

DEVELOPMENTS IN SOUTH AFRICAN WASTE LAW – THE 2013 NEMA AMENDMENT ACT AND RECTIFICATION APPLICATIONS

by Melissa Strydom van Dyk, Senior Associate, Bowman Gilfillan

INTRODUCTION

The end of 2013 saw a flurry of environmental law publications in the *Government Gazette*, including publications which have changed aspects of the waste management regime.

These publications include:

- Amendments to the National Environmental Management Act 107 of 1998 (“**NEMA**”) introduced by the National Environmental Laws Second Amendment Act 30 of 2013 (“**the 2013 NEM Amendment Act**”);ⁱ
- Amendments to the List of Waste Management Activities published in terms of the National Environmental Management: Waste Act 59 of 2008 (“**the Waste Act**”);ⁱⁱ
- Amendments to the NEMA Listed Activitiesⁱⁱⁱ in relation to certain waste related activities;
- Publications under the Waste Act of waste classification and management regulations;^{iv} National Norms and Standards for the storage of waste;^v disposal of waste to landfill^{vi} and National Standards for the extraction, flaring and recovery of landfill gas;^{vii} and the scrapping or recovery of motor vehicles.^{viii}

In this update we discuss certain aspects of the 2013 NEM Amendment Act, which appears to have aligned the NEMA with aspects of the Waste Act, particularly the specific inclusion of the Waste Act as a specific environmental management Act (“**SEMA**”) and the application of section 24G of NEMA to the unlawful commencement of waste management activities.

Please contact us if you wish to discuss any of the other amendments of the law listed above.

UNLAWFUL COMMENCEMENT OF WASTE MANAGEMENT ACTIVITIES

The Waste Act states, amongst other things, that it must be read with NEMA, unless its context indicates otherwise^{ix} and that it is regarded as a SEMA^x (a concept defined in the NEMA which includes a list of environmental management laws). The NEMA provisions relating to enforcement action (including section 24G rectification applications) apply to SEMAs and “environmental authorisations” issued under NEMA or a SEMA. However, as the Waste Act was not previously included in the definition of a SEMA an authorisation granted under the Waste Act, arguably, did not fall within the ambit of section 24G rectification applications.

Thus, the use of a section 24G process to rectify unlawful commencement of waste management activities was debatable. Nevertheless, the authorities applied this rectification process in the waste context. The 2013 NEM Amendment Act has amended the definition (in NEMA) of a SEMA to include the Waste Act and this has, amongst other things, removed the uncertainty of the application of section 24G of NEMA to the Waste Act.

Background to section 24G of NEMA

Section 24G of NEMA was only introduced in terms of the NEM Amendment Act 8 of 2004 (with effect from 7 January 2005)^{xi} and provides for the rectification of unlawful commencement of NEMA listed activities, i.e. commencing with an activity without the requisite environmental authorisation. This is a *sui generis* (unique) remedy for cases where

an application for the authorisation of a NEMA listed activity was not made at the appropriate time or through the normal application procedure.

By submitting an application for rectification in terms of section 24G of NEMA an applicant admits that it has committed an offence, by commencing with an activity unlawfully. An applicant will, further, be subjected to an administrative fine of up to R5 million (this amount has been increased from up to R1million to up to R5 million by the 2013 NEM Amendment Act). After the payment of the fine and submission of certain reports the competent authority must then decide whether or not to grant an environmental authorisation.

Prior to the amendments to section 24G by the 2013 NEM Amendment Act, the application of section 24G on waste management activities (regulated under the Waste Act) was widely debated. The previous wording of section 24G was limited to activities listed under NEMA or SEMAs (which arguably did not include the Waste Act). In the *Interwaste*^{xii} matter the Court rejected the argument that section 24G has nothing to do with the Waste Act. The court held that *“There are provisions in the Waste Act which specifically incorporate and recognise the rights and obligations created in NEMA within the structures of the Waste Act...”*^{xiii}

In the judgment given in the *Interwaste*^{xiv} matter Horn J also expressed the view that the effect of a rectification application is to suspend the penal provisions and, by implication, any unlawfulness and that further action against an applicant who applies for rectification in terms of section 24G is suspended pending the finalisation of the rectification application.^{xv} The holder of a section 24G authorisation is not exempt from criminal prosecution, although it seems that the prosecuting authority has been reluctant to prosecute such offences in circumstances where a rectification application has been made.

The uncertainty of section 24G’s application to waste management activities as well as the suspension of future action pending the finalisation of a rectification application has since been clarified through the 2013 NEM Amendment Act.

