LLM RESEARCH REPORT

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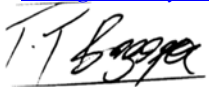
TITTLE: REVIEWING SOUTH AFRICA'S 'ONE ENVIRONMENTAL SYSTEM': CHALLENGES AND OPPORTUNITIES

1. INTRODUCTION

On 8 December 2014, the One Environmental System (OES) replaced South Africa's fragmented environmental management system for mining, a system that had often resulted in excessive lead times, regulatory uncertainty and constraints on investment. The integrated system was introduced to improve the way of doing business and the global competitiveness of South Africa as a mining investment jurisdiction. The advent of the OES, however, has also come with challenges.

There is an African saying that one cannot have two bulls in the same kraal. Shortly interpreted or unpacked, this saying means that you cannot have two regulators regulating one thing as conflicts would be inevitable. In the past, the relationship between the Department of Mineral Resources and Energy[1] (DMRE) and the Department of Environment, Forestry and Fisheries (DEFF)[2] has been defined by tensions over which Environmental Authorisations (EA) a mining company had to apply for prior to the commencement of mining operations, when such EAs were required and who was the competent authority in this respect. The tension was exacerbated by a fragmented regulatory framework which gave rise to administrative ineffectiveness, duplication and contradictions.[3] The mining sector is heavily reliant on foreign direct investment and the general perception has been that the South African mining and environmental regulatory framework is overly regulated and convoluted.[4] The two main pieces of legislation causing the fragmentation were the National Environmental Management Act 107 of 1998 (NEMA) and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), including their respective regulations. The process of having to deal with different departments at different levels was cumbersome and not necessarily coordinated. In certain

[1] For many years DMRE was designated as the Department of Mineral Resources and since 2019, under President Ramaphosa's regime it is known as DMRE.
[2] Up until President Ramaphosa's regime, the Department of Environment, Forestry and Fisheries was known as the Department of Environmental Affairs.
[3] Tracy-Lynn Humby 'One environmental system': aligning the laws on the environmental management of mining in South Africa' (2015) 33:2 *Journal of Energy & Natural Resources Law* 112.
[4] Shamila Mpinga 'The One Environmental System for the mining industry: Has it given rise to intra-governmental conflict of interest?' available at http://www.mlia.uct.ac.za/news/one-environmental-system-mining-industry-has-it-given-rise-intra-governmental-conflict-interest, accessed on 25 January 2020.



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instances, these processes resulted in litigation, which further prolonged the processes and resulted in protracted delays in development.

Now that the OES has been in operation for a number of years, it is necessary to assess whether the OES has resolved the challenges which existed prior to its introduction. Some of the cases emanating from the challenges associated with the OES are still pending before the South African courts even today.[5]

This paper discusses the importance of the OES, legal and practical challenges or problems which came with it, and the future of the OES in the South African regulatory framework. It also focuses on how the courts have dealt with the OES.

2. EMERGENCE OF TWO REGULATORY PROCESSES FOR ENVIRONMENTAL AUTHORISATION IN MINING

Prior to the implementation of the OES, NEMA and MPRDA had their own processes for the environmental authorisation of mining and there was a lack of integration. Environmental regulation of mining or prospecting operations (including mining permits and retention permits), was largely regulated through the requirement to have an Environmental Management Plan or Programme (EMPr) in place, approved by the Minister of Mineral Resources under the MPRDA. Any other activities which triggered listed activities requiring an environmental authorisation, waste management licence, biodiversity permit or atmospheric emissions licence were dealt with under the relevant environmental management Act, largely administered by the Department of Environmental Affairs.

Prior to the enactment of NEMA, the Environment Conservation Act 73 of 1989 (ECA) governed the identification of activities for which environmental authorisation (then called 'record of decision') was required. Section 22 of the ECA provided that no person may undertake an identified activity (an activity which may have a substantial detrimental effect on the environment) without written authorisation to do so. Regulations were published on 5 September 1997 in terms of section 22, identifying activities that may have a substantial

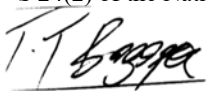
[5] Some of these cases are discussed later in this paper with specific identification of the case which is still pending before the South African courts. At the time this paper was submitted, the Supreme Court of Appeal had just handed down a judgement in *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* 2021 (2) ALL SA 1 (SCA).

detrimental effect on the environment and setting out the procedures and requirements to be followed regarding such activities (ECA EIA Regulations and the Original ECA Listed Activities). The Original ECA Listed Activities were substantially amended on 10 May 2002 in an amendment published in Government Notice R670 Government Gazette 23401.

NEMA came into operation on 29 January 1999. The commencement of NEMA, and Chapter 5 in particular, introduced a new statutory foundation for Environmental Impact Assessments (EIAs), under the 'integrated environmental management' framing concept. The EIA regime is a process which is systematic in nature. The aim is to identify, assess and report impacts on the environment associated with an activity. NEMA largely replaced the ECA as the primary statute that regulates 'listed activities' requiring authorisation, following some form of EIA. In terms of regulations promulgated in terms of the NEMA from 2006 onwards, an EIA may take the form of a basic assessment process or a scoping and environmental impact reporting process. Since 2006, Section 24F (1) of NEMA stipulates that, notwithstanding the provisions of any other Act, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority has granted an environmental authorisation for such activity.

When NEMA came into force, section 24 of the first version of NEMA made provision for implementation and in doing so it gave statutory powers to the Minister of Environment, Forestry and Fisheries to identify activities which could not commence without the Minister's authorisation.[6] Section 24(3) of the first version of NEMA required that the investigation, assessment and communication of potential impacts of activities comply with the procedures under NEMA which were set out in section 24(7) of NEMA. This version of the NEMA allowed every Minister responsible for an organ of state charged with authorising, permitting, or otherwise allowing an activity that requires an authorisation or permission to prescribe regulations on the procedures to be followed and the report to be prepared for purpose of compliance with section 24(3)(a) of NEMA. The Minister charged with such responsibility from the pure reading of NEMA appears to be the Minister other than the Minister of Environment, Forestry and Fisheries and it is safe to say at the time, NEMA envisaged the such Minister overseeing other department, and not DEFF, would be able to prescribe regulations

[6] S 24(2) of the National Environmental Management Act 107 of 1998.



laying down the EA procedure. However, such regulations would need to have complied with section 24(7) of NEMA. The kraal was at this stage being opened for two bulls. This would inevitably create tensions when MPRDA and its supporting regulations was enacted. NEMA would at the later stage introduce section 24L which allows two different departments to exercise powers to issue environmental authorisation jointly where a listed activity is regulated in terms of another law, mining would be a theoretical example of such an activity.

