EVERSHEDS SUTHERLAND

8/2019

Edition 1

Newsletter

South Africa

Environmental newsletter

Editor’s comments

Welcome to the first edition of the Eversheds Sutherland (South Africa) Environmental Newsletter

South Africa’s Environmental Laws are extremely complex, despite the implementation of the “*one environmental system*”, and compliance requires sound, dedicated resources, regardless of whether your business operates in the highly regulated Mining and Natural Resources Sector, or any other sector, in South Africa.

At the heart of environmental compliance with South Africa’s Environmental Laws, is the Constitutional right to an environment that is not harmful to both health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

More commonly spoken of, is the “*duty of care*”, contained in Section 28(1) and Section 28(1A) of the National Environmental Management Act, No. 107 of 1998 (“**NEMA**”). Recent developments have placed significant focus on the “*duty of care*” and what it means, within the context, particularly, of historical activities that have resulted in pollution and ecological degradation.

While most companies understand, or at the very least, are aware of the “*duty of care*”, many companies only truly get to understand what the “*duty of care*” means, when faced with enforcement action by the regulators, community activism, and, as BP recently discovered, through private prosecution.

In this, our first edition of the Environmental Newsletter, we address the private prosecution of BP, the newly enacted Carbon Tax Act, the proposed Financial Provision Regulations 2019, and the Waste Exclusion Regulation, 2018.

We hope that you enjoy reading them as much as we enjoyed preparing them for you.

Warren Beech, *Partner – Head of Mining and Infrastructure*
T: +27 10 003 1455
M: +27 83 656 6584
warrenbeech@eversheds-sutherland.co.za

Contents

For further information, please contact:

Warren Beech, Partner - Head of Mining and Infrastructure
T: +27 10 003 1455
M: +27 83 656 6584
warrenbeech@
eversheds-sutherland.co.za

Pascale Defroberville, Associate
T: +31 940 0501
M: +82 746 3218
pascaledefroberville@

Nicholas Veltman, Partner
T: +27 10 003 1477
M: +27 83 301 9892
nickveltman@
eversheds-sutherland.co.za

Themba Khumalo, Partner
T: +27 10 003 1460
M: +27(0)82 407 0063
thembakhumalo@

Eben van Zyl, Snr. Associate
T: +27 10 003 1459
M: +27 71 361 2410
ebenvanzyl@
eversheds-sutherland.co.za

Refiloe Vengeni, Snr. Associate
T: +27 10 003 1455
M: +27 72 6515 790
refiloevengeni@
eversheds-sutherland.co.za

Glynn Kent, Associate
T: +27 31 940 0501
M: +27 72 384 7025
glynnkent@
eversheds-sutherland.co.za

Financial provision regulations

Introduction

There has been significant debate amongst key stakeholders including government, mining companies, and environmental lobbyists regarding how mining companies should not only be held accountable for mine closure but also how the often vast sums of money needed to close mines properly, will be made available so that the State does not end up having to remediate and rehabilitate mines that close prematurely or become "*ownerless*".

There was a radical shift regarding the calculation of total amount needed to carry out mine closure and rehabilitation, and the amount that had to actually be made available at any point in time to achieve the objectives, when the "*Regulations pertaining to the Financial Provisions for Prospecting, Exploration, Mining or Production Operations*" were published in GNR 1147 of 20 November 2015 ("**the Financial Provision Regulations 2015**").

Prior to the publication of the Financial Provision Regulations 2015, holders of mining rights were required to comply with Section 41 of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ("**MPRDA**") read with MPRDA Regulation 53 and 54. Section 41 of the MPRDA (which has subsequently been repealed) required the holder of a mining right ("**the Holder**") to make financial provision through the mechanisms and by determining the quantum (amount) in accordance with MPRDA Regulations 53 and 54.

MPRDA Regulation 53 sets out the methods (vehicles) for the financial provision and includes a trust, a financial guarantee, a cash deposit, or any other method as the Director General may determine (this included insurance products, for a period).

MPRDA Regulation 54 sets out the methodology for determining the quantum of the financial provision. The amount (quantum) of the financial provision was determined in accordance with a guideline document published by the Department of Mineral Resources. The last version of the Guideline was published in 2005 ("**the DMR Guideline**"). The amount required a detailed itemisation of all actual costs required for (a) premature closing regarding the rehabilitation of the surface of the area, the prevention and management of pollution of the atmosphere, the prevention and management of pollution of water and the soil, and the prevention of leakage of water and minerals between subsurface formations and the surface, (b) decommissioning and final closure of the operation, and (c) post closure management of the residual and latent environmental impacts.

In summary, the basis of calculating the quantum was "*actual costs*" required for the three categories, namely (a) premature closing, (b) decommissioning and final closure of the operation, and (c) post closure management of residual and latent environmental impacts.

The methodology set out in MPRDA Regulations 53 and 54 was acceptable to most mining companies, but came under heavy criticism from environmental lobby groups for not providing sufficient amounts to cover the costs of rehabilitation, generally, and more specifically, on premature closure, and the "*ownerless mines*".

These concerns were addressed in the Financial Provision Regulations 2015 to some extent, but it became apparent almost immediately, that there were numerous interpretational challenges and that there could be a significant impact on the viability of new mining projects, and existing mines that would now need to both quantify a much higher provision, and make larger amounts available through one of the recognised mechanisms, to meet their responsibilities under the Financial Provision Regulations 2015.

The ink was hardly dry on the Financial Provision Regulations 2015, when stakeholders were again forced into discussions and this resulted in proposed amendments, and the publication of the Proposed Financial Provision Regulations 2017 ("**the Proposed Financial Provision Regulations 2017**"). The Proposed Financial Provision Regulations 2017 were met with criticism from many stakeholders including the environmental lobbyists, but of course, for vastly different reasons. Further engagement took place, which ultimately resulted in the publication of the "*Proposed Regulations Pertaining to Financial Provision for the Rehabilitation and Remediation of Environmental Damage caused by Reconnaissance, Prospecting, Exploration, Mining or Production Operations*", on 17 May 2019 on 17 May 2019 ("**the Proposed Financial Provision Regulations 2019**").

Interested and affected parties had a period of 45 days calculated from 17 May 2019, to submit comments on the Proposed Financial Provision Regulations 2019.

Interested and affected parties had a period of 45 days calculated from 17 May 2019, to submit comments on the Proposed Financial Provision Regulations 2019.