Criticism of the section 24G rectification process

The general ambit of section 24G has been widely criticised, as it was considered to be a “quick fix” option for developers who did not want to wait for a lengthy authorisation process and would rather pay a fine, which may be considered insignificant in comparison to the delays of an authorisation process and the financial incentives of progressing with a development.

Another aspect of criticism against the section 24G process is that the assessment and reporting does not follow the more detailed approach as contained in the Environmental Impact Assessment Regulations published under NEMA.

The reluctance to prosecute unlawful activities which have been the subject of a section 24G rectification application has also been criticised, and new subsections have been added by the 2013 NEM Amendment Act to clarify this aspect.

Changes to section 24G as a result of the 2013 NEM Amendment Act

The amended wording of section 24G, which took effect from 18 December 2013, makes it clear that this rectification process relates to offences where a person has commenced with an activity which requires an environmental authorisation under NEMA and / or has *“commenced, undertaken or conducted”* a waste management activity without a waste management licence issued in terms of the Waste Act.

Section 24G now also contains specific subsections relating to criminal investigations and prosecutions which state, amongst other things, that the submission of a rectification application does not derogate from environmental management inspectors' or the South African Police Services' authority to investigate the transgressions in terms of NEMA or a specific environmental management act, or the National Prosecuting Authority's ("NPA") authority to institute criminal prosecution.

The sequence in section 24G, in which the competent authority may issue a directive suspending the activity and receipt of reports assessing the activity, has also changed. The competent authority may now, simultaneously, direct that the activity is ceased and the necessary reports / assessments undertaken. Previously, the competent authority had to wait for the reports and information before it could direct that the activity is ceased (similar to a refusal to grant the authorisation) in terms of section 24G.

The 2013 Amendment Act further includes a provision that the decision maker may, in certain circumstances, defer a decision to issue an environmental authorisation until such time that the investigation is concluded and: the NPA has decided not to prosecute the contravention; or the applicant has been acquitted or convicted in respect of an offence relating to that contravention, and all appeal and review proceedings have been exhausted.

These amendments give a sense of the direction in which enforcement action by the authorities may lead and their insistence that such contraventions are prosecuted. The deferral of a decision to grant or refuse an authorisation, subsequent to the submission of a rectification application, may cause significant delays if a criminal trial has to be concluded before a decision is made to grant or refuse the authorisation. If the competent authority directs an applicant to cease the activity, pending a lengthy criminal trial, this may have significant implications for a project.

Due to the many changes to and unaligned provision of the environmental laws, determining whether a section 24G process is relevant or required in respect of the commencement or undertaking of a particular activity is not a simple task. Often, the activity that supposedly requires rectification is no longer a listed activity. In such circumstances, a rectification application cannot be a recommended remedy if the law no longer requires the activity to be authorised. Evidently, such a determination has to be done on a case-by-case basis considering the facts and relevant timelines.

These amendments and complexities around the application of section 24G reinforce the importance of obtaining adequate legal advice in identifying activities requiring authorisations and potential timing implications, at the earliest stage of a development / activities.

ⁱ The majority of the 2013 NEM Amendment Act commenced with effect from 18 December 2013.

ⁱⁱ Published in Government Notice ("GN") 921 in *Government Gazette* 37083 of 29 November 2013 which has amended the initial List of Waste Management Activities published in GN 718 of 2009.

ⁱⁱⁱ Listing Notice 1 (activities which require a Basic Assessment) and 2 (which requires an Environmental Impact Assessment) published in GN R544 and GN R 545 published on 18 June 2010, respectively which has now been amended by GN R922 and GN R923 published on 29 November 2013.

^{iv} Published under GN R634 in *Government Gazette* 36784 of 23 August 2013.

^v Published under GN 926 in *Government Gazette* 37088 of 29 November 2013.

^{vi} Published under GN R635 in *Government Gazette* 36784 of 23 August 2013.

^{vii} Published under GN 924 in *Government Gazette* 37086 of 29 November 2013.

^{viii} Published under GN 925 in *Government Gazette* 37087 of 29 November 2013

^{ix} Section 5(1) of the Waste Act.

^x Section 83 of the Waste Act.

^{xi} Proclamation R1 in *Government Gazette* 27161 on 6 January 2005.

^{xii} Unreported, referred to as [2013] ZAGPJHC 89, 22 April 2013; available online at <http://www.saflii.org.za/za/cases/ZAGPJHC/2013/89.html>.

^{xiii} Page 11, paragraph 30 of the judgment.

^{xiv} Unreported, referred to as [2013] ZAGPJHC 89, 22 April 2013; available online at <http://www.saflii.org.za/za/cases/ZAGPJHC/2013/89.html>.

^{xv} Page 10 and 11, paragraph 29 of the judgment.