



NEWSLETTER- NOVEMBER 2017

Dear Readers,



The November edition of the newsletter will look at updates in the environmental, mining and natural resources sector while also focussing on cases, law and news.

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NATIONAL LEGISLATION

National Environmental Management: Protected Areas Act 57 of 2003 - GN 1157 in GG 41224 of 3 November 2017 - Norms and standards for the inclusion of private nature reserves in the register of protected areas of South Africa

National Environmental Management: Waste Act 59 of 2008 - GN 1147 in GG 41213 of 30 October 2017 - Proposed Regulations for the Control of Import or Export of Waste, 2017 - for comment

COULD YOU ENJOY THE BENEFITS OF BEING A PROTECTED AREA AND CONTRIBUTE TO CONSERVATION?

The National Environmental Management: Protected Areas Act 57 of 2003 ("**NEMPAA**") provides for the protection and conservation of ecologically viable areas, representative of South Africa's biological diversity and its natural landscapes and seascapes. Further, the purpose of NEMPAA is to establish a

national register of all national, provincial and local protected areas and to ensure the management of those areas in accordance with national norms and standards.

Conservationists have realised that conservation initiatives are best undertaken as a partnership between government and the private sector. In South Africa in particular, the best chance that we have of conserving the biodiversity of our beautiful country is if all parties work together. In the first of this multi-part article, we explore the mechanics and potential benefits associated with being a protected area.

Section 23 of the NEMPAA offers private landowners the opportunity to have their land declared a private nature reserve, if the land has significant natural features or biodiversity, is of scientific, cultural, historical or archaeological interest or is in need of long term protection for the maintenance of its biodiversity or for the provision of environmental goods or services.

On application to the relevant authority (usually the provincial nature conservation authority) the authority will consider the applicant's motivation and then make its own assessment of the property. The criteria mentioned above will be taken into account in addition to the authority's own criteria, usually related to either regional or national conservation standards. So for example, the biome that the land is situated in could be important or the presence of rare and endangered species occurring on the property. Reference may also be had to the National Protected Areas Expansion Strategy to determine how the property fits within national priorities regarding protected areas. Other issues will also be considered such as the size of the property, state of infrastructure and biodiversity value particularly with reference to the vegetation units occurring on the property.

In Limpopo, for example, a guideline document exists which the authorities use as a yardstick when assessing the prospective property.

The authorities will also carry out other checks as to the status of the property, including land claims and mining rights. Participation of the surrounding community is encouraged and before the property is declared, a notice of intention to declare the property as a protected area is usually published in the national gazette.

Once the property has passed through these hoops, the declaration is finally gazetted and the landowner and the authority enter into a declaration agreement. The landowner must nominate a management authority and submit a management plan. Although this may sound overwhelming, it is in fact not really, and a large degree of flexibility is allowed- the landowner after all must have control of its land and use and enjoy the property as it sees fit, within the parameters of the law. Section 41 of the NEMPAA sets out the minimum criteria in this regard. The authorities fully recognise the need not only for environmental sustainability but for commercial sustainability too and act as the trustee of protected areas in terms of Section 3 of the NEMPAA. Section 3 also states that the landowner and the State act in partnership to realise the aims of the NEMPAA. So, the landowner is encouraged to pursue its commercial activities on the property, while at the same time conserving biodiversity.

Those progressive landowners that achieve protected area status will enjoy some significant financial and taxation benefits for the undeveloped parts of their land. Section 17 of the Municipal Rates Act states that a municipality may not levy a rate on those parts of a special nature reserve, national park or nature reserve within the meaning of NEMPAA or of a national park which are not developed or used for commercial, business, agricultural or residential purposes. Although enabling in nature, the Municipal Property Rates Act has by now been adopted by most municipalities.

In addition, Section 37D of the Income Tax Act allows for a taxation incentive in terms of protected areas. It allows a taxpayer to claim, in the year of assessment, as an allowance certain costs associated

with the acquisition of the land plus improvements or costs of the acquisition of the land according to a certain formula. The allowance is granted at 4% per annum over 25 years.

In future newsletters we will explore some of the legal aspects around protected areas in more detail and also hunt for some successful case studies to whet the appetite.

Adam Gunn

NATIONAL CASE LAW

On 23 November 2017, the appeal against the environmental approval granted to Indian-owned Atha-Africa Ventures Pty Ltd to build a coal mine inside a protected area and a strategic water source area near Wakkerstroom in Mpumalanga, known as the Mabola Protected Environment, was refused.

The coalition challenging the MEC's approval already has two other High Court cases pending against other approvals for the proposed mine. These are a High Court judicial review of the mining right, and a High Court judicial review of the Minister of Mineral Resources and Environmental Affairs' decision to approve mining inside a protected environment. It will now also take its fight against the environmental approval to court.

Moreover, the MEC said that the mine was in line with South Africa's invitation to Indian companies to invest in our mining sector, and that the mine would help to "develop export markets for South African products and services". However, many experts conclude that coal demand has peaked and that any further investment in coal assets now risks stranded assets and also risks other supply viability as over-supply will drive down prices.

In addition to being a declared protected environment under the NEMPAA, the Mabola Protected Environment also falls within a strategic water source area that has been identified as incredibly important and strategic to protect in the interests of all South Africans. The proposed mine area is located in that part of the Enkangala Drakensberg strategic water source area which constitutes the headwaters of the Usutu River System, via the Assegaai River. The Assegaai River flows into the Heyshope Dam, from which water is inserted into the Vaal River System via inter-basin transfer. Accordingly, the mine area is a water source of the Vaal River System, which supports Gauteng's water needs. The Usutu River flows through Swaziland and, after joining the Pongola River, flows into Mozambique, where it is known as the Maputo River. Accordingly, the health of the Usutu River System is also relevant to South Africa's international obligations to Swaziland and Mozambique. All of these users will be affected if the sources of those rivers are compromised. Watch drone footage of the area here.