While the Proposed Financial Provision Regulations 2019 have retained some of the general principles that were contained in the Proposed Financial Provision Regulations 2017, there are significant and substantial differences.

The key provisions are (a) to whom do the Proposed Financial Provision Regulations 2019 apply, (b) how is the total amount that must be provisioned for, be calculated, (c) how much must actually be made available at any time, through one of the mechanisms that are recognised in the Regulations, and (d) the transitional provisions.

Comparison to 2017 draft

The Proposed Financial Provision Regulations 2017 were just that i.e. they were proposed regulations. The appropriate point of departure is therefore the Financial Provision Regulations 2015, because the intention is that the Proposed Financial Provision Regulations 2019, will replace the Financial Provision Regulations 2015.

The Financial Provision Regulations 2015 identified three categories of persons to whom the Regulations applied, namely (a) an applicant, (b) a holder, and (c) a holder of a right or permit.

In summary, the reference to "*applican*t" is a reference to an applicant for a new right, while the term "*holder*" refers to an entity that holds an existing right, prior to 20 November 2015. The term "*holder of a right or permit*", refers to an entity which acquired the right, after 20 November 2015.

This was extremely important, for holders of historical rights. It meant that they would be "*holders*", and would only be required to comply with the Financial Provision Regulations 2015, to the extent contemplated in the transitional arrangements set out in Chapter 4 and Chapter 5 only. While the Financial Provision Regulations 2015 were immediately applicable to applicants, holders were allowed to elect the transitional period which was either within three months of their financial year end or fifteen months from the promulgation of the Financial Provision Regulations 2015. The transitional period was extended to February 2020, due to extensive pressure being placed on the regulators, and engagement with stakeholders.

The practical effect of the extended timeline is two-fold, namely (a) a holder is only required to comply with Chapters 4 and 5 by 2020, and (b) in the interim, the holder is required to continue complying with the processes set out in MPRDA Regulations 53 and 54 (including the annual assessments and the method of determining the quantum set out in MPRDA Regulation 54)

The transitional arrangements in the Financial Provision Regulations 2015 require a holder to ensure that a review, assessment and adjustment of the financial provision is conducted in accordance with Regulation 11 read with the necessary changes. Regulation 11 contemplates a review of the requirements for (a) annual rehabilitation as reflected in the Annual Rehabilitation Plan ("**Annual Rehabilitation Plan**"), (b) final rehabilitation, decommissioning and closure at the end of life of operations as reflected in a Final Rehabilitation, Decommissioning and Mine Closure Plan ("**Mine Closure Plan**"), and (c) remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk report ("**Environmental Risk Report**").

In addition to widening the scope of application of the Financial Provision Regulations 2015 to applicants, holders and holders of rights and permits, the Financial Provision Regulations 2015 identified what needed to be included when calculating the overall quantum of the financial provision, and for the first time, there was specific reference to the pumping and treatment of polluted or extraneous water as reflected in the Environmental Risk Report.

In addition, the methodology of calculating the amount that needed to be available increased the financial provision, significantly, because it now required availability of funds, calculated over a ten year period and it included the annual rehabilitation requirements in the financial provision (the annual rehabilitation costs were historically included as operating expenses and not specifically included in the amount needed to be made available or to be held available for rehabilitation).

The quantum also increased significantly as a result of a requirement to make provision for the pumping and treatment of polluted and extraneous water as reflected in the Environmental Risk Report.

These changes resulted in severe criticism, primarily because the view was expressed that the significant increases in the overall quantum, and the amount that was needed to be made available through one of the vehicles (trust, cash deposit, or guarantee), would impact on the viability of mining projects, and existing mines.

These criticisms, together with those of the environmental lobbyists, that were proposing that even larger amounts should be made available for rehabilitation, resulted in the Proposed Financial Provision Regulations 2017 being published for comment.

The Proposed Financial Provision Regulations 2017 identified three parties, namely (a) an applicant, (b) a holder, and (c) a holder of a right or permit. The definition of an "*applicant*" was amended, and included a person who is required in terms of the MPRDA or NEMA to amend or replace the financial provision made in respect of any prospecting, exploration, mining or production operations as a result of an application for consent to cede, transfer, assign, alienate or amend a right or permit as contemplated in Section 11 or Section 102 of the MPRDA i.e. if an entity applied for consent in terms of Section 11 of the MPRDA, or amendments in terms of Section 102 of the MPRDA, these entities would now be regarded as applicants, and would be required to comply fully with the provisions of the Proposed Financial Provision Regulations 2017. Previously, an applicant was restricted to an applicant for a new right.

The definition of "*holder*" was also amended to mean the holder of the relevant mining right that was issued in terms of the MPRDA prior to 20 November 2015 and where no closure certificate has been issued in terms of Section 43 of the MPRDA.

The term "*holder of a right or permit*" was amended to mean a holder of the relevant right which was issued after 20 November 2015, or the holder of the right issued after the coming into force and effect of the Proposed Financial Provision Regulations 2017.

Some of the more important amendments that were proposed in the Proposed Financial Provision Regulations 2017 were the following:

- no financial vehicle is proposed for annual rehabilitation i.e. this is a change from the Financial Provision Regulations 2015, where the annual rehabilitation was included in the Financial Provision quantum. Under the Proposed Financial Provision Regulations 2017, annual rehabilitation will be included under OPEX (this may expose the DMR to liability is the holder of the rights do not comply with the obligations in the early stages of the mining operations. However, the annual rehabilitation costs and the risk associated with premature closing may nevertheless be included in the final rehabilitation costing where the methodology set out in Appendix 2, is applied)
- the restrictions on the financial vehicles that may be used, has been lifted. The only restriction is that a financial guarantee cannot be utilised for the Environmental Risk Report costing i.e. residual and latent costs. A further financial vehicle has been identified, namely contributions to rehabilitation companies
- the care and maintenance provisions in the Financial Provision Regulations 2015 have been removed in their entirety
- under the Financial Provision Regulations 2015, a holder is required to ensure that the Financial Provision required was at any time equal to the sum of the actual costs of implementing the Annual Rehabilitation Plan, Mine Closure Plan and Environmental Risk Report, and the amount that needed to be available at any one time, was for a ten year period. This has now been reduced to three years for holders i.e. holders of mining rights granted / issued prior to 20 November 2015
- the requirement relating to costs for post closure pumping and treatment of polluted and extraneous water remains in place (this was not required under the MPRDA Regulations)
- a distinction is made between new and existing mining operations in the methodologies used for determining the financial quantum i.e. Appendix 1 and Appendix 2
- the Financial Provision must be clearly linked to a right and permit.