The first set of Regulations and listed activities in terms of Chapter 5 of NEMA were promulgated on 21 April 2006[7] and came into operation on 3 July 2006 (2006 NEMA EIA Regulations and 2006 NEMA listed activities). These Regulations replaced the ECA EIA Regulations. The 2006 NEMA EIA Regulations listed prospecting as an activity which requires basic assessment whereas mining was listed as an activity requiring scoping and EIA process. The 2006 NEMA listed activities came into force on 1 July 2006 except for prospecting and mining.[8] At the time, the DMRE was of the view that provisions of the MPRDA which regulates EMPrs were enough to justify exclusion of mining and prospecting from the NEMA listed activities. [9] In this respect, Humby noted that the DMRE took the position that the environmental requirements in the MPRDA "covered the field" and no additional authorization was necessary. DMRE was of the view that the EMPr sufficiently dealt with the environmental impacts and no additional authorisation was necessary (this is reflected in the case law discussion below). From this, it can be inferred that the DMRE was happy to monopolise regulation, implementation and enforcement powers in the mining sector. On the other hand, the authorities responsible for environment took a stance that they still had to oversee at least the ancillary activities in a prospecting or mining area, as that was their constitutional duty.[10] The power struggle between two regulators had now begun; DMRE versus DEFF.

On 18 June 2010, the second set of Regulations and listed activities in terms of NEMA were promulgated under Government Notice R543 GG 33306, which were subsequently amended, and came into operation on 2 August 2010 (2010 NEMA EIA Regulations). With the 2010 NEMA EIA Regulations coming into operation, the 2006 NEMA EIA Regulations were

[7] GN R385, GN R386 and GN R387 *GG* 28753 of 21 April 2006.
[8] Supra note 3 at 115.
[9] Ibid.
[10] Ibid.

repealed, subject to the transitional provisions. In addition to the 2010 NEMA EIA Regulations, three sets of NEMA listed activities were published on 18 June 2010 and came into operation on 2 August 2010.[11] The 2010 NEMA EIA Regulations also listed mining and prospecting together with the related activities as NEMA listed activities and this did not resolve tensions between the DMRE and DEFF.[12] Many mining companies continued to ensure compliance with both the MPRDA and NEMA by applying for integrated EAs for the listed activities under NEMA and seeking the approval of their EMPr under the MPRDA.[13] The obligation to comply with various statutes and dealing with a number of departments thus persisted.

In an attempt to resolve the persisting tensions between DMRE and DEFF, on 8 December 2014, the third set of NEMA EIA Regulations came into force under the OES. The EIA Regulations, 2014 were published on 4 December 2014 and came into effect the same day.[14] These Regulations and the Listing Notices replaced the 2010 NEMA EIA Regulations and associated Listing Notices. Triggering a listed activity requires that EA be obtained before the commencement of the activity.

In an atmosphere where there are competing and conflicting interests, enforcement is often neglected, or confusion arise on who has the enforcement powers. The earlier versions of NEMA only dealt with enforcement and compliance in a limited manner and only made provision for duty of care and remediation of the environment; protection of workers refusing to do environmentally hazardous work and control of emergency incidents. This changed in 2005 when provisions were made under section 31L of NEMA in relation to powers to issue compliance notices. In addition to the above, it must also be noted that section 31L of NEMA provides that appointed environmental management inspectors (commonly referred to as the green scorpions) may issue a compliance notice if there are reasonable grounds for believing that there has been a non-compliance with NEMA. It bears mentioning that at this time, MPRDA made its own enforcement provisions under section 91. Applicability of NEMA and MPRDA still brought confusion on who has the enforcement powers in the mining areas, and this is discussed in this paper.

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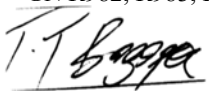
[11] Listing Notice 1 in GN R544 *GG* 33306 of 18 June 2010. Listing Notice 2 in GN R545 *GG* 33306 of 18 June 2010. Listing Notice 3 in GN R546 *GG* 33306 of 18 June 2010.
[12] Supra note 3 at 115.
[13] Ibid.
[14] GN R982, R983, R984 *GG* 38282 of 8 December 2014.



Now that we have highlighted the NEMA provisions, it is pivotal to turn to the MPRDA which previously ran parallel to the NEMA system. Historically, the MPRDA dealt with environmental issues through the requirement of obtaining an EMPr when undertaking mining activities.[15] The MPRDA obliged applicants for rights or permits to submit an EMPr and not an EA, which was approved by the Regional Managers of the respective regional branches of the DMRE, under delegation from the Minister of Mineral Resources and Energy. The MPRDA and its regulations[16] (MPRDA regulations) set out the procedure and the minimum content of the EMPr required for submission. The MPRDA regulations made provision for the scoping and environmental impact assessment reports and in doing so, through section 38(1)(b) of the MPRDA, required the scoping and environmental impact assessment reports to comply with section 24(7) of NEMA.[17] To this date, it remains unclear whether the MPRDA EMPr has the same status as the NEMA EA and this is still yet to be resolved by the courts. This also illustrates the conflicts between two statutes which are administered by the two different departments being DMRE and DEFF.

The licencing and permitting processes which the mining sector had to deal with was not only limited to NEMA and the MPRDA, but they also had to comply with a raft of national statutes including the National Water Act 36 of 1998 (NWA) and the National Environmental Management: Waste Act 59 of 2008 (the Waste Act). Until the OES took effect in December

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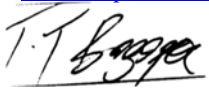
[15] Before the amendment of the MPRDA in June 2013, section 39 of the MPRDA required every person who applied for a mining right in terms of section 22 to conduct an environmental impact assessment and submit an environmental management programme within 180 days of the date on which he or she was notified by the Regional Manager to do so. The section set out the detailed criteria against which the EMPr would be assessed. Section 39(3) of the MPRDA said that the EMPr was required to deal with the impact of the mining operations on the environment. Under section 39(4) of the MPRDA, the Minister was required to approve the plan within 120 days of its lodgement if it met the requirements set out in 39(3) of the MPRDA. Section 39(4)(b) of the MPRDA said that the Minister could not approve the EMPr unless he or she had considered the comments of any State department charged with the administration of any law which relates to matters affecting the environment. On 7 June 2013, section 33 of the MPRDA Amendment Act repealed certain sections of the MPRDA, including section 39. Thus, under the June 2013 MPRDA, section 39 had been repealed and the definition of an environmental management plan had also been deleted from the Act. Despite this, section 22 of the MPRDA, which dealt with applications for mining rights, still required applicants to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39. Section 25(2)(e) of the June 2013 MPRDA further confused matters because it stipulated that the holder a mining right was required to comply with the EMPr approved in terms of section 39 of the MPRDA, albeit that section 39 had been repealed. Problems in the environmental mining regulation persisted for many years and OES was required to try and address these problems.

