



JUNE/JULY NEWSLETTER 2020

Dear Readers,

We hope that you are safe and well amidst the COVID-19 pandemic!



The June/July edition of our newsletter looks at updates in the climate change and waste sectors while also focusing on recent legal notices and amendments.

NATIONAL LEGISLATION

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE ACT 59 OF 2008**

Proposed Extended Producer Responsibility Scheme for the Lighting Sector published for comment (GN 717 in GG 43480 of 26 June 2020) (p3)

Proposed Extended Producer Responsibility Regulations, 2020 published for comment (GN 718 in GG 43481 of 26 June 2020) (p3)

Proposed Extended Producer Responsibility Scheme for Paper, Packaging and Some Single Use Products published for comment (GN 719 in GG 43482 of 26 June 2020) (p3)

Proposed Extended Producer Responsibility Scheme for the Electrical and Electronic Equipment Sector published for comment (GN 720 in GG 43483 of 26 June 2020) (p3)

What is Extended Producer Responsibility?

This is a concept which states that manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle, including upstream impacts inherent in

the selection of materials for the products, impacts from manufacturers' production process itself, and downstream impacts from the use and disposal of the products.¹

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

Notice of publication for comment of draft Second Generation Air Quality Management Plan (AGMP) for the Vaal Triangle Airshed Priority Area (VTAPA) published (GNs 654 & 655 in GG 43418 of 12 June 2020) (pp 24 & 26)

❖ **NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 10 OF 2004**

Notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn, 2019 published with effect from a date to be determined (GN 625 in GG 43386 of 3 June 2020) (p3)

Regulations relating to Trade in Rhinoceros Horn, 2019 published with effect from a date to be determined (GN 626 in GG 43386 of 3 June 2020) (p8)

Amendment of the Alien and Invasive Species Lists and the Critically endangered, endangered, vulnerable and protected species list published with effect from a date to be determined (GN 627 in GG 43386 of 3 June 2020) (p26)

PROVINCIAL LEGISLATION

❖ **LIMPOPO**

SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013:

Musina Local Municipality: Appointment of Municipal Planning Tribunal Members published (PN 52 in PG 3082 of 12 June 2020) (p14)

❖ **WESTERN CAPE**

SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013:

Knysna Local Municipality: Notice of adoption of the Spatial Development Framework (2020) published (LAN 20236 in PG 8256 of 26 June 2020) (p362)

Oudtshoorn Local Municipality: Notice of adoption of the Spatial Development Framework, 2020 published (LAN 20218 in PG 8249 of 12 June 2020) (p332)

WESTERN CAPE LAND USE PLANNING ACT 3 OF 2014:

Knysna Local Municipality: Notice of adoption of a zoning scheme map published (LAN 20246 in PG 8256 of 26 June 2020) (p362)

¹ <https://www.oecd.org/env/waste/factsheetextendedproducerresponsibility.htm>

CLIMATE CHANGE IN SOUTH AFRICA & PLANNING FOR A LOW-CARBON FUTURE

By Tim van der Merwe, Associate

Background to Climate Change

Climate change is increasingly being recognised as the biggest threat to the environment and human health. Under the 2015 Paris Agreement, 195 countries pledged to limit global warming to below 2 degrees Celsius, and ideally not more than 1.5 degrees Celsius. To reach this optimistic goal, decarbonization of numerous industries (and effectively entire economies) must occur in a relatively short space of time.

Reducing emissions has thus become a top strategic concern for many industries globally. South Africa has one of the most carbon-intensive economies in the world, largely due to our continued reliance on coal as a source of power. The coal sector is responsible for around 48% of all carbon emissions, with the remainder coming from the metal products sector, the transportation sector, and the chemical, rubber and water-supply sectors.

The mining industry, as a user of massive amounts of energy, generates significant emissions. Carbon pricing gives mines the opportunity to consider using renewable energy, as well as other energy sources, as an alternative to the emissions-intensive methods still in operation today. In South Africa, carbon pricing has taken the form of a carbon tax, which is gradually being phased in to give polluters ample opportunity to invest in green technology.

