

Environment - South Africa

Contaminated land provisions of Waste Act in operation

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Introduction

The long-delayed contaminated land provisions in Part 8 of Chapter 4 of the National Environmental Management: Waste Act (59/2008) came into effect on May 2 2014.⁽¹⁾

While the act came into force on July 1 2009, the contaminated land provisions have been dormant for almost five years. Allied with the commencement of contaminated land provisions, the final norms and standards for the remediation of contaminated land and soil quality were published on May 2 2014.⁽²⁾ In addition, the remediation of contaminated land was removed as a listed activity from Category A of the Waste Management Activities List.⁽³⁾

This update looks at the implications of the commencement of the contaminated land provisions – particularly the implications for the transfer of contaminated land.

Contaminated land framework

The act includes a broad definition of 'contaminated' and includes the presence of a substance or microorganism above its standard level of concentration which may adversely affect, directly or indirectly, the quality of the environment.

The contaminated land provisions create a number of concerns for landowners as they require the owner of land that is considered to be significantly contaminated, or a party which undertakes an activity that caused the land to be significantly contaminated, to notify the relevant authority of the contamination as soon as it becomes aware of it.

Failure to do so may result in either a fine of up to R5 million or imprisonment for up to five years, or both. This penalty may be imposed in addition to any other penalty under the National Environmental Management Act (107/1998).

Although the contaminated land provisions are similar to the duty of care sections in the National Environmental Management Act and the National Water Act,⁽⁴⁾ they create a new form of liability for landowners akin to strict liability. These provisions will also alienate the land, as no person may transfer contaminated land without informing the transferee that the land is contaminated. If the site is in the process of remediation, the relevant authority must be notified and only conditions specified by it must be complied with before such transfer takes place.

While commentators have long noted that the provisions are vague and fall significantly short of what a potentially effective regime should include,⁽⁵⁾ the provisions must now be interpreted in conjunction with the norms and standards. These provide for a uniform national approach to:

- determine the contamination status of an investigation area;
- limit uncertainties about the most appropriate criteria and method to apply in the assessment of contaminated land; and
- provide minimum standards for assessing necessary environmental protection measures for remediation activities.⁽⁶⁾

Draft regulations were previously published (although were not finalised) to regulate the contents of a site assessment report as considered in Section 37 of the Waste Act and the parties which may conduct such assessments.⁽⁷⁾

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The removal of remediation of contaminated land as a listed activity from Category A of the Waste Management Activities List⁽⁸⁾ means that a waste management licence is no longer needed for this activity. This is a significant benefit as there has long been uncertainty regarding when the clean-up of land triggered the need for such a licence. Remediation of contaminated land is now essentially akin to a norms and standards activity similar to the other listed waste management activities that were recently removed.

Way forward

Following the commencement of Part 8, Chapter 4 of the Waste Act, determining the presence of contaminated land should be a key consideration in a due diligence investigation before any property acquisition. The due diligence should determine the condition of the land and existing liabilities, and alert a purchaser to possible future obligations.

Even if the land is found not to be contaminated, such an investigation will form an important benchmark of the condition of the land when the purchaser acquired the property. This is important for both the purchaser and the seller. Such investigation will be necessary to demonstrate that "all appropriate inquiries" were conducted before a property is purchased. This information can be used to negotiate the purchase price of a property and ensure that a purchaser and lender are informed of the associated risks.

Where the property is contaminated or where the decommissioning of facilities would require an environmental authorisation,⁽⁹⁾ an assessment of the site's contamination should be undertaken and the necessary reporting done.

Remediation orders or directives relating to the monitoring and management of the risk may be issued, which may require the person against whom the order is issued to undertake the remediation at his or her own cost. Sale of the land will not interrupt the operation of the order against the person to whom it is issued, nor will it automatically transfer to the purchaser. Contravention of such an order or directive may result in a fine of up to R10 million to be imposed or imprisonment for up to 10 years, or both, in addition to any other penalty under the National Environmental Management Act. The orders and penalties may be imposed against any party, irrespective of whether that party is responsible for the contamination. Landowners are therefore at risk of being held responsible for the remediation of land contaminated by someone else.

Comment

With the enactment of the contaminated land provisions, any party considering the transfer of land as part of a transaction should perform a due diligence investigation into the possible contamination of land to determine the liabilities of the parties and to alert a purchaser to possible future obligations.

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Endnotes

(1) Proclamation 26, *Government Gazette* 37547 (April 11 2014).

(2) National Norms and Standards for the Remediation of Contaminated Land and Soil Quality GN 331 *Government Gazette* 37603 (May 2 2014).

(3) Amendment to the List of Waste Management Activities that have, or are likely to have, a Detrimental Effect on the Environment GN 332 *Government Gazette* 37603 (May 2 2014). A party which submitted an application for a waste management licence for activity 3(8) in Category A of the Waste Management Activities List and a decision is still pending on the date of publication of this notice, must consider such an application withdrawn and Part 8 of the Waste Act will apply.

(4) Act 36 of 1998.

(5) M Kidd, "Should bad law be remediated? The Contaminated Land Provisions in the National Environmental Management: Waste Act" *SAJELP* (2009) 16, 2.

(6) Section 2 of the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality GN 331 *Government Gazette* 37603 (2 May 2014).

(7) Regulations for Site Assessments and Reports GN 234 of *Government Gazette* 35161 on 19 March 2012.

(8) Amendment to the List of Waste Management Activities that have, or are likely to have, a Detrimental Effect on the Environment GN 332 *Government Gazette* 37603 (May 2 2014). A person who submitted an application for a waste management licence for activity 3(8) in Category A of the Waste Management Activities List and a decision is still

pending on the date of publication of this notice, must consider such an application withdrawn and Part 8 of the Waste Act will apply.

(9) Activity 27 of GNR 544 published in *Government Gazette* 33306 (June 18 2010) requires an environmental authorisation for the decommissioning of existing facilities or infrastructure for activities where the facility or the land on which it is located is contaminated.

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