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ENVIRONMENTAL SEMINAR

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ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

Targets, Trends and Tips





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PRIVATE SECTOR INITIATED ENVIRONMENTAL ENFORCEMENT: THE RISE OF NGO INITIATED CRIMINAL INVESTIGATIONS AND ADMINISTRATIVE ACTION LITIGATION



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“The world, for obvious reasons, is becoming increasingly ecologically sensitive. The citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance. The Legislature has rightly seen fit to cater for both aspects in legislation, driven by constitutional imperatives...”

Navsa JA



OUTLINE

- Explore the increasing role of non-governmental stakeholders (NGO) in the protection of the environment especially in the enforcement space.
- Consider different techniques and tools used by NGOs to enforce compliance.
- Briefly analyse some of the recent cases relating to environmental protection and environmental compliance where NGOs played a critical role and extract a few “take aways” for industry from these case studies.
- Make some suggestions on how industry and NGOs can cooperate in the protection of the environment and avoid disruptions often caused by an enforcement or litigation action.

BACKGROUND

- Recent litigation and trends show the growing importance of the NGOs in the enforcement of the environmental laws.
- More specifically, NGOs are using litigation very strategically and are targeting certain government policies as we show further below.
- For example, last 3 years has seen **at least 10** reported judgments primarily arising from the litigation initiated by NGOs targeting certain policies and practices.
- The increasing litigation role of NGOs in the enforcement space and policy realm is partly due to open access to courts and perceived lack of enforcement by the government.
- Viewed against the above background, NGOs will continue to play a significant role in the enforcement of environmental laws and the techniques they use need to be properly understood.

OVERVIEW OF TECHNIQUES

- NGOs have evolved from just focusing on advocacy and the adequacy of the public participation processes in the decision-making.
- NGOs use a variety of instruments to protect the environment and enforce environmental laws or to achieve their objectives. These include:
 - ✓ Transparency and disclosure campaigns and/or access to information requests.
 - ✓ Strategic litigation primarily aimed at government policy which in turn affects various big infrastructure projects.
 - ✓ Increasing threats of private prosecutions in terms of section 33 of NEMA.

NGO TRANSPARENCY AND DISCLOSURE INITIATIVES

- The most well known examples of the NGO disclosure and transparency campaigns in SA are the CER's **Corporate Accountability** and **Transparency** programmes.
 - ✓ The Corporate Accountability programme exposes corporate failures to comply with environmental laws. It relies on the relevant **corporation's environmental disclosures to shareholders** and **criminal prosecution of the relevant corporation's directors** among others.
 - ✓ The Transparency programme primarily relies on access to information requests in terms of the **Promotion of Access to Information Requests Act, 2000 (PAIA)**.

TRANSPARENCY AND DISCLOSURE CONTINUED

- The courts regularly decided cases relating to PAlA requests in the environmental context. Despite various grounds upon which information requests could be declined, the general trend is towards automatic disclosures.
- For example, the courts generally grant access to information requests relating to corporate decisions and activities that impact on the environment because of:
 - ✓ The public interest nature of these decision and polycentric considerations like intergenerational equity; and
 - ✓ The need to entrench open and transparent decision-making process.
- The courts are however mindful not to force corporations to throw open their books without a justifiable cause.
- The recent legislation and regulations also reflect the move towards automatic disclosure. For example, see the **Environmental Impact Assessment Regulations, 2014** on the disclosure of the audit reports.

STRATEGIC LITIGATION CASE STUDIES

- The recent examples of cases where NGOs have used litigation strategically include the following cases:
 - ✓ *Earthlife Africa Johannesburg and another v Minister of Energy* (**Nuclear case**)
 - ✓ *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal* (**DEA Inspectors' mandate**);
 - ✓ *Mpumalanga Tourism and Parks Agency v Barberton Mines (Pty) Ltd* (**Protected areas case**);
 - ✓ *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (**Coal Power Station and Climate Change Case**); and
 - ✓ *Company Secretary Arcelor Mittal SA and another v Vaal Environmental Justice Alliance*

STRATEGIC LITIGATION CASES CONTINUED

- In addition to the above cases, there are several pending or threatened cases. These include the:
 - ✓ Environmental liability in the liquidation and mine closure context (initially pursued by the *Federation for the Sustainable Environment* case);
 - ✓ Administrative Tribunal cases; and
 - ✓ Settled cases.