Regulatory Outline in South Africa

As a major ESG issue, South Africa has recognised the importance of combating climate change and began its response to the problem by ratifying the Paris Agreement in November 2016. Under the Paris Agreement, each country submitted Intended Nationally Determined Contributions (INDCs). These are effectively climate pledges and include information on emissions reductions.

Information that INDCs should take into account includes a reference point (base year), time frame, scope and coverage, methodological approach for calculating emissions, the fairness and level of ambition of the contribution, and how the INDC contributes towards achieving the UN's climate convention objectives. This information is vital for making country pledges comparable to some degree, although the specific circumstances of each country (particularly developing nations) plays a role as well. INDCs become Nationally Determined Contributions (NDCs), and thus binding, upon ratification of the Paris Agreement by a nation.

Mitigation and adaptation are key terms under the Paris Agreement. In 2019, the Draft National Climate Change Adaptation Strategy was published in line with South Africa's commitment to achieve the stabilization of greenhouse gas (GHG) emissions and limit temperature increases to 1.5 degrees Celsius. The strategy is key for attaining the objectives in the National Climate Change Response Policy, which most notably include managing climate change impacts while building and sustaining South Africa's social, environmental and economic resilience. This is supported by the Climate Change Bill, which is aimed at providing for a coordinated and integrated response to climate change to support sustainable development.

At the 2009 Copenhagen Climate Change Conference, the South African government committed to reducing South Africa's GHG emissions by 34% below then-current levels by 2020, and 42% below then-current levels by 2025. This was reaffirmed when South Africa ratified the Paris Agreement.

The Carbon Tax

While several measures exist for reducing emissions, the carbon tax has emerged as one of the more popular and more effective methods. It is an attractive alternative to traditional command-and-control mechanisms for environmental enforcement as they are not state-centred, they internalize negative externalities associated with pollution and environmental harm by holding polluters accountable for their emissions, and they give polluters greater incentive to reduce pollution by investing in green technology. Essentially, less emissions means a polluter will pay less tax.

A carbon tax allows for governance through a dependence on market relationships and an increased reliance on market processes to achieve environmental goals. The pollution caused by polluters has traditionally been a cost paid for by society (whether it be a monetary, health, social or other cost). The carbon tax, as a market-based mechanism, is designed to enforce the polluter-pays principle and shift the burden back onto the polluter. In this way, it becomes financially beneficial for polluters to take extra steps in order to emit less. Instead of having their behaviour regulated through the use of directives and so forth, polluters must decide on the extent to which they wish to reduce their emissions in order to benefit from the financial incentives that market-based mechanisms provide.

The National Environmental Management: Air Quality Act (NEM: AQA) sets a variety of standards and criteria that revolve around air quality monitoring, with the ultimate goal of giving effect to the environmental right in section 24 of South Africa's Constitution. NEM: AQA places a general duty on the state to improve South Africa's air quality as part of the obligation contained in section 24 of the Constitution. Calculation of a polluter's carbon tax liability will be done in accordance with a methodology approved by the Department of Environment, Forestry and Fisheries, which will be in line with the National GHG Reporting Regulations that were published under NEM: AQA in April 2017.

Phase 1 of the carbon tax came into effect on 1 June 2019 and will run until 31 December 2022. This phase allows for various offsets and allowances, so that the initial rate of R120/ton of carbon dioxide equivalent can be reduced to somewhere between R6 and R48 per ton. This phased-in approach decreases the impact on business and gives polluters time to adapt. Polluters will be liable to pay carbon tax where their activities are above a set threshold and are listed in Schedule 2 to the Carbon Tax Act. Listed industries include energy, manufacturing, construction, transport, property and agriculture.

Phase 2 will run from 2023 to 2030, while the third phase will run from 2031. The allowances permitted under phase 1 will likely be amended under phases 2 and 3 to slowly increase carbon liability for taxpayers. The rate of R120/ton will increase by the Consumer Price Index (CPI) plus 2% per annum until the end of 2022, after which it will increase by the average CPI for the preceding year.

