

GUNN
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COMMERCIAL
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NEWSLETTER – January 2015

Welcome to our first newsletter of 2015.

Our newsletter is produced as an information service to clients every second month. It is composed of interesting developments in the legal sector in the areas where our clients are most active- the environmental, mining and natural resources sectors. The newsletter focuses on specific issues which we hope will be of interest to our readers. We took the decision not to summarise all of the new laws and cases. In our first edition, we have also included a short snippet introducing our firm.

Good news is that Gunn Attorneys now has an office centrally located on Glenhove Road, Melrose, Johannesburg and we hope that this will be a convenient and comfortable place for our clients to meet (see page 5).

ENVIRONMENTAL LAW UPDATE

The number of changes to South Africa's environmental laws over the last few years is staggering. In discussing this issue with professionals in the field of environmental law, the concern was raised that the changes were so voluminous that people felt that a field of law that they once understood and knew well was now so complex as to render a thorough understanding and compliance, practically impossible. This begs the question as to whether the legislators are over-doing the changes. Yes change is necessary, and important but a well-understood and consistent legal framework is equally so.

The 2014 NEMA EIA Regulations

On 8 December 2014, changes were gazetted to the NEMA EIA Regulations ("the 2014 NEMA EIA Regulations"). This third set of NEMA EIA Regulations (predecessors the 2006 and 2010 NEMA EIA Regulations) bring about changes to the listed activities for which authorisation is required in terms of the NEMA. In line with the 2010 NEMA EIA Regulations, activities are divided into those which require a basic assessment process (GNR 983) and those that require scoping and environmental impact assessment (GNR 984). An interesting aspect of the 2014 NEMA EIA Regulations is the identification of the "Competent Authority" for each listed activity and in the case of mining and prospecting and directly related activities, the Minister of Mineral Resources is identified as the competent authority.

The new process to be followed to receive environmental authorisation (the so-called EIA process) is as per GNR 982 and some notable changes have been introduced regarding Environmental Assessment Practitioners ("EAP's") and the disqualification of EAP's in certain circumstances. Wholesale changes to the EIA process timeframes have been made and time will tell whether industry and the regulators can comply with the abbreviated timeframes.

Also in December, new regulations were gazetted for the NEMA EIA appeals process and other administrative procedures which may be required to be followed in terms of the NEMA. (GNR 993). Several important changes have been made to the appeal regulations notably that there is no longer

a requirement to give notice of intention to appeal and that the actual appeal document must be filed within 20 days of the date of notification of interested and affected parties. The same gazette contains an exemptions process which allows an applicant to apply for exemption from the provisions of the NEMA (GNR 994). This replaces the previous Chapter 5 of the 2010 NEMA EIA regulations exemptions process.

MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT ACT (MPRDAA)