The generally accepted view amongst legal practitioners was that the amount actually required to be available, would be less than the amounts calculated in terms of the Financial Provision Regulations 2015, under the Proposed Financial Provision Regulations 2017 for two primary reasons, namely (a) the time period was reduced from ten years to three years, and (b) the costs associated with the Annual Plan are no longer included, because they are part of OPEX.

The Proposed Financial Provision Regulations 2019 retain several of the concepts that were included in the Proposed Financial Provision Regulations 2017, but simplifies a number of these concepts, and clarifies a number of aspects that were previously contentious.

Some of the more important amendments set out in the Proposed Financial Provision Regulations 2019 include the following:

- the purpose is set out clearly, namely to regulate the manner in which an applicant or holder is to determine, provide, set aside, maintain and management financial security for undertaking progressive rehabilitation, decommissioning, closure and post closure activities associated with reconnaissance, prospecting, mining, exploration and production operations
- only two entities are identified, namely (a) an applicant, and (b) a holder. An applicant is defined to mean a person who applies for or requires a right, or consent in terms of Section 11 or Section 102 of the MPRDA, or a renewal of, amongst others, a prospecting or mining right. The scope has therefore been widened to include any entities that apply for renewal of prospecting or mining rights
- the holder is defined to now specifically include the holder of an old order right, rights such as prospecting and mining rights, or any consent in terms of Section 11 of Section 102 of the MPRDA, and for which no closure certificate has been issued
- the purpose of the financial provisioning is also clarified and the stated purpose is to ensure that, amongst others, a prospecting or mining area can be brought to the approved sustainable end state at the scheduled or unscheduled closure of operations, and to manage the related rehabilitation of residual and latent impacts post closure
- a distinction is still made between (a) determining the financial provision i.e. the total quantum that is required to achieve the approved sustainable end state, and (b) what amount needs to be made available, at any time through one of the financial provision vehicles / mechanisms. Regulation 6(2) will require the applicant or holder to determine the financial provision through a detailed itemisation of all activities and costs based on actual market-related rates for implementing the activities for (a) annual rehabilitation, (b) final rehabilitation, decommissioning and mine closure, and (c) remediation and management of residual and latent environmental impacts. A methodology to determine the amounts, in respect of each of the categories, is set out in Appendix 1 (Annual Rehabilitation), Appendix 2 (Decommissioning and Mine Closure), and Appendix 3 (Residual and Latent Liability)
- Regulation 7 sets out the amount that needs to be available, at any point in time, through one of the recognised mechanisms. Regulation 7 confirms that, while annual rehabilitation must be taken into account when determining the total quantum for financial provisioning, the amounts calculated for annual rehabilitation, do not form part of the amount which must be made available, under Regulation 7 i.e. annual rehabilitation, must once again be funded from OPEX;
- Regulation 7 requires the applicants and holders to set aside funds, using the methodologies set out in Appendix 4 or Appendix 5. Appendix 4 applies in the case of all new rights, while Appendix 5 applies in respect of existing rights. The funds that must be set aside or available, must remain in place until a closure certificate is issued unless a withdrawal as contemplated in Regulation 11 is allowed;
- Regulation 8 sets out the financial vehicles that can be used for setting aside the financial provision i.e. making the relevant amounts available from time to time. These vehicles or mechanisms include a cash deposit, a trust fund, the establishment of a closure rehabilitation company, or a financial guarantee. Regulation 8 sets out a number of new requirements relating to the various financial mechanisms, which are likely to come under severe criticism, by the financial institutions and other entities that provide guarantees for financial provisioning;
- based on the wording in the appendices, it also seems that the method of calculation and the amounts to be made available, will be based on volumetric calculations, rather than being calculated on surface distances i.e. hectarage. This is likely to increase the financial provision amounts, both in respect of the total amount, and what needs to be made available from time to time, significantly.

The proposed changes are still likely to result in robust debate, but the changes are clearer in relation, particularly, to the methodology for calculating the total quantum of the financial provision, and the actual amounts that must be made available from time to time, through one of the relevant mechanisms. The emphasis is now on calculating the amounts with reference to the current disturbed areas, anticipated disturbance for the next year of mining operations, and the residual and latent impacts associated with the current disturbed areas, the anticipated disturbance for the next year of mining operations, and the impacts of inflation on the costs of a third party closure. While this may not be as simple as the mechanisms under MPRDA Regulations 53 and 54, it is far simpler in comparison to both the Financial Provision Regulations 2015, and the Proposed Financial Provision Regulations 2017. It also seems that the actual amount that must be provisioned for through one of the mechanisms, will be less than the amounts which need to be made available, under the Financial Provision Regulations 2015, and what was calculated or contemplated under the Proposed Financial Provision Regulations 2017.

In summary, the Proposed Financial Provision Regulations 2019 are a significant improvement on both the Financial Provision Regulations 2015, and the Proposed Financial Provision Regulations 2017, because they are much clearer in relation to who needs to comply with them, how to calculate the total liability, and the basis on which the provision that needs to be made available at any point in time, is calculated.

This does not however mean that the mining industry will be better off – calculations are still being made by mining companies, and these calculations may reveal that, with the new calculation methodologies in the Proposed Financial Provision Regulations 2019, the actual amounts that need to be made available, will be significantly higher than those required under MPRDA Regulations 53 and 54. If this is the case, then the previous criticisms have not been addressed, to the satisfaction, certainly, of the mining companies i.e. that any additional amounts that need to be made available, including those that are made available under guarantee, will increase the costs of operations, significantly, and this may impact on the viability of both new mining projects and existing mining operations.

To the extent that there are any sticking points, this will be around whether or not the total quantum impacts on the viability of both new mining projects and existing mining operations, and the costs of making the financial provision available, as required under Regulation 7. There are significant costs associated with, for example, making guarantees available to guarantee the required amount. It is logical that if the amount that needs to be available, increases, the mechanisms such as the guarantees, need to be increased, and there are costs associated with the increase of the amounts under a guarantee.

The potential change to a volumetric calculation, is likely to increase the costs substantially. Typically, accounting provisions, as opposed to "*DMR calculation*", are based on hectarage, and not volumetric calculations. While it is not crucial for the accounting principles to be entirely aligned with the DMR calculations, applying new methodologies which are not aligned with financial and accounting calculations, could prove challenging for mining companies.

