BIZCOMMUNITY

Big shift to environmental legislative landscape is finally here

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The final signing into law of the Nemla Act has introduced a major shift in South Africa's environmental legislation from 24 June 2022 and will deter non-compliance with environmental laws.

Image source: Vladislav Gajic – 123RF.com

Act No. 2 of 2022 – undoubtedly the most significant piece of environmental legislation that has been published since the implementation of the One Environmental System (OES) in 2014 – has finally been signed into law (the Act).

This Act started out as the National Environmental Laws Amendment Bill, known as 'the Nemla Bill' or 'Nemlaa4', when it was introduced to Parliament in 2017. More than five years on, this Bill has finally ended its arduous parliamentary journey, which involved much debate and numerous changes following its rejection by the National Assembly in 2018, and its lapsing and subsequent revival in 2019. We were kept on tenterhooks until the very end, when, despite being passed by both the National Assembly and the National Council of Provinces on 1 March 2022, it took almost four months for the Bill to be signed into law.

From 24 June 2022, the Act has officially introduced a wholesale shift in South Africa's environmental legislative landscape. Many of these changes were intended to clean up a range of issues associated with the roll-out of the OES – which overhauled the manner in which environmental issues are regulated on mine sites, among other things. Overall, it is clear that the changes imposed by the Act aim to deter non-compliance with environmental laws by, among other things, introducing new offences, increasing the quantum of fines and administrative penalties where laws or licences have been contravened, and extending enforcement powers to enable more widespread enforcement of environmental laws.

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In the next couple of weeks, we will explore these changes in a series of focused alerts. These alerts will consider the amendments to the National Environmental Management Act, 1998 (Nema), the National Environment Management: Air Quality Act, 2004 (Nemaqa), and National Environmental Management: Waste Act, 2008 (Nemwa), among others, and explore what these changes mean for your business and way in which it operates. The important changes that will be considered include the following:

- **Changes to rectification provisions under Nema and Nemaqa:** The scope of section 24G rectification applications under Nema has been extended. "Successors in title" and "persons in control" of land on which a listed activity under Nema or Nemwa has been unlawfully commenced may now submit a rectification application. Previously, only the guilty person who carried out the unlawful activity without the required environmental authorisation or waste management licence, as the case may be, could apply. It has also become mandatory for the competent authority to direct the applicant to, among other things, cease the unlawful activity pending a decision on the rectification application.

  This is significant, because applicants were not often required to cease activities pending the outcome of the rectification application. In addition, the maximum administrative fine that must be paid in order for a section 24G application to be processed has been increased from R5m to R10m. Section 22A of Nemaqa has also been overhauled.

- **Management of residue stockpiles and deposits:** Residue stockpiles and residue deposits have been excluded from Nemwa and are therefore no longer regarded as waste for which a waste management licence is required. Instead, residue stockpiles and deposits will now be regulated in terms of the provisions of Nema.

- **Expanded enforcement powers:** Municipal managers are now also empowered to issue Nema section 28(4) directives for contravention of the duty of care obligations. Designated environmental mineral and petroleum inspectors will also be able to issue section 31L compliance notices. These changes are likely to see an increase in administrative enforcement action.

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- **Changes to financial provisioning (FP):** The changes to FP have paved the way for the much-anticipated final

replacement FP Regulations under Nema. The definition of "financial provision" has been amended to refer specifically to a "holder" (ie. a person to whom a right/permit has been granted in terms of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), a holder of an old order right (as defined under the MPRDA) and an applicant (ie. any person who has submitted an application for an environmental authorisation under Nema). This change is important to clarify that the Nema FP requirements apply to both new applicants and holders of EAs for mining activities since the OES came into force, as well as historical holders who have now transitioned to the Nema system under the OES. The new definition makes it clear that the State should not bear the financial burden of rehabilitation, closure, and post-closure activities. These should be covered by the aforementioned categories of persons.

Section 24P will apply generally to the remediation of environmental damage in relation to specific instances which can be prescribed by the Minister of Environment, Forestry and Fisheries (Environment Minister) (or MEC in concurrence with the Environment Minister). When such instances have been prescribed, the FP must be 'determined' before an EA is issued. A new section 24PA has been introduced to specifically regulate FP requirements for mining. Failure to comply with certain requirements under section 24P or 24PA have now become criminal offences under Nema and will constitute Schedule 3 offences for which director liability may be imposed.

- **Changes in competency of the Minerals Minister:** The Minister of Mineral Resources and Energy (Minerals Minister) now has less power than this time last week. For example, section 48 of the National Environmental Management: Protected Areas Act, 2003 previously prohibited commercial prospecting, mining, exploration, or production from being undertaken in a protected environment without the permission of the Environment Minister and the Cabinet member responsible for minerals and energy affairs. As of last Friday, the decision to allow mining etc in a protected environment falls within the exclusive competence of the Environment Minister. Written permission is no longer required to be obtained from the Minerals Minister.

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