[16] The MPRDA regulations in GN 527 *GG* 26275 of 23 April 2004. See in particular regulations 48 – 52.

[17] Supreme Court of Appeal heads of argument in the *Global Environment Trust and 2 Others v Tendele Coal Mining (Pty) Ltd and 2 Others* case available at https://cer.org.za/wp-content/uploads/2020/10/08-06-2020-First-Respondents-HOA-and-Practice-note_GET_Tendele.pdf, accessed on 3 March 2021.



2014, residue stockpiles and deposits were excluded under the Waste Act, but licences may have been needed for other waste management activities. This has also been a matter before the South African courts and it is one of the challenges associated with the OES.[18] It was a statutory requirement for mining companies to obtain a Water Use Licence (WULs) for section 21 water uses listed under the NWA. Furthermore, under section 22 of the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) an atmospheric emissions licence had to be obtained, if required, and this remains the position to this date. The duty of care provisions under NEMA and the NWA also created confusion as to whether the closure certificate obtained under the laws regulating mineral development was an exception to mining proponents from complying with 'the duty of care' directives.[19] There were also some in the mining sector, and others among the economic key players who viewed the promotion of sustainable development by the DEFF as an economic development and growth restriction. The OES was introduced to resolve these tensions.[20]

3. ROAD TOWARDS OES

OES was not formulated nor introduced overnight. The OES was introduced to deal with the tensions between the two bulls in one kraal. Establishment of harmonious relations between the two bulls commenced on or around late 2000s between the Minister of Environment, Forestry and Fisheries and the Minister of Mineral Resources and Energy.[21] The OES finds its origin in amendments to the principal legislation, namely by the National Environmental Management Amendment Act 62 of 2008[22] and the Mineral and Petroleum Resource Development Amendment Act 49 of 2008[23] (2008 Amendment Acts). The OES was, however, only brought into force when the National Environmental Management Laws Amendment Act, 2014 came into force, with an effective transitional implementation date of 8 December 2014.

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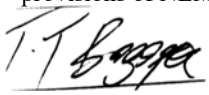
[18] This point becomes clear dealing with the *Tendele* currently pending before the Supreme Court of Appeal below.
[19] Supra note 3 at 116.
[20] Supra note 1.
[21] Supra note 3 at 116.
[22] The Amendment, *inter alia*, identified the Minister of Mineral Resources and Energy where the prospecting, mining and related activity required an EIA in the boundaries of mining or prospecting area (section 2C(2A) and regulation making powers for mine closure requirements and procedure, financial provision and management of residue stockpiles amongst other things were extended to Minister of Environment, Forestry and Fisheries (section 24 of NEMA).
[23] The Amendment, *inter alia*, repealed bulk of the MPRDA's provisions dealing with the environment (sections 39-42 were repealed); mining could not be undertaken without an environmental authorisation (section 5A(a)) and the Minister of Mineral Resources and Energy will be the competent authority to implement environmental provisions of NEMA dealing with prospecting and mining and activities incidental thereto (section 38A(1)).



It is therefore not an unfounded submission made in this paper that there was a regulatory dilemma facing the mining sector because towards the end of the 2000s, the Minister of Mineral Resources and Energy and the Minister of Environment, Forestry and Fisheries started to pursue a common goal towards the achievement of the OES. In 2008, the Ministers reached an agreement to do away with a fragmented environmental system and again in 2008, the South African parliament passed legislative amendments to the environmental provisions in the MPRDA and the NEMA as stated above.[24] However, the agreement was not implemented because the Ministers involved in the negotiation and implementation of the agreement (particularly the Minister of Mineral Resources and Energy and DMRE), waited for the court to decide the extent to which the MPRDA is applicable to the environmental issues in relation to mining in the case of *Maccsand (Pty) Ltd v City of Cape Town & Others*.[25] It can be inferred that the Minister of Mineral Resources and Energy and DMRE had hopes that *Maccsand* would decide that the MPRDA sufficiently covered the environmental field and one bull, being DMRE, could be left in the kraal.

Thus, in 2009 only the National Environmental Management Amendment Act 62 of 2008 came into force whereas the Mineral and Petroleum Resource Development Amendment Act 49 of 2008 was left hanging.[26] The delay in bringing the Mineral and Petroleum Resource Development Amendment Act 49 of 2008 into force could also be used to create an argument that the DMRE and the President appeared to not be in favour of the implementation of the OES because without the enabling legislation coming into effect there would not be any implementation.

When the *Maccsand* case (supra) was heard by the Constitutional Court, the Court did not provide clarity on the alignment of MPRDA with the NEMA, as it appears, based on a legal technicality, but to a great extent also because the Constitutional Court did not comprehend the significance of NEMA authorisations for ancillary activities.[27] The opportunity was before the apex Court to provide much needed clarity but failed to do so due to the lack of understanding of the importance of authorisations granted in terms of NEMA for ancillary activities and thus left it to the political heads of the two relevant departments to find a solution. After the

[24] Supra note 3 at 119.
[25] 2012 (4) 181 (CC).
[26] Supra note 3 at 119.
[27] Supra note 3 at 117.

