



JANUARY NEWSLETTER 2019

Dear Readers,

We wish you a happy and prosperous 2019!



The January edition of this newsletter will look at updates in the environmental compliance, land and protected areas sectors while also focussing on recent legal notices and amendments.

We are proud to announce that Gunn Attorneys will be conducting monthly environmental training workshops. The details of which are provided at the end of this Newsletter.

NATIONAL LEGISLATION

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998**

National Environmental Management Laws Amendment Bill 2017 [B14D-2017]

The primary amendments include, providing clarity to the definition of “financial provision”, providing for simultaneous submissions in terms of the National Environmental Management Act and other specific environment management Act applications for purposes of creating one integrated environmental system, providing clarity on consultation undertaken by an environmental assessment practitioner on application for environmental authorization and providing clarity around the financial provision required by a mining right applicant or holder (including progressive rehabilitation, mitigation, mine closure and the management of post closure environmental impacts).

❖ **MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 49 OF 2008**

Mineral and Petroleum Resources Development Amendment Bill (B27 – 2013)

The amendment is intended to remove ambiguities that exist within the Act, to provide for the, regulation of associated minerals, partitioning of rights and to enhance provisions relating to beneficiation of minerals, to promote national energy security, to streamline administrative processes, to provide for enhanced sanctions and to improve the overall regulatory system.

❖ **STANDARDS ACT 8 OF 2000**

GN 55 in GG 42203 of 1 February 2019

SANS 10012:2019 Ed 4.1: The use of light metals in hazardous locations at mines – Consolidated edition incorporating amendment No. 1

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT 39 OF 2004**

GN 71 in GG 42203 of 1 February 2019

National Greenhouse Gas Emissions Reporting Regulations, 2016: Notice of procedure to be followed by Category A data providers for registration and reporting as a Category A data provider

PROVINCIAL LEGISLATION

❖ **LIMPOPO**

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 10 OF 2004

PN 1 in PG 2966 of 4 January 2018 (p11)

Determination of Bioregions and Bioregional Plans published

FOR COMMENT

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT 57 OF 2003**

GNS 69 & 70 in GG 42203 of 1 February 2019

Notice of intention to de-proclaim the Nyl Valey Nature Reserve as a Nature Reserve

Expropriation Bill 2019

5 February 2019 by Sonam Mansingh

Introduction

The new draft Expropriation Bill 2019 (the “**Bill**”) was published for public comment on 21 December 2018. The Bill represents a third attempt at refreshing the existing expropriation laws in terms of Expropriation Act 63 of 1975. This Act has been criticized for not adequately reflecting the “just and equitable” standard for compensation required by the Constitution, 1996.

The Bill is largely similar to the previous 2015 Expropriation bill. The most important development noted in the 2019 Bill is the inclusion of Section 12(3) permitting nil compensation in certain circumstances.

The draft Bill is separate from the process to amend the Constitution. Whether the Constitution is amended or not, the new Bill would allow for land expropriation with nil compensation, where fair and appropriate.

Highlights of the Bill

The most noteworthy addition to the Bill, are the five categories of land that may be expropriated for nil compensation. These land parcels may only be expropriated where it is in the public interest. Section 12(3) lists five types of land that maybe expropriated for nil compensation, that is, land occupied by a labour tenant, land held for speculative purposes, land owned by state-owned entities, abandoned land, and land with lesser value than the State subsidies that it received. The major concern surrounding Section 12(3) is that the above five categories of land, do not reflect a closed list. In order to create certainty and secure the foundational elements of the right to property, the Bill must be amended to present fixed and finite categories of land that will be considered for nil compensation.

It is crucial for the public to understand that nil compensation does not mean, land taken for free. It merely indicates instances where the state deems that just and equitable compensation is nil, this decision may be challenged, in a court of law, by any affected party.

A downfall of the Bill is that land deemed to be held for speculative purposes and abandoned land has not been clearly defined. The Bill needs to clarify the relationship between land with a lesser value than the state subsidy it has received and land that has already been transferred in terms of existing land reform programs, as well as land held in terms of customary rights.

A further implication of the draft Bill is that mining rights granted or existing in terms of the Minerals and Petroleum Resources Development Act 28 of 2002, may not be expropriated.

The Bill does not include an exact formula to calculate compensation. Just and equitable compensation will be determined in terms of the factors surrounding each case.

Section 21 includes a mediation clause to resolve deadlocks in a more efficient and cost-effective manner. This will relieve part of the burden imposed on land owners or right holders to engage in time consuming and expensive litigation.

Who may expropriate?

Expropriation may be undertaken by the Minister of Public Works or any other delegated state official for a public purpose or in the public interest. Private individuals are not empowered to expropriate land.

The definition of “expropriating authority” in the Bill is unduly broad and includes any organ of state. The definition should be more specific to provide clarity around this important power.

The process

The Bill requires a notice of expropriation to include the reason for expropriation, full details of the property, and details around how to object.

The owner or right holder then has 30 days to object or comment on the expropriation. The owner must also submit a statement on the amount claimed by him or her as just and equitable compensation.

The Bill includes an additional investigation phase before expropriation may occur. During this phase the state must negotiate with the land owner in an effort to reach an agreement, before the expropriation process commences. This is an essential step in the process, if carried out in good faith, it will lead to an uncomplicated hand over and ensure that transparency and fairness are paramount. It should be noted, that even if consensus is not achieved, expropriation will continue.