Atha was granted a mining right by the Minister of Mineral Resources in 2015, shortly after the declaration of the Mabola Protected Environment by the Mpumalanga MEC. Since then, Atha has received licences and approvals from the Mpumalanga environment department, the Department of Water & Sanitation, and the Ministers of Environmental Affairs and Mineral Resources. All these approvals have been challenged by the coalition through internal appeals, a High Court judicial review of the mining right, and a High Court judicial review of the Minister of Mineral Resources and Environmental Affairs' decision to approve mining inside a protected environment. The coalition also successfully brought an interdict application to ensure that mining does not start without the requisite approvals.

(Article sourced from CER - <https://cer.org.za/news>)

Stern NO and Others v Minister of Mineral Resources (5762/2015) [2017] ZAECGHC 109 (17 October 2017)

The court in the Stern NO case, set aside the decision of the Minister of Mineral Resources to make the Regulations for Petroleum Exploration and Production, 2015 (published in Government Notice R 466 in Government Gazette 38855 dated 3 June 2015). The purpose of the Regulations, commonly known as the fracking regulations, were to prescribe standards and practices to ensure safe exploration and production of petroleum.

The applicants contended that the Minister of Mineral Resources did not have the authority to make the Petroleum Regulations, that the making of the Petroleum Regulations contravened the law or was not authorised by the empowering provisions and that the process by which the Petroleum Regulations were made was procedurally unfair.

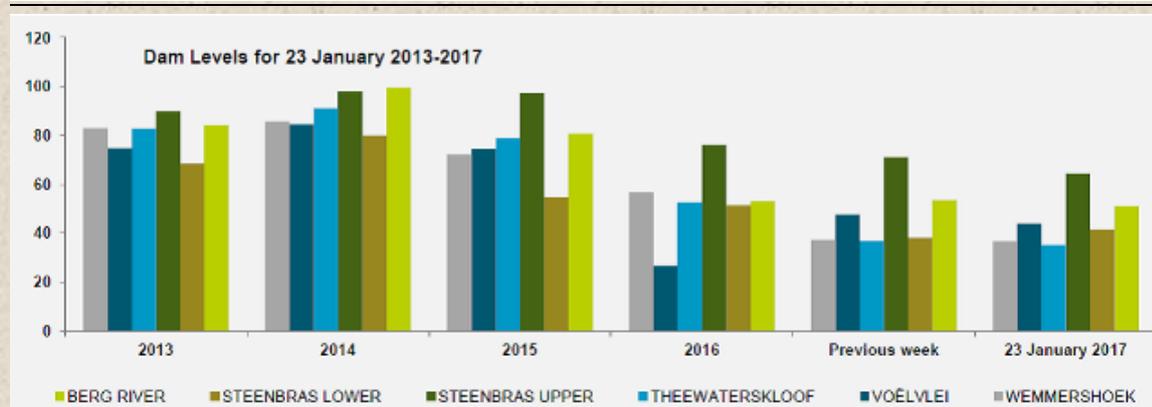
Secondly, they contended that the aim or purpose of the Petroleum Regulations was to regulate the environmental consequences of deep drilling and hydraulic fracturing, but that such was not permitted by section 107 of the Mineral and Petroleum Resources Development Act (the MPRDA).

(Read the full case: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAECGHC/2017/109.html&query=stern>)

NATIONAL NEWS

The Western Cape Dam Levels are critical, see below the capacity of the dams as at 27 November 2017

<u>Dam</u>	<u>% Full This Week</u>	<u>% Full Last Week</u>	<u>% Full Last Year</u>
Cape Town System Dams Consist of : Wemmershoek-; Voëlvlei-; Steenbras Upper and Lower- ; Theewaterskloof Dam and Berg River Dam			
<i>Cape Town System Dams (Combined)</i>	35.78	35.89	55.28
<i>Berg River Catchment</i>	50.99	50.62	65.33
<i>Breede River Catchment</i>	31.47	31.77	54.04
<i>Gouritz River Catchment</i>	21.09	21.06	33.40
<i>Olifants / Doorn River Catchment</i>	33.89	35.18	88.18
<i>Western Cape State of Dams</i>	34.49	34.66	55.93



A VIDEO ABOUT SEABED MINING IMPACTS

<https://cer.org.za/news/new-animation-illustrates-the-stark-reality-of-seabed-mining-impacts>

ABOUT GUNN ATTORNEYS

Gunn Attorneys was established in 2014 by Adam Gunn, leveraging on many years of experience in the natural resources sector. Amongst other things Adam was legal counsel to Ridge Mining and First Uranium Corporation and a partner at Edward Nathan Sonnenbergs and Eversheds. The vision of the firm continues to be to provide exceptional service to our clients in the natural resources sector.

Our contact details:

Adam Gunn

Fax: +27 86 459 2405

Mobile: +27 72 533 4399

Physical: 11 Greenway Road, Greenside, 2193.

E-mail: adam@gunnattorneys.co.za

professionals@gunnattorneys.co.za

Website: www.gunnattorneys.co.za

Social media: https://www.facebook.com/gunnattorneys/?ref=aymt_homepage_panel

https://twitter.com/Gunn_Attorneys

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