Constitutional Court's decision in 2011, the Minister of Minerals Resources and Energy and the Minister of Environment, Forestry and Fisheries reached a second political agreement and accordingly initiated amendments to NEMA and MPRDA for the second time.[28]

The Mineral and Petroleum Resources Amendment Act 49 of 2008 was brought into force by Presidential Proclamation No 14 of 2013 published in *Government Gazette* 36512 of 31 May 2013. It proclaimed that 7 June 2013 was the date on which the MPRDA Amendment Act would come into operation. I shall refer to the amended law in effect from 7 June 2013 as "the June 2013 MPRDA". Under the June 2013 MPRDA, section 39 was repealed and the definition of an EMPr was also deleted from the Act. Despite this, section 22 of the MPRDA, which dealt with applications for mining rights, still required applicants to conduct an environmental impact assessment and submit an EMPr. To this date and as evidenced by the pending court cases which are discussed below, there is still confusion on whether the EMPr granted before the coming into effect of the OES is the same as the EA under NEMA and this at times causes regulatory and compliance dilemma which leads to judicial challenges

Section 25(2)(e) of the June 2013 MPRDA further confused matters because it stipulated that the holder of a mining right was required to comply with the EMPr approved in terms of section 39 of the MPRDA, albeit that section 39 had been repealed. Section 37 of the June 2013 MPRDA provided that the environmental management principles set out in NEMA served as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

Schedule II of the MPRDA set out transitional arrangements. This was the same schedule that had existed since the transition from the Minerals Act 50 of 1991 to the MPRDA in 2002. It was therefore a schedule designed to deal with the transitional arrangements between the repeal of the Minerals Act 50 of 1991 and the MPRDA when it was first enacted in 2002. For this reason, item 10 of Schedule II said, for example, that any EMPr approved *in terms of section 39(1) of the Minerals Act* and in force immediately before the MPRDA took effect and any steps taken in respect of the relevant performance assessment and duty to monitor connected with that EMPr continued to remain in force when the MPRDA came into effect. This item of

[28] Ibid 117.

Schedule II therefore regulated the transition from the old Minerals Act and EMPrs granted under it on the one hand and on the other side to the new MPRDA when it was enacted in 2002. The schedule did not contain any provision that dealt with the transition from the regime that operated prior to the June 2013 amendment to the new regime afterwards. Clearly confusion relating to environmental regulation in the mining sector goes back a long way.

The NEMA Amendment Act was designed to introduce the OES that would create a unitary regime in terms of which environmental matters in the mining sector were consolidated and dealt with under a single system. An important feature of this system was to be the introduction of section 5A into the MPRDA. The section says that "no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without, … an environmental authorisation" (emphasis added). This was to be combined with a definition of "environmental authorisation" that assigned to the term the same meaning as under NEMA. An amended section 22(4) also provides that once an application for a mining right is accepted, the Regional Manager has to notify the applicant to submit the relevant environmental reports, as required in terms of Chapter 5 of the NEMA within 180 days from the date of the notice.

Under the OES, which was to come into effect 18 months after the MPRDA Amendment Act had been brought into operation by the President's proclamation, applicants for mining rights needed to obtain EAs, and not approved EMPrs anymore. And they were to do so in accordance with the requirements for such EAs set out in NEMA. The sections of the MPRDA dealing with the power to approve an EMPr and the criteria against which it would be approved had been deleted from the Act with effect from 7 June 2013. However, the new sections of the MPRDA that were designed to replace the EMPr regime and give effect to the OES, would only come into effect 18 months later. This left a considerable legislative lacuna and resulted in two parallel systems administered by two bulls in one kraal. Many persisting challenges of the OES relating to enforcement, permitting and compliance are linked to the above parallel system which existed between NEMA and the MPRDA.

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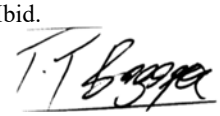
4. THE DESIGN OF THE OES

The roll-out of the OES commenced on 8 December 2014 and entailed a streamlined approach to the processes of licensing for mining rights, EAs, WMLs and WULs. Under the OES, the Minister of Mineral Resources and Energy is the competent authority for applications for EAs and WMLs in terms of the NEMA and the Waste Act respectively, for prospecting and mining activities, as well as the activities relating to the primary processing of minerals. The Minister of Environment, Forestry and Fisheries is the appeal authority for these authorisations.

In essence, the OES is an agreement between the Minister of Mineral Resources and Energy, Minister of Environment, Forestry and Fisheries and the Minister of Human Settlement, Water and Sanitation that all environment-related aspects of mining and prospecting operations will be regulated through the OES (which is the NEMA system) and that all environmental provisions contained in the MPRDA will be repealed.[29] The Environment Minister sets the norms and standards and provides the regulatory framework relating to prospecting, exploration, mining or operations, and the Minister of Mineral Resources and Energy will implement the NEMA provisions and the subordinate legislation as far as it relates to mining and prospecting operations.[30] The Minister of Mineral Resources and Energy will issue EAs in terms of NEMA for prospecting and mining operations, and the Minister of Environment, Forestry and Fisheries will be the appeal authority for these authorisations. The three ministers (minerals, environment and human settlement) will agree on fixed time frames for the consideration and issuing of the authorisations; be it mining rights, WULs, WMLs and/or EAs in their jurisdiction and also agree to align the permitting time frames and processes.[31]

The legislature has since repealed all environmental management provisions in the MPRDA. Under the OES and section 50A of NEMA, the Minister of Environment, Forestry and Fisheries is empowered to stipulate the regulatory framework for environmental management. The DMRE is mandated to implement the framework. Practically, to obtain an EA, MPRDA EMPr is no longer required, and all that is required of a mining company is to submit a NEMA EA application to the DMRE.[32] The Minister of Environment, Forestry and Fisheries therefore

[29] S 50A(2) of Act 107 of 1998.
[30] Ibid.
[31] Ibid ss 50A(2)(a)-(d).
[32] Ibid.



only serves as the appeal authority for the decisions taken by the DMRE. The OES also provides a 300-day timeframe within which EAs applications must be processed.[33]

According to the articles available on OES, its introduction was met with mixed feelings by both the mining sector and civil society, since the previous uncoordinated, contradictory system significantly delayed mining operations, resulting in major financial losses and delays in development.[34] Over the years, the mining companies found comfort in allegations that the delays in the application processes prior to commencement of mining operations, were as a results of objections which the DEFF lodged in terms of NEMA. In relation to the processing of EA applications, there is a belief in the mining sector that by aligning the timelines within which such applications must be processed, the OES brings with it the much needed certainty within the regulatory space, which has the potential to reduce delays previously experienced and thus attract the much needed investments for the mining sector.[35]