As a result, there have been significant improvements in the Proposed Financial Provision Regulations 2019, the methods of calculation, may yet prove too costly for certain mining companies.

By Warren Beech, *Partner- Head of Mining and Infrastructure*

Private Prosecution of BP Southern Africa:

Uzani Environmental Advocacy CC and BP Southern Africa Proprietary Limited as represented in terms of Section 332(2) of the Criminal Procedure Act, No. 51 of 1997 by Mr Robert Sazi Mfeka

Introduction

South Africa has recently developed a culture of private prosecution. The trend towards private prosecution has largely been focused on the prosecution of individuals for corruption. The significant challenges faced by the private prosecutors (primarily AfriForum) are well documented. There are various extensive legal hurdles that must be overcome, before a private prosecutor can initiate private prosecution against individuals, for example, for corruption.

This is not the case in relation to private prosecutions for environmental offences. The legislation which is applicable, namely the National Environmental Management Act, No. 107 of 1998 ("**NEMA**") makes specific provision for private prosecution and sets lesser requirements that must be met, for a private prosecutor, to initiate prosecution under NEMA.

The judgement of the High Court, Gauteng Division, Pretoria on 1 April 2019 has been ground-breaking in several respects, primarily, because it resulted in the private prosecution of BP Southern Africa Proprietary Limited ("**BP**") in relation to the so-called "*rectification applications*" i.e. applications which companies often submit after commencing activities which require environmental approvals and authorisations, before they may be commenced, in terms of Section 24G of NEMA.

Section 24G of NEMA essentially allows a company that has commenced with an activity (in the case of BP, it was in the construction and upgrade of various filling stations), before obtaining the relevant authorisations, to apply for rectification i.e. post-commencement authorisation. It is the principle of "*it is rather better to apply for forgiveness than permission*". There have been various reasons for companies adopting this approach, including the extended time periods that are often taken by the regulator, to grant consent. The rectification process under Section 24G of NEMA has been used to "*bypass*" these lengthy time period, which could impact on the timelines for the implementation of a development and other activities associated with development, construction, etc.

At the heart of each application in terms of Section 24G of NEMA ("**the Section 24G Application**"), is an admission, by the applicant that it ought to have applied for an environmental authorisation, prior to the commencement of the activity, and that it has failed to do so. Section 24G of NEMA provides that an applicant can, based on this "confession" obtain ex post facto environmental authorisation, provided that the processes had been followed. The processes set out in Section 24G of NEMA include the payment of an administrative fine, conducting appropriate environmental impact assessments, and proper completion of the Section 24G Application forms. What is important, is that, despite the payment of the administrative fine, which is a prerequisite to the regulator considering the application, the applicant for rectification, exposes itself to a criminal prosecution. In the circumstances, i.e. that the applicant has to "confess", it has long been thought, in South Africa, that prosecutions should automatically follow the submission of the Section 24G Application. This has however not been the case for various reasons, including discussions between the Department of Environmental Affairs and the Office of the Director of Public Prosecutions ("**DPP**").

The judgement of the High Court in the Uzani / BP matter ("**the BP Judgement**") has, essentially, confirmed that private prosecutors can step into the gap created by a failure of the DPP to prosecute applicants that have submitted Section 24G Applications.

BP has successfully been prosecuted by Uzani Environmental Advocacy CC ("**Uzani**"), acting as private prosecutor, on various charges, based on Section 24G Applications. It is important to note that it is the corporate entity i.e. BP that has been prosecuted, and no individuals have been prosecuted, including its directors, officers, and environmental specialists. Under South Africa Law, where a corporate entity is prosecuted, the consequence, will be a criminal fine, and not imprisonment. The relevant representative of BP, namely Mr Robert Sazi Mfeka ("**Mr Mfeka**") appeared in his representative capacity, and was therefore, not prosecuted nor found guilty, in his personal capacity. This is the most common form of initiating prosecutions against corporate entities i.e. that one or more directors are cited in their representative capacity and are therefore not prosecuted personally, and of course they are not therefore, found guilty, in their personal capacity. This does not mean that this principle will apply in all cases, because South Africa Law doe sallow prosecution of individuals, such as directors, officers, and environmental specialists.

In summary, the BP Judgement confirms the following:

- private prosecutions can be initiated in relation to environmental breaches, specifically, as was the situation in the BP Judgement, where a corporate entity has applied for rectification in terms of Section 24G of NEMA
- an entity such as Uzani could initiate the private prosecution, because it was a "*person*" as defined in Section 1 of NMA, it had complied with the provisions of Section 33(2) and (3) of NEMA, and it met the test, namely that it was acting in the public interest.

While the BP Judgement focused on the situation where the applicant (BP) had applied for rectification in terms of Section 24G Application, the principles could apply more broadly i.e. to circumstances where a corporate entity had not complied with its obligations, but has not applied for rectification. In these circumstances, securing the conviction of the "*accuses*" may be more challenging, because there is no "confession" In a rectification application, but private prosecutions in these circumstances also now remain a distinct possibility.

The attorney behind Uzani, Mr Kallie Erasmus ("**Mr Erasmus**") has, of the back of the success of the BP Judgement, publicly announced the following:

- Uzani will be prioritising those companies which Uzani believes have committed the "*most serious offences*"
- any amounts received by Uzani, following the BP Judgement, will be utilised to empower law firms across the country, so that further public prosecutions can be initiated
- the intention is to create a network of "*private prosecutors*" to go after "serial offenders" and "*those companies which have committed the most serious offences*".

Rectification applications in terms of Section 24G

Without going into extensive detail, Section 24 of NEMA provides that activities that have been identified which will or may potentially have a significant impact on the environment, may not be commenced with, until such time as an environmental authorisation has been granted in terms of NEMA. In order to obtain the relevant environmental authorisation, an extensive process must be followed by the applicants, which can take an extensive period of time, to be concluded, before the environmental authorisation is granted.

NEMA acknowledges that in certain circumstances, an activity may be commenced, without environmental authorisation, and makes provision for "rectification" i.e. ex post facto authorisation of an activity, which did not, at the time of commencement, have the relevant environmental authorisation.