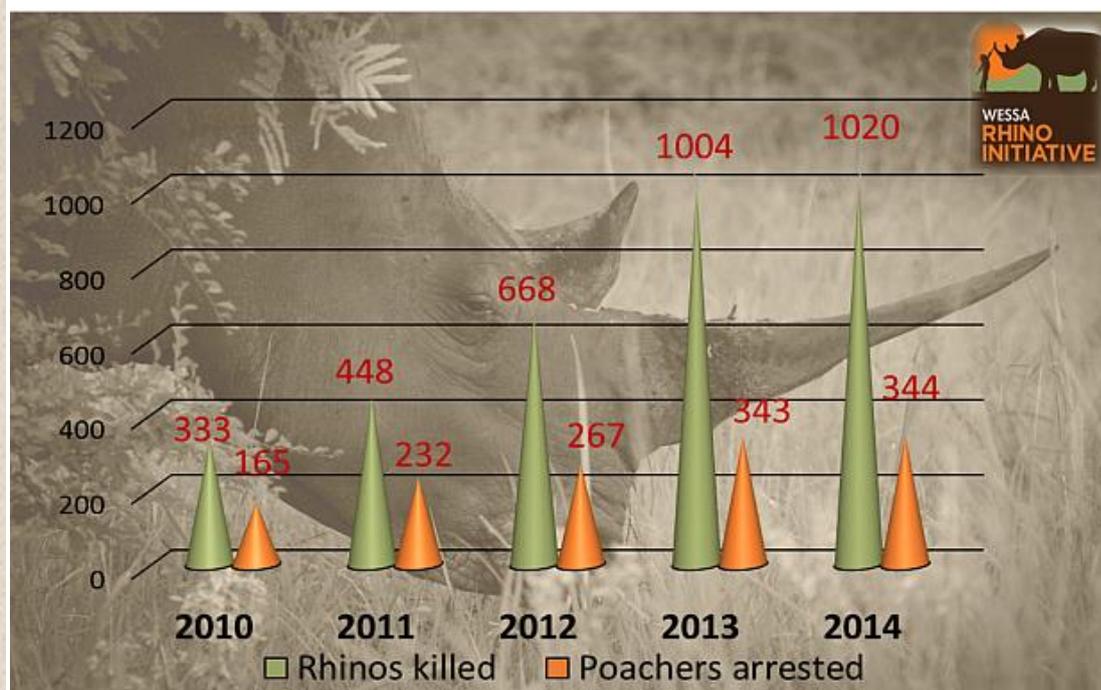
The long-awaited changes to the MPRDA are now officially off the table. In a letter to Parliament dated 16 January 2015, President Jacob Zuma cited reasons for referring the MPRDAA back to Parliament. The reasons apparently included concern over South Africa's international trade obligations, excessive discretion given to the Minister of Mineral Resources and inadequate public hearings (Source: Business Day, 26 January 2015).

The news was greeted with mixed reaction- on the one hand with relief from the oil and gas sector (that felt that the free carry provisions contained in the MPRDAA were draconian) and on the other hand with disappointment from the mining sector that had negotiated some key provisions into the MPRDAA over a lengthy process.

RHINO POACHING- HOW ARE WE DOING?

According to recent figures, 1215 rhinos were poached in South Africa during 2014. This is compared to 1004 in 2013, 606 in 2012, 448 in 2011 and 333 in 2010. This exponential growth in poaching numbers is cause for massive concern. Although arrests have also increased considerably over the same period (from 165 in 2010 to 344 in 2014) it is common cause that only a bold and far-reaching political intervention might assist in solving the matter. Even then, some argue that the best political intervention will not abate the problem. Demand for rhino horn products from the far East is being driven by socio-economic factors which are well beyond South Africa's control.

Rhino poaching and arrest figures from the last 5 years



Some private rhino owners have argued that legalising the trade in rhino horn must form a part of the solution to save the rhino- and that the demand for rhino horn can be sustainably managed.

The international treaty which governs the trade in fauna and flora (and rhinos) is the IUCN Convention on International Trade in Endangered Species or CITES. CITES is one of the oldest conservation and trade treaties. CITES was drafted in 1973 and it entered into force in 1975. Species are listed in the Appendixes to CITES- with the most threatened species being Appendix I species. Trade in Appendix I species (such as rhinos) is strictly controlled by a permitting system. Parties meet approximately once every three years and the 17th meeting of the Council of the Parties (or COP 17) is due to be hosted by South Africa in Cape Town in October 2016. It is certain that the topic of the trade in rhino (particularly with respect to the role of the growing private sector populations) will stimulate vigorous debate.

History teaches valuable lessons for those willing to listen. In the current rhino poaching epidemic the lesson seems to be that the war must be fought on at least two fronts. Firstly, fighting the poaching syndicates themselves, this includes protecting rhino- the war on the ground, fighting corruption and root causes of the poaching and secondly spreading the rhino gene pool. It is clear that this strategy is already being adopted by custodians of large numbers of rhino such as SAN Parks. In October/ November 2014 SAN Parks moved large numbers of rhinos to safe havens both within and out of the Kruger National Park. This formed part of the rhino integrated strategic management plan approved by Cabinet in August 2014. The repatriation of rhino to former breeding ranges from excess populations in South Africa will thus form an important part of the fight against rhino extinction.