Civil society, mining affected communities (which are mostly communities in poor rural areas) and environmental advocacy groups as well as environmental activists, including the Centre for Environmental Rights have noted their concerns about the OES.[36] In general, these groups have collectively argued that the consignment of the environmental oversight function to the DMRE, which is a department that has a mandate to promote extraction of minerals, creates an inevitable conflict of interest. The DMRE's aim is to contribute towards the development of South Africa through exploitation of mineral resources and energy, but effectively it now fulfils the DEFF's mandate, which requires balance of the environment with socio-economic factors.[37]

The contractions and tensions between the DMRE and the DEFF are nothing new. In the previous years and in most instances, the mining sector together with other key economic players in South Africa have seen and interpreted sustainable development, which is promoted by the DEFF, as a restricting factor of economic development and growth. The OES was

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[33] Ibid.
[34] Sipho Kings 'The day big mining won the battle to wreck the environment' available at *https://mg.co.za/article/2017-05-16-the-day-big-mining-won-the-battle-to-wreck-the-environment/*, accessed on 30 January 2020; Supra note 4.
[35] Supra note 1.
[36] Centre for Environmental Rights 'Mining companies launch their first attacks on the One Environmental System' available at *https://cer.org.za/news/mining-companies-launch-their-first-attacks-on-the-one-environmental-system* accessed on 25 January 2020; Supra note 4.
[37] Ibid.

introduced to address this tension.[38] Environmental activists argue that the OES has not been successful in ironing out these tensions and that it will not succeed because the introduction of the OES was mainly orchestrated by powerful and influential economic key players in the mining and energy sector and not by the DEFF itself.[39] The argument further stresses that the DEFF is subjected to the treatment as an 'orphan department' because it does not possess the equivalent economic and political muscle and advantage, as that of the DMRE.[40] There are also those who think because the DMRE lacks expertise, capacity and political will to strengthen compliance with the environmental laws through enforcement, the OES will result in compromised environmental management in the mining sector. One continues to wonder whether the OES addresses the tensions which existed prior to its introduction, or whether it offers more opportunities than challenges.

5. ENFORCEMENT UNDER THE OES

The fragmented regulatory regime described above wasted resources such as skilled and unskilled, time and man-power in the execution of exercises which were repetitive under the different legislative instruments such as the actual enforcement of authorisations and permitting.[41] Another flaw of this fragmented, confusing and uncoordinated regime was the possibility of differing values placed on conservation aspects during the application process by the relevant authority.[42] This confusion persisted and the people and the environment continued to suffer.[43]

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[38] Ibid.

[39] Glenn Ashton 'An example of the impacts of adopting the 'One Environmental System' of mining governance: some lessons in environmental governance from MRC's Tormin mine' 2017 *Conversation around Transparency and Accountability in South Africa's Extractive Sector* 17.

[40] Ibid.

[41] William Junior Tashinga Musodza *The One Environmental System, did we get it right* (LLM Thesis, Witwatersrand University, 2018) 19.

[42] A practical example would be where decisions are taken by local government based on conservation and development considerations when DMRE will not place any value on this but focus on national developmental goals.

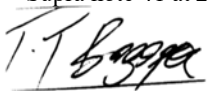
[43] C Bosman, L Kotzé *et al* 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective' (2004) 19 *SAPR/PL* 411 at 411. In this instance the Potchefstroom City Council sued the water and sanitation department, in order to ensure that mining companies would repair a dam storing the City's water. The legal proceedings were triggered by confusing water regulations which were applicable at the time. Practical example of the confusion which was in existence because of law was seen in 2012 in a situation which played out in Potchefstroom-please see the source referenced in this footnote for more detail.

Under the fragmented regime described above, NEMA made provision for a corps of dedicated Environmental Management Inspectors (EMIs) responsible for compliance monitoring and enforcement of the NEMA and SEMAs. [44] At the time of undertaking the enforcement work, the DMRE indicated that it has a shortage in man-power. It could be argued that this shows lack of will to enforce environmental laws on the part of DMRE, as it would rather channel its energy and resources towards the promotion of the exploitation of mineral resources with less concern for the environment. The OES remedied the DMRE's position through the introduction of a parallel body which is called Environmental Mineral Resource Inspectors (EMRIs). The role of EMRIs is to enforce and ensure compliance with NEMA, the MPRDA and SEMAs. EMRIs are appointed by the Minerals Minister and they have exclusive jurisdiction over mining and related enforcement matters.[45] The DEFF and the Minister of Environment, Forestry and Fisheries no longer have immediate implementation/enforcement capabilities in the mining sector under the OES, unless the EMRIs are unable or not adequately able to fulfil the compliance monitoring and enforcement functions.[46] However, they can still play a role in the protection of environmental management as they have the power to create policies which dictate to the DMRE how to use the authority they do have.[47] I will also discuss how this structure has caused problems in the recent past.

6. IMPLEMENTATION OF OES AND PERSISTING CONTROVERSIES

Following the advent of the OES, the Minister of Mineral Resources and Energy, the Minister of Human Settlement, Water and Sanitation and Environment Minister established an Inter-Departmental Project Implementation Committee (IPIC) which was made up of departmental officials. Initially, the IPIC was tasked with ensuring that amendments in the various pieces of legislation were undertaken, and to ensure that the review and alignment of administrative processes took place to ensure that the legal mandate is provided to the Minister of Mineral Resources and Energy to perform such function. Post 8 December 2014, the IPIC's task was to monitor the effective and efficient implementation of the OES. After identifying the OES challenges, the IPIC had to resolve them. If the IPIC could not resolve such challenges, they

[44] Part 2 of Act 107 of 1998.
[45] S 31BB(1) of Act 107 of 1998.
[46] Ibid, s 31D(4)-(9). One can say the Minister of Environment, Forestry and Fisheries have 'step-in and assist powers' which are enforced in concurrence and in consultation with the Minister of Mineral Resources and Energy
[47] Supra note 41 at 24.



had to be escalated to the Director-General or Ministers forum.[48] One needs to also mention that the IPIC accounted to the Minerals Minister, Environment Minister and had 6 task teams including, *inter alia*: (1) Enforcement, that ensured the enforceability of legislation to ensure greater compliance. (2) Co-ordinated timeframes which coordinated time frames and processes between the respective laws. (3) Capacity, which ensured capacitation and effective implementation.[49]

A turn needs to be made to now look at whether the IPIC has been successful in its mandate by looking at on-going debates and in doing so, I will be answering the question on whether the challenges and tension which existed prior to the introduction and implementation of the OES have been resolved. Legal environmental advocacy groups are of the view that OES was a necessity from the compliance point of view; however, the much needed law reform is faced with difficulties brought about by poor legislative drafting, the staggered approach towards the commencement of the amendment of different sections of legislation, and an incomplete execution of the OES which has not been helpful in dealing with the previous challenges and tension that existed prior to its introduction and implementation.[50] Furthermore, the advocacy groups are of the view that the mining companies are always looking to take advantage of the law where there is legislative uncertainty and the cases I will discuss in this paper demonstrate that the mining companies want to find ways to circumvent their obligations under the OES.[51] It would be premature to determine whether the OES has addressed the challenges and confusion created by the previous system, without looking at the kind of issues which came before the courts.

