



NEWSLETTER- MAY 2016

Dear Readers,

We would like to wish everyone a happy Earth Day which was celebrated on the 22 April 2016.

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

Gunn Attorneys will be publishing a new website very soon, so watch this space. (www.gunnattorneys.co.za)

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ENVIRONMENTAL NEWS

International environmental law

On Friday, 22 April 2016, the signing ceremony for the Paris Agreement on Climate Change took place at UN Headquarters in New York. Following an opening ceremony, 175 countries signed the Paris Agreement, the largest number of countries to ever sign a multilateral agreement on the day on which it opens for signature. The agreement will only come into force when 55 countries responsible for 55% of the world's greenhouse gas emissions have ratified it. The target date is 2020.

Environmental Authorisations

The Department of Environmental Affairs announced that it will make Environmental Authorisations ("EA's") automatically available to the public without requiring submission of a request in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). This announcement enshrines the importance of transparency within the environmental sector and the move to ensure that such principles are reiterated throughout the environmental sector.

International Rhino Horn Trade

Minister Environmental Affairs, Mrs Edna Molewa made an announcement on 8 May 2016 stating that South Africa will not be applying for the opening of legal international commercial trade in rhino horn at the 17th Conference of Parties to CITES. This decision is in consequence of the decision made by the Committee of Inquiry on the Feasibility of Rhino Trade.

Domestic Rhino Horn Trade

In our January newsletter reference was made to a case regarding a moratorium on domestic trade of rhino horn. In summary, in 2009 an application challenging a 2009 moratorium on the domestic trade in rhino horn was brought to the court. The High Court, Gauteng Division, Pretoria, set aside the moratorium last year. The Minister responded with an application for to leave to appeal the High Court, which was dismissed. The Minister then petitioned the SCA for leave to appeal. The SCA, on 20 May 2016, dismissed the Minister's application for leave to appeal with costs.

The Minister is considering the implications of the decision before deciding her next step.

Solar Power

Minister Molewa has commended the Department of Transport on the official opening of a yet another solar-powered airport in Kimberley.

Transport Minister Dipuo Peters on Friday, 13 May 2016, officially opened the Kimberley Airport Solar Plant, a project that is spearheaded by the Airports Company of South Africa (ACSA) at a special ceremony in the city. The construction of the Kimberley Airport solar plant started in September last year and forms part of the ACSA's broader plan to install solar energy plants at all six regional airports over the next three to five years. This is to make the regional airports more self-sufficient.

The Kimberley Airport Solar Plant will use 1620 Solar Photovoltaic (PV) panels and 18 inverters to generate electricity by converting solar radiation into renewable and clean energy source. The plant is designed to deliver 500 KWp of peak production per year. This initiative is in line with the government's sustainable development imperatives, energy security priorities and environmental conservation obligations.

In its first phase, the Kimberley Airport solar plant will generate 141 870 kWh and is forecasted to produced approximately 927 000 kWh hours per year.

Illegal fishing

South African authorities have detained three Chinese vessels and 100 crew members for allegedly illegal fishing in Indian Ocean waters off Port Elizabeth. The three ships were escorted into East London port after trying to flee from South African patrol vessels early on Sunday, and inspectors found about 600 tons of squid on board. The 96 sailors from the ships have been held for allegedly violating territorial waters regulations and illegal fishing.

Another Chinese vessel was held last week and its crew charged and fined for violating environmental laws. Fisheries Minister Senzeni Zokwana expressed concern at the growing poaching of fish off South Africa.

Mine closure and rehabilitation

On 5 May 2016 a conference was held at the University of Witwatersrand pertaining to mine closure and rehabilitation, the topic being “*From Dereliction to Accountability*”. The conference was presented by the director for the Centre for Sustainability in Mining and Industry, Professor Caroline Digby. Other speakers included Professor Tracy-Lynn Humby from Wits School of Law. The conversation was around the resilience to mine rehabilitation both within the mining industry and government. A comparison was made to the international community and how there has been a shift change within the international community toward a more pro-active approach to mine rehabilitation. This change has been as a consequence of more public awareness.

Further, the new regulations on Financial Provision for Prospecting, Exploration, Mining or Production Operations published under NEMA in 2015 and the idea of *One Environmental System* was discussed. Regarding the new regulations, it was stated that the understanding of a mine’s life cycle has become more relevant and in essence the new regulations view the mine’s life cycle in its entirety, which includes closure and rehabilitation. This new approach has moved away from the narrow approach and towards a broader approach regarding mine life cycles.

