Environmental authorizations required for mining?

Claire Tucker and Melissa van Dyk

Introduction

The Constitutional Court recently gave judgment in the long standing dispute on whether consent or authorization is required in terms of land-use and environmental legislation for mining activities.

Unfortunately, while the Constitutional Court has cleared up the confusion regarding the land use planning competence of municipalities, it did not really clarify the position regarding regulation of environmental matters in the mining sphere.

Background

The City of Cape Town ("the City") instituted proceedings for an interdict restraining Maccsand (Pty) Ltd ("Maccsand") from mining sand dunes until the dunes were rezoned to allow mining as a land use. The City also sought an order that environmental authorization in terms of the National Environmental Management Act 107 of 1998 ("NEMA") is required before mining can commence.

Maccsand argued, *inter alia*, that the decision to grant a right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") trumped considerations in terms of other laws, such as NEMA and the Land Use Planning Ordinance 15 of 1985 ("LUPO"). It argued that mining is an exclusive national competency in terms of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and that other spheres of government cannot interfere this competency.

The counter argument was that LUPO and NEMA serve different purposes and requiring dual (or multiple) authorizations for the same activity would not be unusual in our law.

[Land use planning **[We could remove this whole section if the article is too long?]**

The initial judgment of the High Court, namely that the Constitution does not give national legislation the right to take away the planning function of municipalities and therefore LUPO had clear application in the dispute, has essentially been upheld in both the SCA and the Constitutional Court.

The implications of the judgment in the Western Cape and other provinces in which LUPO applies is that there can be no land use change without the consent of the applicable municipality.

The implications in other provinces is that the land use planning legislation is of application in a mining context, but this does not necessarily mean that the municipality has to authorize the land use for mining in all cases.

Historically, when most of the land use municipal planning legislation was drafted municipalities were "Islands" in farmland and rural areas. The jurisdiction of the municipality extended to a municipal boundary and within that area the municipality had jurisdiction. All such areas generally had a town planning scheme and zoning applied to them. Beyond the municipal border was rural and agricultural land which did not necessarily have any zoning. With the advent of democracy, municipal borders were extended to create "wall-to-wall" municipalities such that all areas in the country now fall under the jurisdiction of a municipality.

In many provinces areas outside of an existing town-planning scheme are rural or agricultural land. Land use change in these areas is regulated primarily through the Subdivision of Agricultural Land Act, 1970 which (*inter alia*) stops this land from being subdivided but does not impose other land use consent requirements in respect of this land.

In each case the town and regional planning decisions of the individual municipality should be consulted to determine whether the land forms part of a town planning scheme or has been incorporated into the planning domain of the municipality in any other way (such as through the Integrated Development Plan which is prepared in terms of the Municipal Systems Act.

There will be problems with the implementation of this decision by the Constitutional Court in the planning context, these difficulties were raised in argument before the court. Amongst these is:

- that the land owner is generally required to make application for land use change but in a mining context the land owner may not consent to the mining activities; and
- minerals do not lend themselves to "planning" - they are either present or they are not and a municipality can only designate a mining "zone" where minerals are found, this cannot be planned in advance.

The Minister of Mineral Resources has indicated that legislation will seek to regulate this conflict but any such legislation will have to tread carefully on the Constitutional competence of municipalities for municipal planning which has been recognized by the Constitutional Court.]

Environmental regulation of mining

In the High Court the Cape Town Municipality was successful in obtaining an order that an environmental authorization in terms of NEMA was required before mining could commence, because, on the Macsands facts, the land in question was zoned public open space and NEMA required an environmental authorization before land so zoned was put to any other purpose.

The SCA on the other hand, overturned this order and decided that it was unnecessary to examine the applicability of NEMA because the listed activities on which the Cape Town Municipality had relied for their order were repealed in 2010 and thus the Court decided the matter was academic. The Court also declined to issue a declaratory order that mining could commence an environmental authorization under NEMA must be granted.

On the NEMA issue, the Constitutional Court also found against the City of Cape Town (and the Provincial Environmental Department which appealed the SCA's judgment).

The reason given by the Constitutional Court was however different to the SCA's reason. The Constitutional Court found that the fact that the NEMA listed activities related to mining had not been put into effect meant that no declaratory order could be granted requiring that before mining could commence an environmental authorization under NEMA must be granted.

The Court also referred to the complicated transitional provisions in NEMA in terms of which the Minister of Mineral Resources will (for a time) be the decision maker on environmental matters in the mining context.

This finding by the Constitutional Court favours the argument that mining companies have been advancing to the DEA namely that the provisions regulating mining in terms of NEMA have not yet commenced and when they do the DMR not the DEA will in fact regulate these activities. As such, until these commence the status quo which should prevail is that the DMR and not the DEA (and provincial environmental departments) should regulate the environmental aspects of mining and as such no environmental authorization is required before mining can commence.

This obviously leaves open the issue of which activities are “mining” activities which do not require authorization, and which activities do require authorization.

It is arguable that activities directly related to winning minerals such as constructing an open cast pit, and infrastructure directly related to such pit (such as haul roads etc) does not require environmental authorization. However, in general every activity that is listed must be applied for in terms of NEMA so if this involves clearing of indigenous vegetation this would arguable trigger the need for an environmental authorization.

Once again this is an area in which the Minister of Mineral Resources has promised legislative clarification.

In the mean time mining companies are probably advised to follow a cautious approach and apply for environmental authorization for listed activities which are triggered by their activities, or risk being the next test case for this conflict between the DMR and DEA.