If the property expropriated is mortgaged, the owner remains liable for their mortgage. An outstanding mortgage should be a strong factor considered to meet the just and equitable standard.

The cornerstones of administrative justice will govern the entire process, as such, all steps in the expropriation process, including the question of what constitutes just and equitable compensation, are subject to judicial review.

Conclusion

Land ownership is a sensitive issue in South Africa, the Bill represents a reasonable course of action if certainty is achieved and it is implemented with due regard to fair legal process. The factors considered when determining just and equitable compensation should be clearly listed. In addition, due to their critical role in the implementation of this piece of legislation the specific authority designated to determine which portions of land may be expropriated must be clearly identified and should vest at national government level.

At this point we can only hope that the State carefully considers the comments submitted by the public and all interested role players, clarifies the outstanding issues and promulgates into law a version of the Bill that is not only fair and justifiable but also supports South Africa’s economic growth and stability.

MEC will not exclude properties from Mabola: Protected Environment remains intact

29 January 2019 by Annette Gibbs

The members of the coalition of civil society organisations who have been challenging mining company Atha Africa's proposed new coal mine inside a Mpumalanga strategic water source area welcome the decision of Mpumalanga MEC Vusumuzi Shongwe to withdraw his notice of intention to exclude the area proposed for mining from the Mabola Protected Environment.

MEC Shongwe had published his intention to exclude the proposed mining area from the Mabola Protected Environment in October 2018, and had called on the public to submit their comments and objections. The coalition submitted a comprehensive objection to the proposed exclusion in December 2018.

The eight coalition members are the Mining and Environmental Justice Community Network of South Africa, groundWork, Earthlife Africa Johannesburg, BirdLife South Africa, the Endangered Wildlife Trust, the Federation for a Sustainable Environment, the Association for Water and Rural Development (AWARD) and the Bench Marks Foundation.

The intended exclusion would not have been legally defensible, and the coalition would have been obliged to apply to the High Court to set aside such a decision. The coalition is reassured by the MEC's decision not to go ahead with the exclusion, and relieved that it does not have a further legal challenge on its hands.

Last week (22 January 2019), the Pretoria High Court refused Atha Africa leave to appeal the November 2018 judgement in which the court set aside the original joint permission given to Atha Africa in 2016 by former Mineral Resources Minister Mosebenzi Zwane and the late Environment Minister Edna Molewa for this large new coal mine.

The upshot is that, should Atha Africa persist with its intention to mine for coal in the Mabola Protected Environment, it requires new permission from both the Environment and Mineral Resources Ministers under the Protected Areas Act. Without that permission, commercial mining may not proceed inside a declared protected area. The proposed mine area also falls within a strategic water source area

INTERESTING ENVIRONMENTAL TOPICS

- ❖ **Climate change must be a central pillar of SA's economic growth**
<https://www.businesslive.co.za/bd/opinion/2019-02-06-climate-change-must-be-a-central-pillar-of-sas-economic-growth/>
- ❖ **Responsible consumption and production: Why less is better**
<https://www.news24.com/Columnists/GuestColumn/responsible-consumption-and-production-why-less-is-better-20190119>

- ❖ **'Stop treating seas as a sewer,' MPs in England urge in bid for protection treaty**
<https://www.theguardian.com/environment/2019/jan/17/stop-treating-seas-as-a-sewer-mps-urge-in-bid-for-protection-treaty>

WORKSHOPS

- ❖ **Energy Law**
Date: Wednesday, 27 February 2019
- ❖ **Introduction to Environmental Law**
Date: Wednesday, 27 March 2019
- ❖ **Climate Change**
Date: Wednesday, 24 April 2019
- ❖ **Mining and Environmental Law**
Date: Wednesday, 29 May 2019
- ❖ **Additional information**

Details for all the above workshops

Venue: Gunn Attorney's offices, 11 Greenway Road, Greenside, Johannesburg

Time: 08h30 to 16h00

Expert Environmental Presenters

Adam Gunn

Adam completed his BCom Law LLB at the University of KwaZulu-Natal and his LLM in Environmental Law at the University of the Witwatersrand. Adam was admitted as an attorney of the High Court of South Africa in 2001, since then gaining over 18 years of experience in providing legal advice to clients in the resources sector. Adam is considered one of the foremost environmental law experts in South Africa and has extensive experience in presenting training workshops.

Sonam Mansingh

Sonam completed her Law LLB at the University of KwaZulu-Natal and LLM in Environmental and Marine Law at the University of Cape Town. The LLM program was a combination of coursework and a dissertation. The courses covered include International Environmental Law, International Law of the Sea, Natural Resources Law and Land Use Planning Law. Her dissertation highlighted the principles of intergenerational equity and fairness at the forefront of climate change law in an effort to safeguard the interests of poor and vulnerable people and countries.

Workshop Information

All attendees will be supplied with the presentation handout, which will be loaded onto a shared Dropbox site.

The cost to attend will include a full day of training, tea, coffee, lunch and ample secure parking.

The workshop style will be interesting, enjoyable and interactive. All attendees will obtain a certificate of attendance upon completion.

Please RSVP to sonam@gunnattorneys.co.za

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.



Sonam Mansingh and Adam Gunn outside our offices at 11 Greenway Road, Greenside.

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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.