to its West-West pit project. I do not think it is desirable to grant such an order in the circumstances of the case. The complication is that the President has not participated in these proceedings, nor has he given any indication as to how he intends to redress the vacuum created by the premature publication.

[34] As acknowledged by counsel for Aquarius, the impact of the conundrum created by the publication of NEMLAA without the regulations has a far wider impact

than simply on Aquarius. Many other stakeholders will be affected by the amendments to various laws affected by the amendments. It would therefore be convenient that the impact of the amendments should be dealt with once and for all. As the order of invalidity I am about to make must first be confirmed by the Constitutional Court, it would be desirable for that court to finally and effectively dispose of the matter as a whole.

[35] There remains the issue of costs. Aquarius has been successful in its case against the President. Counsel for the Minister of EA and her department effectively argued for the dismissal of the relief against the president, who, in my view, wisely did not oppose such relief. Much time was spent during argument on the case against the President, which Aquarius eventually succeeded on. That should be reflected in the order of costs. I think that a fair order would be that the Minister of EA and her department should be liable to 60% of Aquarius' costs.

[36] In terms of s172 of the Constitution, the Registrar of this Court would be requested to transmit this judgment to the Constitutional Court for it to decide whether to confirm the order of invalidity in the order I made.

[37] For all the above reasons, the order referred to in para [1] was made.

TM Makgoka
Judge of the High Court

Date of hearing:	27 January 2015
Judgment delivered:	27 May 2015
Appearances:	
For the Applicant:	Adv.L. Bekker
Instructed by:	Malan Scholes Incorporated, Johannesburg Klagsbrun Edelstein Bosman De Vries, Pretoria
For the First and Second Respondents:	Adv. K. Moroka SC Adv. H. Rajah
Instructed by:	State Attorney, Pretoria
No appearance for Third And Fourth Respondents	
For the Fifth and Sixth Respondents:	Adv.M. Oosthuizen SC Adv. M. Molea
Instructed by:	State Attorney, Pretoria