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[48] Department of Environmental Affairs 'Portfolio Committee on Environmental Affairs Meeting on Implementation of the One Environmental System of 14 February 2017' available at https://pmg.org.za/files/170214One_Environmental_System.pptx, accessed on 25 January 2020 at 5.

[49] Ibid at 6.

[50] Centre for Environmental Rights 'Mining companies launch their first attacks on the One Environmental System' available at https://cer.org.za/news/mining-companies-launch-their-first-attacks-on-the-one-environmental-system, accessed on 25 January 2020; Centre for Environmental Rights 'As new environmental laws for mines start coming into effect, confusion reigns' available at 'https://cer.org.za/news/as-new-environmental-laws-for-mines-start-coming-into-effect-confusion-reigns', accessed on 17 March 2021. There are steps which still need to be taken for the full implementation of the OES. The President June 2013's proclamation suspended commencement of MPRDAA which contains various important provision which needs to come into force. One of the outstanding provision which has been suspended indefinetely is section 38B, which makes provisions for EMPR approved under the MPRDA before to 8 December 2014 to be deemed to be a NEMA environmental authorisation.

[51] Ibid.

Environmental interest groups and activists have also directed an attack on the DMRE. They question whether the DMRE is comfortable with the decentralisation of its power which it enjoyed under the previous system. One of the on-going debates and the views put forward by the activists is that the DMRE has so far demonstrated an unwillingness to enforce the environmental laws, or has through deliberate conduct interpreted the law in a manner that ensures that sound environmental management is defeated.[52] The activists take the debate further and admit that only initial steps have been implemented to commence with the establishment of the necessary designation and capacity within the DMRE to enable it to execute its role of monitoring and enforcing compliance with NEMA under the OES.[53] In essence, all the signs associated with the warnings raised by civil society against placing the implementation of NEMA with the DMRE are already evident.[54]

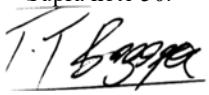
Questions such as what authorisations are required under the MPRDA and NEMA, EMPrs *versus* EA, who is the competent authority, who has enforcement powers and what regulations are applicable, remain unresolved even post commencement of the OES and this caused on-going uncertainty and confusion which had to be resolved by the South African courts.[55] Taking the above into consideration, it would be unrealistic to say IPIC has succeeded in executing its mandate.

7. PERSISTING CHALLENGES AND JUDICIAL CONSIDERATIONS

(a) Whether an EA was required for mining pre-OES

Shortly after the introduction of the OES and in relation to the Elandsfontein and Mineral Sands Resources project in the Western Cape, Elandsfontein Exploration and Mining (Pty) Ltd (EEM), which is a mining company, took a decision to withdraw its application for an NEMA EA made in order to authorise listed activities by provincial environment authorities.[56] It has done so at the time that it has nevertheless commenced undertaking some of the listed activities

[52] Ibid.
[53] Ibid.
[54] Supra note 67
[55] *West Coast Environmental Protection Association v Minister: Department of Water and Sanitation and Others* unreported case no WT 01/17/WC of 20 November 2017.
[56] Supra note 50.



which requires an EA under NEMA, such as clearing vegetation and building roads, which are some of the listed activities that were the subject of its application just withdrawn.[57]

According to EEM, it required no authority from the environmental regulators since the DMRE was the competent authority to administer and enforce NEMA, under the OES.[58] As I have described the design of the OES system above, its understanding was correct, however, instead of applying for EA for the NEMA listed activities it was undertaking from the DMRE, it relied on its DMRE approved EMPr which was approved under the MPRDA.[59] The NEMA listed activities which were undertaken (clearing of vegetation and road construction) were not dealt with, in that MPRDA DMRE approved EMPr and this meant that those activities were undertaken without following any EIA process which ensures that environmental impacts are mitigated and managed – the purpose of EA. Therefore, unauthorised activities were undertaken.[60]

The publicly available information shows that calls were made on the DMRE to put an end to the illegal activities described above (to excise its powers under the OES to enforce NEMA compliance).[61] The DMRE's position and view was that the EMPr remains in force and valid until reviewed and set aside on appeal or by a court of law, and EEM could carry on its 'mining activities' until that happens.[62] It appears that the fact that the EMPr did not deal with the mitigation and management of environmental damage that would be caused by clearing of vegetation and road-construction, remained irrelevant to the DMRE, despite its obligation to administer and enforce environmental laws, specifically NEMA.[63] This demonstrates the attitude of the DMRE towards its obligations under the OES. It shows that not all the challenges which existed prior to the introduction and implementation of the OES, have been addressed as enforcement remains an issue; as the DMRE appears to be more concerned with the promotion of exploitation of mineral resources than with enforcement of the environmental laws. The contentious issue on whether an EA was required for mining pre-OES is still pending before the South African courts even today in the Tendele case discussed below.

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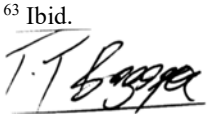
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Supra note 50.
[62] Ibid.
[63] Ibid.