There are other ways in which the war on rhino poaching is being fought, such as, for example, the Mark Boucher Castle Lager legacy whereby a national DNA database of all rhino in Southern Africa is being built. The information provided by a national rhino database greatly assists with the management of rhino in South Africa. The rhino DNA information has already been used in the prosecution of rhino poachers and trading syndicates.



Photo courtesy of WESSA

ESKOM- QUO VADIS?

Every business in South Africa depends on a reliable source of energy from our national power producer, Eskom. Indeed the national psyche also depends on it and ratings agencies devour the lack of it in their quest to justify Afro-pessimism. Power outages reared their ugly heads in 2014 and the phenomenon it set to continue in 2015 and well beyond.

There is no short term solution to the problem as reliable power supply from a national utility can only be achieved by a well-executed sustainable business plan- chief amongst these being the energy diversification mix in terms of achieving reliable, sustainable and environmentally acceptable energy.

Eskom has taken strides in the production of energy from clean sources through its outsourced Renewable Energy Independent Power Producer Programme (REIPPP) with targeted additional installed capacity of some 3725 MW. Put in context of Eskom's approximately 40 000 MW installed capacity this would represent almost 10% of generation capacity.

There was a strong indication in 2014 from Government that Eskom would pursue its nuclear new build programme to add much-needed capacity to the grid. This is a long term programme though and the difficulty of bringing new power onto the grid can be seen from the significant delays that have befallen Eskom with its current new builds – Medupi and Kusile.

Can legislation assist with providing a solution?

It is often stated that law is the most powerful tool that government has at its disposal. Could the law assist with the Eskom power crisis?

Eskom is a state monopoly and as such has overall control over all aspects of electrical energy in the grid in South Africa- this includes generation (mainly from its ageing coal fired stations), transmission (through the power line network) and distribution (either directly through Eskom or sub-contracted to Municipalities). Many governments have learnt that parastatal monopolies are often not sustainable in the long run. Restructuring of the energy sector was attempted by transferring the distribution responsibilities of Eskom to another parastatal under the Department of Energy in terms of the Independent Market Systems Operator Bill (ISMO). ISMO was subsequently shelved in 2014 as it was perceived that it added risk to the already risk-laden Eskom. And some may remember the attempt to introduce the Regional Electricity Distributors (REDS) a few years ago! However the South African power crisis has deepened and the winds of change are now even stronger than ever.

About our clients

Gunn Attorneys provides a wide range of legal services to clients in the mining and natural resources sector. This includes companies in water treatment, mining, mining reclamation and mineral reprocessing activities, game farming and agriculture, property development, engineering, private equity, energy and environmental services.

About Gunn Attorneys



Gunn Attorneys was founded by Adam Gunn in June 2014. Adam was admitted as an attorney of the High Court of South Africa in 2001, since then gaining over 13 years of experience in providing legal advice to clients in the resources sector.

He started his career at Webber Wentzel Bowens where he obtained valuable experience in commercial, mining, environmental and property law.

Being a serial entrepreneur and with a love of the outdoors, Adam tried his hand at running his own business in the eco-tourism industry, before returning to a career in law.

In-house legal positions at junior exploration and mid-tier mining companies (Ridge Mining and First Uranium) provided Adam with excellent exposure to the complexity and nuances of mining and exploration operations.

Adam also served as a director on the boards of client's companies and this has given him first-hand experience of the strategy required to ensure a successful business.

Gunn Attorneys is therefore positioned to provide your business with strategic legal advice.



Adam with fellow Attorney Keith Whitaker outside Gunn Attorney's new premises at 15 Glenhove Road (Corner Cecil Avenue) Melrose.

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Disclaimer:

This newsletter does not aim to provide a summary of all the legal developments in the environmental mining and natural resources sectors. For professional legal advice on any particular issue, please contact us.