On 19 June 2020, Finance Minister Tito Mboweni finalized the next set of regulatory mechanisms under the Carbon Tax Act. In terms of the Trade Exposure Allowance Regulations, entities/polluters with exposure to international competitiveness are granted some reprieve according to the sector(s) they operate in. Where an entity operates in more than one sector, a weighted average of the tax-free allowance levels will be calculated and used to determine that entity's liability.

Certain sectors will be subject to approved sector emission intensity benchmarks. Where a polluter puts in place measures to reduce its GHG emissions and subsequently emits less than the benchmark, that polluter will qualify for a performance allowance, further reducing their carbon tax liability. The above Regulations (the Trade Exposure Allowance Regulations and GHG Emission Intensity Benchmark Regulations that determine the performance allowance) are, according to the Act, deemed to have come into operation on 1 June 2019 and can accordingly be applied under the current tax return period.

The Importance of Managing Climate Risk

Current issues facing companies, within the climate change and carbon reporting sphere, are numerous and becoming increasingly important. Standard Bank has been in the spotlight recently, having refused to table a climate risk-related shareholder resolution that effectively recognises that Standard Bank has taken steps to acknowledge the financial risk posed by climate change, and also to improve its management and disclosure of such risks. Gaps in this disclosure still exist and there is poor alignment between the bank's recognition of climate risks and actions taken to mitigate these risks. The resolution requested an assessment of Standard Bank's exposure to climate-related risks in its investing, lending and other financial activities, and further requested the adoption of a policy that covers the financing of gas and oil exploration and production. As one of the largest gas and oil lenders in sub-Saharan Africa, adopting such a policy and publicly disclosing it is important for the bank's image and its future.

Although Standard Bank was the first South African company to table a climate change-related shareholder resolution, the board recommended that shareholders vote against it. However, the decision to table it is ground-breaking in its own right, highlighting that shareholders are permitted to exercise voting rights on matters concerning climate change. This indicates a shift in the landscape surrounding shareholder activism and responsible investment in South Africa. If passed, the resolution will require the bank to report its assessment of the GHG emissions resulting from its financial portfolio and its exposure to climate change risk in its investing, financing and lending activities, as well as adopt a policy on lending to coal-fired power projects and coal mining operations. Such a policy would also have to be publicly disclosed.

The Standard Bank case study shows that strategically planning for, and managing, climate change risk is vital for companies to succeed in future. The rapidly changing landscape, both from a legal and public opinion perspective, means that companies are having to drastically alter the way they perceive and deal with climate change related matters.

Developing long-term and short-term strategies, setting carbon neutral goals (in some cases), disclosing emissions and publishing accurate carbon footprint reports will all be important aspects of any business. Sustainability reporting, risk mitigation, developing carbon budgets and encouraging effective governance over climate change-related matters will aid directors in performing their fiduciary duties, boost public image, promote compliance with the relevant legislation, and reduce carbon tax liability.

Reporting on and managing climate change risks is a global imperative, with many countries having already taken notable strides in this regard. Businesses and investors across Europe have committed to achieving net-zero emissions by 2050. The transition will be supported by decarbonizing their business models, creating sustainable jobs, and reporting on several climate-related facets of their businesses. Massive companies such as Unilever, P&G, DSM and Maersk have committed to these zero-carbon economies of the future, citing several methods of doing so in line with the Paris Agreement. While larger companies are paving the way, all polluters will need to adapt and mitigate their climate-change impacts in the near future. Reporting on emissions is vital for companies to determine their potential climate-change impacts and carbon tax liability, and also promotes confidence amongst shareholders and the general public. As the world moves towards zero-carbon economies, companies that carefully plan for and manage their climate risk will be the companies that survive and grow.