COAL POWER STATION AND CLIMATE CHANGE CASE

- The case concerned the review and setting aside of the environmental authorisation for a proposed coal-fired power station (the **Project**).
- The main ground of review was that the decision to grant the Project an EA was unlawful because in the light of the country's "international and domestic policy commitments to address climate change", a climate change impact assessment (**CCIA**) for the Project ought to have been carried out as part of the EIA for the Project.
- The review application was preceded by an internal appeal which was partially successful.
- The review application was thought to be necessary because the DEA had no power to withdraw the EA should the CCIA and the public's comments on the assessment "necessitate that result".

COAL POWER STATION AND CLIMATE CHANGE CASE

- The court accepted that a CCIA was a relevant factor in deciding whether to grant the environmental authorisation for the Project.
- As a result, the court remitted the matter of climate change impacts to the Minister for reconsideration. The judgment may be appealed.
- Several key issues arise from this case as it currently stands and these include:
 - ✓ The question of whether the climate change policy can be formulated and applied on an individual level in respect of a **single project**.
 - ✓ The catalytic effect of this decision to motivate the environmental NGOs to challenge current and future similar projects based on the perceived non-compliance with the climate change policy imperatives.
 - ✓ The role of IRP in deciding new generation capacity projects especially the policy adjustments in the IRP which the judgment does not meaningfully deal with.

THE NUCLEAR CASE

- This matter concerned the steps taken by the State between 2013 and 2016 in furtherance of its nuclear power procurement programme.
- The Applicants challenged the lawfulness of:
 - ✓ the determinations made by the Minister of Energy in 2013 and 2016, respectively, in terms of sec 34 of the Electricity Regulation Act, 4 of 2006; and
 - ✓ intergovernmental agreements.
- From an environmental perspective, the Applicants argued that the determinations were unlawful *inter alia* because:
 - ✓ the affected persons and the public were not given an opportunity to make representations on the proposals to make those determinations;
 - ✓ taken without regard to the relevant considerations or with regard to the irrelevant considerations.

THE NUCLEAR CASE CONTINUED

- The case was decided on administrative justice principles and found that the decision-makers ought to have acted in a procedurally fair manner and rationally among others.
- Very little in this decision relates to the protection of the environment or enforcement of environmental laws. The Applicants simply argued that the decision embodied in the sec 34 determination has potentially far reaching implications for the environment.
- The significance of the case is that SA environmental NGOs can no longer be type cast as fighting green issues only. This is because this case primarily concerned itself about the affordability of the nuclear infrastructure when one takes into account other competing interests.

MINERAL SANDS RESOURCES

- The case concerned the validity of a search warrant issued to the DEA for the search for documents and things related to alleged contraventions of NEMA and ICMA at Tormin Mine, a mine operated by Mineral Sands Resources (Pty) Ltd.
- The genesis of the challenge of the search warrant is the perennial problem on who has jurisdiction to regulate or enforce environmental laws in the mining industry. The Applicant challenged the mandate of a DEA environmental inspector and DEA's jurisdiction to bring an application for a search warrant.
- The court impeached (set aside) the search warrant for material non-disclosure. The material non-disclosure was that the DEA environmental inspectors failed to disclose the fact that their mandate to inspect the mine was being challenged and the legislation governing their mandates had been recently challenged.

OVERSTEPPING THE BOUNDARIES

- NGOs like any litigant may overstep the boundaries and cause damage to the interests of other parties or cause delay to projects.
- Several remedies are available to the affected parties and these include:
 - ✓ A claim for damage;
 - ✓ Punitive costs (e.g. Biowatch);
 - ✓ Interdicts etc.

“TAKE AWAY” AND SUGGESTIONS

- Due to diverse nature of the nature of the NGOs, focus is not on any particular environmental media. From an NGO perspective, any aspect of environmental protection may be subject of strategic litigation and any industry may be targeted for environmental enforcement action.
- Defending an enforcement or strategic litigation by an NGO requires a deep understanding of the policy issues underlying the dispute so that an appropriate compromise can be reached.
- To the extent possible, avoid adversarial positions when dealing with the environmental NGOs as courts and authorities are generally sympathetic to policy and social considerations as opposed to pure commercial or economic interests. The examples in this regard include:
 - ✓ The Coal Power Station//Climate Change Case where the IRP (the applicable policy) was given a very cursory treatment.
- Best approach in access to information and transparency cases is disclosure of all the non-proprietary and economical sensitive information.

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