Section 24G(1) of NEMA provides that, on application by a person who has commenced with a listed or specified activity without an environmental authorisation in contravention of Section 24F(1) of NEMA, has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of Section 20(b) of the National Environmental Management: Waste Act, No. 59 of 2008 ("**NEM:WA**"), the Minister, the Minister responsible for Mineral Resources, or the MEC concerned, as the case may be, may direct the applicant to (a) immediately cease the activity pending a decision on the application submitted

in terms of this subsection, (b) investigate, evaluate and assess the impact of the activity on the environment, c) remedy any adverse effects of the activity on the environment, (d) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation, (e) contain or prevent the movement of pollution or degradation of the environment, (f) eliminate any source of pollution or degradation, and (g) compile a report containing a description of the need and desirability of the activity, the assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity, a description of mitigation measure undertaken or to be undertaken in respect of the consequences for or impacts on the environment or of the activity, a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed, and an environmental management programme or provide such other information or undertake such further studies as the Minister, Minister responsible for Mineral Resources, or MEC, as the case may be, may deem necessary.

Section 24G(4) of NEMA provides that a person i.e. the applicant must pay an administrative fine, which may not exceed R5 million, and which must be determined by the competent authority, before Minister, Minister responsible for Mineral Resources, or MEC concerned may act in terms of Section 24G(2)(a) or (b) of NEMA i.e. consider the application, and take the appropriate steps, and possibly issuing the appropriate environmental authorisation.

Importantly, Section 24G(6) of NEMA provides that the submission of an application or the granting of an environmental authorisation in terms of Section 24G(2)(b) of NEMA shall in no way derogate from (a) the Environmental Management Inspectors or the South African Police Services authority to investigate any transgression in terms of NEMA or any specific Environmental Management Act, and (b) the National Prosecuting Authority's Legal Authority to initiate any criminal prosecution.

The reference in this context, is to the authority of the National Prosecuting Authority/ DPP to prosecute, notwithstanding (a) the payment of the administrative fine, which is pre-requisite to the processing of the rectification application, context, to private prosecutions, as this is addressed in terms of Section 33 of NEMA. The same principle would however apply i.e. if the criteria set out in Section 33 of NEMA are complied with, then a private prosecution can be initiated, notwithstanding that a rectification application has been granted, and the applicant has paid the administrative fine as contemplated in Section 24G of NEMA.

Private prosecution in terms of NEMA

Section 32(1) of NEMA provides that any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provisions of NEMA or any other specific Environmental Management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources. Any such person may do so (a) in that person's or group of person's own interest, (b) in the interest of or on behalf of a person who is, for practical reasons, unable to institute such proceedings, (c) in the interest of or behalf of a group or class of persons whose interests are affected, (d) in the public interest, and (e) in the interest of protecting the environment.

In terms of Section 32(2) of NEMA a court may decide not to award costs against a person or group of persons which fails to secure the relief sought in respect of any breach or threatened breach if the court is of the opinion that the person or group of persons acted reasonably out of concern for the public interest or in the interests of protecting the environment and had made due effort to use other means reasonably available for obtaining the relief sought.

Section 32(3) of NEMA provides that where a person or group of persons secures the relief sought, a court may on application (a) award costs on an appropriate scale to any person or persons entitled to practice as an advocate or attorney in the Republic who provided free legal assistances or representation to such person or group in the preparation for conduct of the proceedings, (b) order that the party against whom the relief is granted pay to the person or group of persons concerned any reasonably costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.

Section 33 of NEMA makes specific provision for private prosecution.

Section 33(1) of NEMA provides that any person may (a) in public interest, or (b) in the interests of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of a duty, other than a public duty resting on an organ of State, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence.

Certain requirements must be met, before a private prosecution can be brought. In summary, these requirements are as follows:

- the person prosecuting privately must do so through a person entitled to practice as an advocate or an attorney in the Republic
- the person prosecuting privately must have given written notice to the appropriate Public Prosecutor that he or she intends to bring the private prosecution and
- the private prosecutor has not, within 28 (twenty-eight) days of receipt of the notice, stated in writing that he/she intends to prosecute the alleged offence.

Importantly, the *"private prosecutor"* is not required to produce a certificate issued by the Attorney General, stating that he/she has refused to prosecute the accused and the person prosecuting privately is not required to provide security for such action. All that is required in this regard, is notification to the relevant office of the DPP, and a failure by the DPP, to respond, within 28 (twenty-eight) days. It is for this reason that prosecution under Section 33 of NEMA is regarded as being easier than in other circumstances where private prosecution is possible.

Further commentary on the BP judgement

The matter in the BP Judgement had a long history, which started with leave being granted on 29 June 2017 by Judge President Mlambo, to Uzani, for it to institute a private prosecution against BP. After various processes, interlocutory applications, arguments, and interim judgements, the matter was finally heard, focusing on alleged contravention, by BP, of its obligations to obtain prior environmental approval for various upgrades to existing filling stations, and the construction of new filling stations.

The court convicted BP on the basis of the rectification application that it submitted in terms of Section 24G of NEMA i.e. essentially, the *"confession"* in the applications, form the basis of the convictions.

As at the date of this memorandum, the "penalties" have not been imposed on BP. On the basis that BP, in its capacity as the corporate entity, has been found guilty of contravening its environmental obligations, the consequences will be the imposition of a criminal fine.

These criminal fines are likely to be substantial, and will be applied, in relation to each of the charges set out in the indictment. NEMA makes provision for a certain amount of the criminal fine (up to a quarter) to be paid to the private prosecutor, which must be applied for, and if granted, must be utilised by the private prosecutor in the interests of environmental protection.