In South Africa, calls have been made for the Presidential Climate Change Coordinating Commission (PCCCC) to be established. This multi-stakeholder institutional platform will focus on the just transition to a low-carbon economy, recognizing that the principles for the transition have already been agreed on, and therefore the focus must shift to implementation. This is a promising prospect and highlights the government's move towards a low-carbon future, in line with its commitments made under the Paris Agreement.

Gunn Attorneys Service Offering

Gunn Attorneys can assist in calculating carbon tax liability, as well as with any legal or related issues concerning the carbon tax. The carbon tax is relatively new and much still needs to be figured out and clarified. Gunn Attorneys aims to be at the forefront of the field and can provide valuable guidance in navigating the uncharted territory that is South Africa's first carbon tax.

We also compile carbon footprint reports, which are used as the basis for calculating a polluter's carbon tax liability. Reducing your footprint means paying less carbon tax, with long-term financial benefits inevitable.

Developing, drafting, and giving effect to a long-term sustainability strategy is vital for companies to survive. Gunn Attorneys, together with strategic partners, is able to deliver concise, accurate climate change and sustainability strategies, reports and advice, allowing companies to transition to the low-carbon future envisioned in the Paris Agreement.

WASTE CASE LAW DEVELOPMENT JUNE 2020

Minister of Environmental Affairs v ArcelorMittal South Africa Ltd 2020 SCA

AMSA has been manufacturing various steel products for decades. One of the by-products of its steel manufacturing process is Basic Oxygen Furnace slag (BOF slag).

At its Newcastle operations, AMSA's BOF slag is derived from two sources. These are 'current arisings', which is BOF slag that has been temporarily stockpiled, crushed and screened for delivery to third parties for use either as lime in the agricultural sector or as an aggregate in road construction and rehabilitation. The other source is what is called 'reclaimed slag'. Reclaimed slag represents BOF slag that is temporarily deposited into AMSA's disposal site for storage because it cannot be immediately sold to third parties. When it is required for sale it is retrieved from the disposal site, crushed and screened on-site in order to convert it to the specifications required by AMSA's customers.

During early 2013, the Environmental Management Inspectors issued a notice to AMSA under s 31H of the National Environmental Management Act ("**NEMA**"). Despite various exchanges between the Department and AMSA, the Department issued a combined compliance notice and directive.

The compliance notice advised AMSA that the disposal of BOF slag into the existing BOF slag disposal site ("**BOFSDS**") was unlawful as AMSA was not a holder of a waste management license ("**WML**"). In addition, that the sale of BOF slag, either in the form of current arisings or reclaimed slag, required the third parties to whom the slag was sold to be WMLs holders.

AMSA objected to the compliance notice and appealed against the directive to the Minister. The Minister dismissed both the appeal against the directive and the objection to the compliance notice.

In the High Court, AMSA's review application was upheld. However, the High Court, omitted to grant an order reviewing and setting aside the Deputy Director-General's ("**DDG**") directive and compliance notice.

The issues raised in the Supreme Court of Appeal ("**SCA**") are:

(i) Did the DDG act within the confines of his statutory powers in issuing his directive and compliance notice?

(ii) Was the Minister correct in dismissing AMSA's appeal against the DDG's directive and objection to the DDG's compliance notice?

(iii) Was AMSA subject to the prescripts of the Environmental Conservation Act, the NEMA and the National Environmental Waste Management Act ("**NEMWA**"), having regard to the fact that AMSA commenced with its Newcastle operations long before the enactment of these Acts?

(iv) Was AMSA required to obtain WMLs under the NEMWA for its activities in respect of its old BOF slag disposal site undertaken since the 1970s before the ECA, the NEMA and the NEMWA were enacted?

During 2011 the Department issued a WML to AMSA for the construction and operation of a new BOFSDS at the Newcastle operations. The WML was granted to enable AMSA to:

- (a) dispose of any quantities of hazardous waste to land; and
- (b) for the construction of facilities listed in the schedule to the licence.