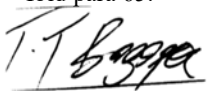


(b) Enforcement Challenges

Furthermore and in relation to enforcement issues, it is important to mention *Mineral Sands Resources (Pty) Ltd (MSR) vs Magistrate for the District of Vredendal*.[64] This case was about the validity of a search warrant which was issued by the magistrate of the district of Vrendendal on 26 September 2016 in which a search of the MSR Tormin sand mine near Lutzville was authorised. The application, *inter alia*, raised questions "(i) relating to the interpretation of legislative provisions which gives effect to the OES agreement, an arrangement intended to establish a single environmental system for assessing the environmental aspects of activities, including mining activities, and (ii) relating to the powers of the different inspectors appointed to monitor and enforce compliance with NEMA."[65]

The MSR case was heard in the Western Cape High Court but the challenge to the validity of the warrant which was issued will not be the focus of this paper. This paper only focuses on the MSR case in relation to the OES. In the year 2007, MSR made an application for a mining right to the DMRE to mine heavy mineral sands (zircon, ilmenite, garnet, leucoxene and rutile) in the Vredendal district on a 12 km stretch of beach adjacent to a farm.[66] The judgment states that this required the preparation of a Mining EMPr.[67] Various amendments were made to MSR's authorisations throughout the years.[68] Fast-forward to the year 2015, in April 2015, complaints were received by the Department of Environmental Affairs, Development and Planning, Western Cape (DPWC) to the effect that MSR had: (i) built a structure which looks like a jetty in the sea, (ii) entered a decommissioned mine located in a nature reserve and removed material which was not authorised, (iii) increased the SCP area, (iv) undertook a listed activity outside the approved layout (constructed pipes), (v) engaged in mining activities in an area which is conserved and (vi) undertook mining activities within a 10 m buffer zone.[69] This was not the first complaint received about MSR. In a letter dated 15 May 2015, the DPWC informed the DMRE of these complaints, clearly on the ground that the DMRE has the statutory competency to deal with these matters under the OES. MSR contended that it only required the

[64] unreported case number 18701/16 of 20 March 2017.
[65] Ibid para 1.
[66] Ibid para 45.
[67] Ibid.
[68] Ibid para 46 – 64.
[69] Ibid para 65.



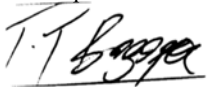
MPRDA approved EMPr to undertake its activities and disputed that it had any obligation to amend its existing NEMA EA or any additional NEMA EA.[70]

On 29 May 2015, through correspondence between DEFF and MSR, an environment inspector informed MSR that DEFF will undertake an inspection at their mining area on 29 May 2015.[71] MSR requested a response to its correspondence dated 21 May 2015 which questioned DEFF's authority to investigate or undertake a compliance site visit. DEFF replied by stating that DEFF was the competent authority for the enforcement of the Coastal Act[72] and its regulations. The main issue was that MSR had control over the mining area and wanted to understand DEFF's legal authority. According to MSR, all environmental related activities within a mining area fell within the jurisdiction of the DMRE under the OES as from 8 December 2014. What MSR was trying to ascertain and establish was DEFF's competency to enforce laws within a mining area.[73]

Only after about 16 months a group of DEFF officials arrived at Tormin mine on 29 September 2016 to execute a search warrant issued by the Magistrate on 28 September 2016 in terms of section 21 of the Criminal Procedure Act 51 of 1977. MSR successfully challenged the warrant which was issued on the grounds that material disclosures were not made and the DMRE lacked jurisdiction to enforce environmental law in the mining area.

The court held the view that if inspectors from different departments were to have concurrent jurisdiction over mining, section 31D(4)-(9) of NEMA would be reduced to a mockery. The court interpreted section 31D(4)-(9) of NEMA and concluded that the Minister of Environment, Forestry and Fisheries can only step into the mining jurisdiction and concurrently appoint inspectors with the Minister of Mineral Resources and Energy, where the mining inspectors have failed to fulfil their obligations and this can only be done if the Minister of Mineral Resources and Energy agrees.[74] The court held further that efficient administration can be achieved through non-competing mandates and section 31D of NEMA must be interpreted in a manner that gives mining inspectors an exclusive jurisdiction to enforce and monitor

[70] Ibid at para 63.
[71] Ibid at para 69.
[72] National Environmental Management: Integrated Coastal Management Act 24 of 2008.
[73] Supra note 64 para 69.
[74] Ibid para 98.



environmental legislation in the mining sector, save for where section 31D(4)-(9) is applicable and this best gives effect to the OES.[75]

From the above case discussion, it is apparent that a degree of confusion is still prevalent specifically in relation to who has the enforcement powers in the mining areas. Mining companies have raised this and other concerns with the respective regulators and in some instances this has resulted in an impasse amongst the parties. As a result, the courts are inevitably required to intervene and determine how the provisions of NEMA must be interpreted, due to the inconsistencies and lack of clarity in the prevailing legislative system. On this basis it appears that the OES does not offer more opportunities but offers further challenges.

(c). Regulatory Challenges

In this context, it is necessary to consider the consolidated matter of *Minister of Mineral Resources vs Stern & others*[76] and *Treasure the Karoo Action Group & another vs Department of Mineral Resources & others.*[77] These matters assess the legality of the Regulations for Petroleum Exploration and Production, 2015 (Petroleum Regulations), published by the Minerals Minister on the 3 June 2015 in terms of the MPRDA. The decision of the Grahamstown High Court was upheld by the Supreme Court of Appeal in the matter of *Stern N.O. and others vs Minister of Mineral Resources*[78] to set aside the regulations made by the Minerals Minister on the grounds that he lacked statutory authorisation to have made those regulations under the MPRDA. The Minerals Minister had made the regulations under the repealed MPRDA provisions. Pursuant to the OES, only the Environment Minister, and not the Minerals Minister, has the power to regulate the matters which are the subject of the Petroleum Regulations.

It is apparent that powers to make regulations in respect of matters related to the environment sometimes create confusion under the OES. When the design of the OES was discussed earlier in this paper, it was noted who the OES envisaged to have powers to make regulations and it

[75] Ibid para 98.
[76] (2019) 3 All SA 684 (SCA).
[77] Ibid.
[78] Ibid.

is not the Minerals Minister. Under NEMA, section 50A(2)(b) expressly provides that the Environment Minister must set the regulatory framework, norms and standards in this regard. The repeal of section 107(1)(a) of the MPRDA in consequence of the OES is relevant under the circumstances as this position divested the Minerals Minister of the power to make any regulations regarding the matters specified in section 107(1)(a)(i)-(viii). The Minerals Minister therefore lacks authority to, *inter alia*, make regulations regarding:

'(i) the environmental conservation at or in the vicinity of any mine or works,

(ii) the impact management of any mining operations on the environment at or in the vicinity of any mine or works,

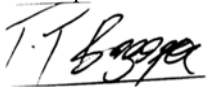
(iii) the rehabilitation of disturbances of the surface of land where such disturbances are connected to prospecting or mining operations,