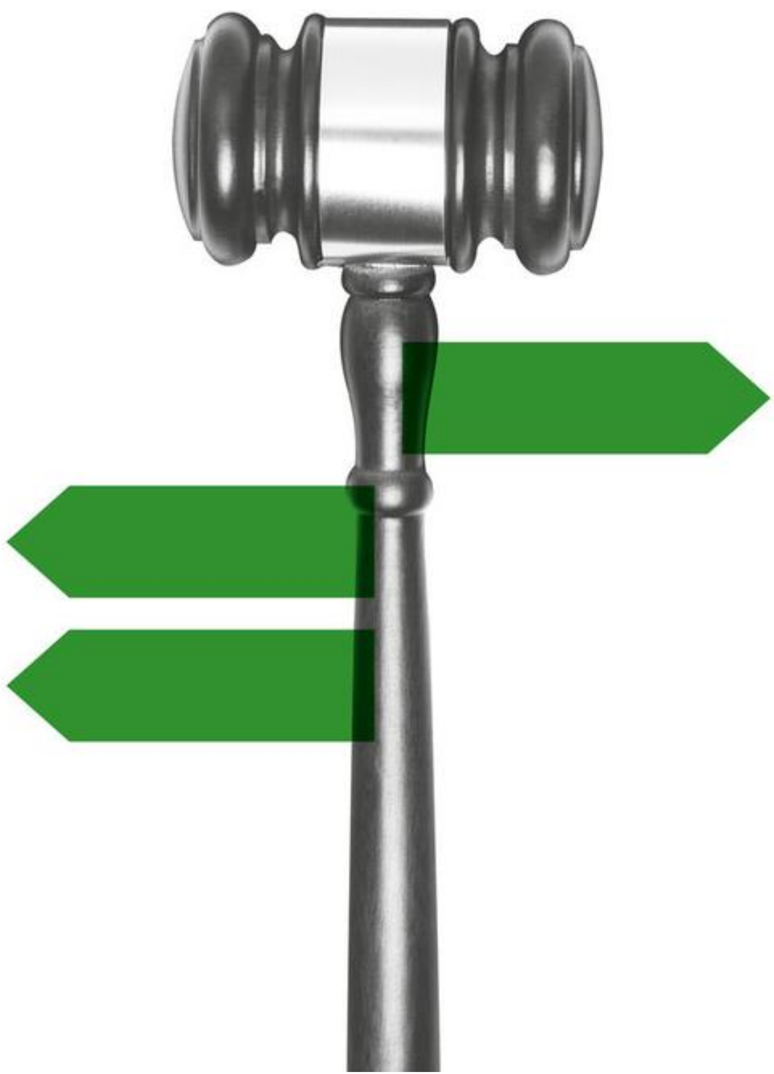
Uzani and Mr Erasmus in his personal capacity faced significant criticism from BP during the course of the matter, for various reasons, including that Uzani would benefit from a conviction. Despite this, the court convicted BP.

Conclusion

The BP Judgement is a landmark decision because it has resulted in a successful prosecution (private) of a corporate giant, within the context of rectification applications, it is important to note that this was the particular context of the matter i.e. BP had applied for rectification in terms of Section 24G of NEMA, which has, as its basis, a *"confession"* of wrongdoing.

What this means, is that careful consideration must be given to any applications in terms of Section 24G of NEMA, and they should be carefully scrutinised, before submission, because of the potential consequences i.e. prosecution.

By Warren Beech, *Partner – Head of Mining and Infrastructure*



Business take note the carbon tax act is coming into effect

The Carbon Tax Act No. 15 of 2019 | Effective as of 1 June 2019

"Reducing the impacts of climate change through facilitating a viable and fair transition to a low-carbon economy is essential to ensure an environmentally sustainable economic growth path for South Africa". (Explanatory Memorandum on The Carbon Tax Bill, 2018)

Historically, the environmental costs associated with pollution and climate change have not been reflected in the final price of goods and services. To address this, the State has intervened by implementing a carbon tax that aligns with the *"Polluter Pays Principle"* which means that the costs of remedying pollution and of preventing, controlling or minimising further pollution must be paid for by those responsible for harming the environment.

Considering the devastating effects of climate change, the transition to a low-carbon economy is vital to ensure progress toward a sustainable future.

For several reasons, including complexity and lack of capacity, an emissions trading system was deemed to be unsuitable for South Africa. It was decided that a carbon tax would be easier to administer, and it would provide the appropriate price signals and policy certainty to nudge the economy towards a more sustainable growth path and drive behaviour change over the short, medium and long term.

The implementation of a carbon tax policy has been under consideration for roughly nine years since the publication of the Carbon Tax Discussion Paper in 2010, and subsequently the 2013 Carbon Tax Policy Paper and the 2014 Carbon Offsets Paper.

The carbon tax policy has gone through extensive stakeholder engagement, including a public consultation process for each iteration of the draft Carbon Tax Bill, finally resulting in the publication of the Carbon Tax Bill No. 46 of 2018 (the "**Bill**") which was tabled in Parliament in November 2018.

The Carbon Tax Act No. 15 of 2019 (the "**Act**") was assented to on 22 May 2019 and the implementation of the first phase of the carbon tax will commence on the **1 June 2019**.

The intention of the Act is not primarily to raise tax revenue, but rather to implement the objectives to reduce greenhouse gas ("**GHG**") emissions as set out in the National Climate Change Response Policy of 2011, to comply with the 2015 Paris Agreement on climate change and to encourage industry to find alternatives to carbon-intensive business practices.

Who is subject to the carbon tax?

Every entity that conducts an activity that results in GHG emissions that are above the threshold listed in Schedule 2 of the Act will be liable to pay an amount of carbon tax.

The threshold is determined by matching the activity listed in the column labelled *"Activity/Sector"* in Schedule 2 with the corresponding number in the column labelled *"Threshold"*. Please see a snapshot showing the Schedule 2 columns below.

The activities resulting in GHG emissions relate to stationary and non-stationary sources and includes, inter alia, fuel combustion activities, manufacturing and construction, transport, industrial processes and product use, agriculture, forestry and waste (treatment and disposal).

For example, some of the current thresholds include 10 MW (thermal) for fuel combustion activities, 4 million bricks manufactured a month for brick manufacturing and 2 million litres of wastewater treated and discharged per day for domestic wastewater treatment and discharge facilities.

Schedule 2

IPCC Code	Activity/Sector	Threshold	Basic tax-free allowance for fossil fuel combustion emissions %	Basic tax-free allowance for process emissions %	Fugitive emissions allowance %	Trade exposure allowance %	Performance allowance %	Carbon budget allowance %	Offsets allowance %	Maximum total allowances %
1	**Energy**									
1A	**Fuel Combustion Activities**									
1A1	**Energy Industries (including heat and electricity recovery from Waste)**									
1A1a	Main Activity Electricity and Heat Production (including Combined Heat and Power Plants)	10 MW(th)	60	0	0	10	5	5	10	90
1A1b	Petroleum Refining	10 MW(th)	60	0	0	10	5	5	10	90
1A1c	Manufacture of Solid Fuels and Other Energy Industries	10 MW(th)	60	0	0	10	5	5	10	90
1A2	**Manufacturing Industries and Construction (including heat and electricity recovery from Waste)**		60	0	0	10	5	5	10	90
1A2a	Iron and Steel	10 MW(th)	60	0	0	10	5	5	10	90
1A2b	Non-Ferrous Metals	10 MW(th)	60	0	0	10	5	5	10	90
1A2c	Chemicals	10 MW(th)	60	0	0	10	5	5	10	90
1A2d	Pulp, Paper and Print	10 MW(th)	60	0	0	10	5	5	10	90
1A2e	Food Processing, Beverages and Tobacco	10 MW(th)	60	0	0	10	5	5	10	90
1A2f	Non-Metallic Minerals	10 MW(th)	60	0	0	10	5	5	10	90
1A2g	Transport Equipment	10 MW(th)	60	0	0	10	5	5	10	90

Snapshot of Schedule 2 of the Carbon Tax Act, 2019

It is important to note that the thresholds listed in Schedule 2 of the Act align with the thresholds provided for in Annexure 1 of the National Greenhouse Gas Emission Reporting Regulations ("**NGGER Regulations**") published by the Department of Environmental Affairs ("**DEA**") in 2017. Annexure 1 provides a *"List of Activities for Which GHG Emissions Must Be Reported to the Competent Authority"*.