A decommissioning WML for AMSA's existing BOFSDS was issued. This licence was subsequently revised to authorise AMSA to reclaim BOF slag from its existing BOFSDS with a view to decommissioning and rehabilitating the existing BOFSDS.

The Department therefore contended that, pursuant to the issuance of WMLs (decommissioning and construction), AMSA was obliged, to dispose of its BOF slag into the new BOFSDS.

AMSA argued that current arisings were not waste for at least two reasons. First, it is not 'a substance, material or object that is unwanted, rejected, abandoned or discarded' within the meaning of 'waste' because it is never deposited nor stored in a BOFSDS. And second, because it has commercial value, hence it is sold to third parties in the agricultural and road construction sectors.

As to the reclaimed slag, AMSA submitted that once BOF slag is recovered from the BOFSDS and recycled, it ceases to be waste. Consequently, AMSA contended that it did not require a WML in order to dispose of recycled BOF slag. Nor were the third parties to whom the BOF slag was sold required to have waste disposal licences, since what they acquired from AMSA was not waste.

Whilst the NEMWA speaks only of waste and says nothing about current arisings and reclaimed BOF slag, it would appear that AMSA has for its operational reasons coined the terms 'current arisings', on the one hand, and 'reclaimed BOF slag' on the other.

The SCA held:

- That any substance, material or object that is not 'unwanted, rejected, abandoned, discarded or disposed of' does not fall within the ambit of the definition. Similarly, any substance, material or object that has been recycled or recovered, in this instance from the BOFSDS, ceases to be waste once recycled or re-used. Consequently, AMSA's current arisings and reclaimed BOF slag self-evidently fall outside the terms of the definition of waste.
- To this end, that sustainable development must be balanced against the need to avoid waste or where waste cannot be altogether avoided or minimised, it must be recycled. Thus, in recycling its waste, i.e. BOF slag in the form of what AMSA describes as reclaimed BOF slag, AMSA was in fact promoting one of the principal objects of the NEMA, that is, to protect the environment from degradation.
- That the decommissioning licence granted to AMSA explicitly provided that AMSA was authorised to decommission its existing BOFSDS and rehabilitate it. In order to give effect to this requirement, it was necessary for AMSA to reclaim part of the material deposited in the BOFSDS, i.e. separate BOF slag from the dump in its BOFSDS, and recycle it for sale to third parties in order to seal and rehabilitate the existing BOFSDS.

In terms of the reasons presented above, the court concluded that all four of the issues posed must be answered in the negative.

The appeal is dismissed with costs, including the costs of two counsel.

The Key Issue:

The Judgment provides a precedent that what constitutes a "waste" is not always crystal clear, a substance is not always a waste due to its chemical composition. It can either be waste or a by-product, depending on the circumstance. This Judgment illustrates that **what constitutes a waste depends on the intention of the party handling the material or substance and on whether the material or substance has commercial value to the holder or to third parties.**

INTERESTING ENVIRONMENTAL TOPICS

❖ **How to participate in plastic free July 2020**

<https://www.greenpeace.org/usa/how-to-participate-in-plastic-free-july-2020/>

❖ **Court orders municipality to act on long-standing sewage problems**

<https://www.dailymaverick.co.za/article/2020-06-04-court-orders-municipality-to-act-on-long-standing-sewage-problems/#qsc.tab=0>

❖ **Greens victorious as Sasol ditches Africa sea paradise gas-drilling plan**

<https://www.dailymaverick.co.za/article/2020-07-06-greens-victorious-as-sasol-ditches-africa-sea-paradise-gas-drilling-plan/#qsc.tab=0>

Our contact details:

Adam Gunn

Mobile: +27 72 533 4399

Physical: 63 Wessel Road, Rivonia, Sandton 2128.

E-mail : adam@gunnattorneys.co.za

professionals@gunnattorneys.co.za

Website: www.gunnattorneys.co.za



Gunn Attorneys welcomes your constructive feedback regarding any aspects of our newsletter.

To unsubscribe from this newsletter, please reply to this e-mail with the subject of the e-mail: "unsubscribe"

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.