It was reiterated that financing for rehabilitation is of the utmost importance regarding rehabilitation and as such funds need to be readily available. However, there was resistance from mines relating to the tax implications for mine rehabilitation financial provisions. Professor Humby touched on this point and brought to light the insurance products for mine closure and rehabilitation. The issue of business rescue and insolvency was also a topic in this regard.

Professor Humby and the audience ascribed the lack of adequate rehabilitation to issues such as transparency, implementation, enforcement and the social costs of the surrounding communities. The DMR was criticized in relation to the aforementioned problems and in particular their lack of action in instances where funds were available for rehabilitation.

In conclusion, there were similar problems and questions addressed by the audience regarding the lack of uniformity of closure standards, lack of implementation of the new rules, lack of enforcement and that the consequences of the failure to rehabilitate for the lives and health of mining affected communities.

Water

The “water crisis” is still a serious problem in South Africa. Restrictions on water use are becoming more common and in this regard as of 29 April 2016 restrictions have been implemented for domestic, industrial and agricultural purposes in the Mzimbuvu-Tsitsikamma Water Management Area (WMA 7) in the Eastern Cape Province.

We urge our readers to be conscious of water usage and to try and make an effort in saving water.

ENVIRONMENTAL CASE LAW

Bongani Nkala and 55 Others v Harmony Gold Mining Company and 31 Others

On 13 May 2016 a landmark judgment in South African law for both mining law and class actions suits was handed down. The Judge in the matter, Windell J, was faced with the task of deciding if the class action law suit may continue.

The biggest class action ever seen in South African courts includes 56 mineworkers who represent more than 25 000 miners and that could affect up to 200 000 people being those that could benefit from the class action.

The class action was based on the issue of silicosis contracted by miners dated as far back as 1965. The issue brought forward in this regard is due to the industry being aware of how to mitigate the inhalation of silica dust but not ensuring such measures were put into place and in an essence ignoring the health of the mineworkers. Therefore, the mineworkers have called for compensation from Harmony Gold Mining Company and 31 other mining companies. The class action would include two classes: gold miners and the dependants of those who have died as a result of silicosis, and gold miners with pulmonary tuberculosis and the relatives of those who have died of it.

Thembekile Mankayi v AngloGold Ashanti Limited.

This judgment preceded and paved the way for *Bongani Nkala v Harmony Gold*. In this case, 4400 mineworkers who had contracted silicosis brought a claim for damages against the South African representative entity of Anglo Gold, AngloGold Ashanti Limited.

The case reached the Constitutional Court and the court had to give judgment on whether section 35(1) of the Compensation for Occupational Injuries and Diseases Act (“**COIDA**”) extinguishes the common law right of mineworkers to recover damages against mine owners even though they are covered by the Occupational Diseases in Mines and Works Act (“**ODIMWA**”), and as such are not entitled to claim under COIDA.

The Court overturned the order of the SCA, held that AngloGold’s restrictive interpretation of section 35(1) of COIDA was incorrect and ordered costs against AngloGold.

Pursuant to this judgment, Anglo American SA and AngloGold Ashanti reached a decision in March 2016 to compensate the mineworkers at an apparent R464 million, which will be put into an independent trust to distribute compensation to the affected mineworkers.

ABOUT THE GUNN ATTORNEYS TEAM

Adam Donald Gunn



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.

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.

Gunn Attorneys has also built a niche practice advising clients on issues relating to the agricultural sector and is proud to be able to offer clients a full service offering in this regard. Please refer to the attached summary of services.

Alexa-Rae Sebba



Alexa-Rae Sebba completed her BA Law LLB at the University of Johannesburg and her LLM in Environmental Law at the University of the Witwatersrand.

In her LLM, Alexa-Rae, focused on Environmental & Sustainable Development Law, Energy Law, Prospecting & Mining Law and International Environmental Law. Alexa-Rae's LLM research report focuses on Section 24 of the Constitution of the Republic of South Africa, 1996. It is titled 'Environmental Ubuntu? The inclusion of non-human animals under section 24 of the Constitution of the Republic of South Africa, 1996.'

Alexa-Rae was accepted to present her report at the 2015 Environmental Law Association of South Africa Postgraduate Conference, held at the University of KwaZulu-Natal.

Alexa-Rae is currently carrying out her articles at Gunn Attorneys.

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Disclaimer:

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