In terms of the NGGER Regulations a data provider is, *inter alia*, any person in control of or conducting an activity that is listed in Annexure 1 if the activity results in GHG emissions above the capacity given in the threshold column of the table.

Consequently, those entities classified as data providers and who are required to report on their GHG emissions in terms of the NGGER Regulations will be liable to pay a carbon tax.

The tax liability calculation and allowances

The carbon tax will be implemented in a phased manner. The first phase will be from 1 June 2019 to 31 December 2022. The initial rate of the carbon tax on GHG emissions is an amount of **R120 per ton of carbon dioxide equivalent** ("**CO_2e**") of the GHG emissions of a taxpayer.

The tax period is from 1 June 2019 and ending on 31 December 2019, and subsequently each tax period will commence on 1 January of each year and ending on 31 December of that year.

From 1 June 2019 until 31 December 2022, the annual rate of tax must be increased by the amount of the consumer price inflation plus two per cent for the preceding tax period as determined by Statistics South Africa. After 31 December 2022 the rate of tax must be increased by the amount of the consumer price inflation for the preceding tax year as determined by Statistics South Africa.

[*"Carbon dioxide (CO2) equivalent" means the concentration of carbon dioxide that would cause the same amount of radiative forcing (the difference of sunlight absorbed by the Earth and energy radiated back to space) as a given mixture of carbon dioxide and other greenhouse gases".*]

To ensure a smooth transition to a low carbon economy and to provide organisations with enough time and flexibility to adapt to and/or improve their use of renewables and other low carbon measures, the design of the carbon tax provides significant tax-free emissions allowances ranging from 60 per cent to 95 per cent for the first phase. These include:

- A basic tax-free allowance of 60 per cent for all activities
- An additional tax-free allowance of 10 per cent for process emissions
- An additional tax-free allowance of 10 per cent for fugitive emissions
- A variable tax-free allowance for trade-exposed sectors (up to a maximum of 10 per cent)
- A maximum tax-free allowance of 5 per cent for above average performance
- A 5 per cent tax-free allowance for companies with a Carbon Budget and
- A carbon offset allowance of either 5 or 10 per cent.

Schedule 2 provides a maximum total allowance of 100 per cent for certain taxpayers, however all other taxpayers must only receive an allowance that does not exceed 95 per cent of the total GHG emissions of that taxpayer in respect of that tax period.

In summary, the carbon tax liability is calculated as the tax base [total quantity of GHG emissions from combustion, fugitive and industrial processes proportionately reduced by the tax-free allowances] multiplied by the rate of the carbon tax.

Carbon tax administration

The provisions of this Act will be administered by the Commissioner for the South African Revenue Service as if the carbon tax were an environmental levy as contemplated in section 54A of the Customs and Excise Act No. 91 of 1964. The carbon tax must be collected and paid in terms of the provisions of that Act.

The South African Revenue Service (SARS) will be the main implementing administrative authority on tax liability assessment and will have access to the Department of Environmental Affairs' ("**DEA**") National Atmospheric Emission Inventory System.

The DEA will be responsible for the monitoring, reporting and verification of emissions and for collecting the GHG emissions data which will form the tax base. The Department of Energy will be responsible for administering the carbon offsets.

How will the Carbon Tax effect consumers?

While consumers may not experience the direct and indirect effects of the new carbon tax immediately, they will be affected by the increase in the fuel price which will kick in on 5 June 2019. The new carbon tax will add 9 cents per litre on petrol and 10 cents per litre on diesel.

Consumers will most certainly begin to feel the effects in the coming months as the price of goods and services rise.

What steps can your organisation take now?

We recommend taking steps to determine which activities and/or processes within your operations fall within Schedule 2 of the Act and are liable to a carbon tax. Thereafter you can calculate your tax liability and implement a carbon offset strategy.

By Pascale Defroberville, *Associate-Environmental*

Waste exclusion regulations 2018 – moving towards circular economy

Introduction

A circular economy is an economic system characterised by the trading of products and services in closed loops or cycles. The system is designed to be regenerative insofar as it aims to retain as much value as possible from used products, substances or materials.

The benefits of moving toward a circular economy are extensive. A circular economy has the potential to drive economic growth and job creation, reduce dependence on mining and importation of raw materials and avoid pollution and environmental damage.

Despite the perceived benefits, strict and cumbersome legislative requirements have ultimately precluded industry from exploiting these potential social, economic and environmental benefits.

It is anticipated that this situation is likely to change with enactment of the long awaited "Waste Exclusion Regulations" ("**the Regulations**") which came into effect in July 2018.

Essentially, the Regulations provide a mechanism to exclude a type of waste from the definition of waste. Once excluded, that waste can be recovered, recycled and re-used for a beneficial purpose without having to comply with cumbersome legislative requirements.

It is expected that the Regulations will stimulate and encourage a circular economy in South Africa.

A definition of "waste"

Prior to its amendment in 2014, the National Environmental Management: Waste Act 59 of 2008 ("**NEMWA**") included a definition of *"by-product"*.

A "by-product" was defined as *"a substance that is produced as part of a process that is primarily intended to produce another substance or product and that has the characteristics of an equivalent virgin product or material"*.

Before the 2014 amendment, by-products were specifically excluded from the definition of waste. The NEMWA recognised that a substance which had the *"characteristics of an equivalent virgin product or material"* could be used as a raw material in other processes and excluded it from regulation under the NEMWA. Industry was provided with the opportunity to proactively find markets for these substances that would otherwise have been disposed of at landfill sites.

However, the Department of Environmental Affairs ("**DEA**") applied a very strict interpretation of the definition of "by-product" which made it difficult for most substances to fall within the ambit of the definition.

"any waste or portion of waste, referred to in paragraphs (a) and (b), ceases to be a waste […] where the Minister has, in the prescribed manner, excluded any waste stream or a portion of a waste stream from the definition of waste".

The Minister made the Regulations to exclude any waste stream or a portion of a waste stream from the definition of waste in terms of section 69 (1)(dd) read with section 1 (definition of waste) of the NEMWA.

The elements of recovery, recycling and re-use and their respective legislative requirements

The NEMWA introduced the concepts of recovery, recycling and re-use of waste into South African legislation for the first time.

Section 1 of the NEMWA provides the following definitions:

- "**Recovery**" means *"the controlled extraction or retrieval of any substance, material or object from waste"*
- "**Recycle**" means *"a process where waste is reclaimed for further use, which process involves the separation of waste from a waste stream for further use and the processing of that separated material as a product or raw material"* and
- "**Re-use**" means *"to utilise the whole, a portion of or a specific part of any substance, material or object from the waste stream for a similar or different purpose without changing the form or properties of such substance, material or object"*.

The "List of Waste Management Activities That Have, or are Likely to Have, a Detrimental Effect on the Environment" (as amended) ("**List of Waste Management Activities**") provides that *"no person may commence, undertake or conduct a waste management activity listed in this Schedule unless a waste management licence is issued in respect of the waste management activity"*. The listed waste management activities include the recovery, recycling and re-use of waste.

A waste management licence is required where the waste management activity meets specific technical qualifications, such as volume, area and type of waste (general or hazardous). For example, a waste management licence is required for *"the recycling of general waste at a facility that has an operational area in excess of 500m2 […]"*.

In order to obtain a waste management licence an organisation is required to conduct an environmental impact assessment in terms of the Environmental Impact Assessment Regulations, 2014 (as amended).

These costly and lengthy assessments have deterred organisations from obtaining the necessary waste management licences, resulting in either unlicensed facilities conducting waste management activities, or the waste simply being discarded to landfill. Producers of waste have further been discouraged from sending their waste to facilities that are unable to obtain the requisite licences.

This has ultimately limited the progression of South Africa's waste economy and precluded industry from the potential social, economic and environmental benefits.

Enter: The Waste Exclusion Regulations, 2018

The Regulations are a well-received step towards removing the legislative barriers to economic growth, job creation and social upliftment through recovery, recycling and re-use of waste, otherwise destined for landfill.

The purpose of the Regulations is to:

- prescribe the manner in which a person may apply to the Minister of Environmental Affairs ("**the Minister**") for the exclusion of a waste stream
- exclude permitted uses of a waste stream or a portion of waste stream from the definition of waste and
- promote diversion of waste from landfill disposal to its beneficial use.

A person or any group of persons who generate waste may submit an application to the Minister, however, the Regulations do not apply to generators of domestic waste which falls within the jurisdiction of a municipality.

In order to apply for an exclusion, an applicant must lodge the application using the prescribed application form. It is incumbent on the applicant to demonstrate that the waste is being or has been or will be used for a beneficial purpose either locally or internationally.

In addition, the applicant must undertake a risk assessment that shows that the intended use of the excluded waste can be managed in such a way as to ensure that such use will not result in significant adverse impacts on the environment.

The Consequences of Excluding A Waste Stream from The Definition of Waste

The Regulations recognise that components of a waste stream have characteristics that are equivalent to raw material that can be utilised as a resource.

When a waste stream or a portion of a waste stream has been excluded from the definition of waste, that waste stream will no longer be considered as "waste". Consequently, the excluded waste will not be regulated in terms of the List of Waste Management Activities.

Activities involving the excluded waste stream, such as recovery, recycling and re-use, will not require a waste management licence; instead they will be managed in terms of a risk management plan.

It is anticipated this will improve efficiencies, reduce costs and allow organisations to reap the benefits associated with recovery, recycling and re-use of the excluded waste streams that were previously diverted to landfill.

Examples of Waste Streams for Exclusion

Since the Regulations were enacted, several applications have been made to the Minister for the exclusion of a waste stream or a portion of a waste stream for beneficial use from the definition of waste. The public comment period ended in May 2019 and we are awaiting a final decision on the applications.

The applications are for the exclusion of the following waste streams from the definition of waste:

- *Waste Slag from Ferrochrome Metallurgy*

  Slag is waste matter that is separated from metal during smelting, such as iron and silica that is removed during copper and lead smelting. Slag can be used for road construction and in cement.

- *Ash from Combustion or Gasification Processes*

  Ash is a by-product created during the combustion or gasification process, such as the firing of boilers with coal or biomass. The ash can be used for brickmaking, cement production or fertilizer.

- *Gypsum from Pulp, Paper and Cardboard Production and Processing*

  Gypsum is a rock like mineral that is commonly used in pulp, paper and cardboard production. Gypsum waste may be used as a soil conditioner or for the production of inert products such as boarding for ceiling panels, wall partitioning and flooring.

- *Biomass from Pulp, Paper and Cardboard Production and Processing*

  Biomass is a non-fossilised and biodegradable organic material originating from plants, animals and micro-organisms. Some examples of biomass include agricultural wastes such as begasse from sugar cane, animal slurry and poultry litter. Biomass has several uses such as compost, soil conditioner and animal bedding.

  Most significantly, biomass can be used as a source of renewable energy. Furthermore, the use of biogas, the mixture of gases produced by the breakdown of organic matter, is better for the environment, can reduce an organisation's electricity costs over the long term and reduces reliance on the state energy grid.

A register of excluded waste streams will be maintained and can be accessed on the South African Waste Information Centre's website: http://sawic.environment.gov.za/

Conclusion

The Regulations, by recognising the intrinsic value of waste, have laid a foundation for an invigorated circular economy.

Private organisations are now able to benefit from the wastes that are produced by their operations, which would otherwise have been destined for landfill. Wastes can now be redirected away from disposal and toward recovery, recycling and re-use. In addition to the reduced costs associated with disposal, an organisation can potentially benefit financially by charging a fee for their waste.

The potential opportunities in the circular economy are abundant. Organisations are encouraged to consider and utilise the opportunities created by the Regulations for their benefit.

Should you require our environmental team to assess your legal requirements, or where you may benefit for the Regulations, please do not hesitate to contact us.

By Pascale Defroberville, *Associate - Environmental*

eversheds-sutherland.com/southafrica

LON_LIB1\20902434\1