(iv) the prevention, control and combating of pollution of the air, land, sea or other water, including ground water, where such pollution is connected to prospecting or mining operations, and

(v) the environmental management programmes monitoring and auditing.'[79]

It follows that in terms of NEMA that the only statutory powers to make regulations in relation to the impacts of the above activities on the environment are those vested in the Environment Minister. These powers include identification of a listed activity under section 24(2), making regulations under section 44(1) to carry out the purposes and provisions of NEMA, making regulations under section 24(1A) and section 24(5) setting out procedures and requirements for an application for an EA and development or adoption of norms and standards in terms of section 24(10) in respect of, *inter alia*, a listed activity. Therefore, it is clear that the Minerals Minister has no regulation-making powers relating to the management of the environmental impacts of exploration or production of petroleum or the process and requirements of an application for an EA. All of this is entirely in harmony with what the OES aimed to achieve as stipulated in s 50A(2)(b) of NEMA. The Minerals Minister 'powers to make regulations are therefore, limited to those set out in section 107(1)(b)-(l) of the MPRDA.'[80] This case highlights the position that even after the introduction of the OES, the respective regulators which were part of the negotiations still do not seem to fully understand what the new regulatory regime seeks to achieve or what its practical implications are. This is evident in the

[79] Ibid para 30.
[80] Ibid para 31.



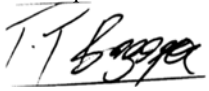
arguments which were advanced by the DMRE below. There is still prevailing confusion on who has the authority to enact what regulations, especially on the part of the DMRE.

An additional matter under consideration was whether all or some of the Petroleum Regulations were authorised by one or more of these provisions.[81] A large number of provisions of the Petroleum Regulations plainly seek to manage the potential impacts of petroleum exploration and production on the environment (e.g. requirements to appoint independent hydrocensus specialists, submit risk assessment reports, underline sites to prevent contaminations, protect water sources).[82] The process and requirements of an application for EA is also dealt with under the Petroleum Regulations. Some of the Petroleum Regulations' provisions could be construed as purely dealing with the technical aspects of hydraulic fracturing. However, most of them in context are aimed at protecting the environment by, *inter alia*, ensuring well integrity and by reduction of risk of contamination and pollution through leakages and blowouts. Accordingly, it is only a few provisions which do not deal with the environmental aspects of petroleum exploration and production.[83]

The court dealt with the Petroleum Regulation and held that section 44(1C) of NEMA prohibited various provisions under the Petroleum Regulations because they fall exclusively under the competency of the Environment Minister and concluded that this means that environmental provisions of the Petroleum Regulations are *ultra vires*.[84] The Minerals Minister argued that the Petroleum Regulations were merely 'process provisions'. However, from section 50A(2)(c) of NEMA and section 38A of the MPRDA, it is clear that the Minerals Minister is the competent authority to issue EAs in terms of NEMA. EAs are not issued or approved in terms of the MPRDA. The process provisions were therefore not authorised by section 107(1)(g) of the MPRDA.[85]

The arguments advanced by the Minerals Minister amongst others were that the process provisions were authorised by regulation 16 of the Environmental Impact Assessment Regulations and for this reason the Environment Minister had no power to make regulations

[81] Ibid para 32.
[82] Ibid para 32-36.
[83] Ibid para 37.
[84] Ibid para 39.
[85] Ibid para 40.



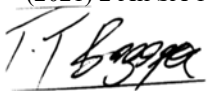
conferring authority on the Minister of Minerals.[86] Again, two bulls in same kraal were pushing each other in an attempt to clarify who has powers to do what. This appears to have not been clear under the legislation and caused tensions between the bulls.

However, the flaw which is fundamental in the above argument is that it ignores the OES and the related shift in the statutory framework of environmental management. The contention in the argument is that the Minerals Minister had exactly the same regulation-making powers in respect of the environment, before and after the introduction of the OES and its consequential amendments. This position is incorrect. Following the introduction of the OES, the environment-related object of section 2(h) of the MPRDA is to be achieved through the application of NEMA to petroleum exploration and production. The Petroleum Regulations' provisions aimed at the management of environmental impacts were neither necessary nor expedient in order to achieve the objects of the MPRDA.[87] The arguments advanced by the DMRE in this case evidently shows that the DMRE is yet to fully embrace the OES. This is the enforcement authority under the OES and for as long as it adopts the attitude of ignoring the OES, the challenges and confusion which existed prior to the introduction and implementation of the OES will continue to prevail in respect of the environmental regulatory space in the South African mining sector.

(d). Constitutional Court's opportunity to provide clarity to murky water

As part of the persisting challenges to the OES system in South Africa, the Supreme Court of Appeal had an opportunity to put clarity to the murky water but it did not fully utilise the opportunity and now all eyes are on the Constitutional Court. The opportunity to provide clarity arose from the *Global Environmental Trust and Others vs Tendele Coal Mining (Pty) Ltd and Others*.[88] Although the Global Trust Environmental Trust case went before the Kwa-Zulu Natal High court as an 'interdict case', what is important for the current purposes is that in seeking an interdict to prevent Tendele from mining coal at the borders of the properties situated near the Hluhluwe-Imfolozi Nature Reserve, the permitting issues surrounding the OES were put before Court. The applicants argued that Tendele mining operations were unlawful on the basis that it did not have, *inter alia*, the environmental authorisation granted in

[86] The EIA regulations in GN R982 *GG* 38282 of 4 December 2014 as amended.
[87] Ibid.
[88] (2021) 2 All SA 1 (SCA)



terms of NEMA[89] to undertake listed activities, and the WML granted in terms of NEMWA[90] to undertake waste management activities. This argument was made even though Tendele was a holder of the valid EMPr approved prior to the OES. Of interest, the Global Environmental Trust case demonstrates that the OES is still bedevilled by many challenges and uncertainty even when it comes to issues of permitting and compliance. Some of the broad issues which the court grappled with was whether Tendele's EMPr which was obtained before the OES gave Tendele an entitlement to continue with its mining operations which existed before the OES. Furthermore, whether an EA under NEMA and WML under NEMWA were required for the mining operations which existed before the OES. Even in practise today, this issue remains unresolved with various law firms holding different opinions. This statement is supported by the arguments led in the Global Environmental Trust case.

In the High Court, the applicant argued that the legislative amendments to NEMA and the MPRDA did not take away Tendele's statutory obligation to obtain an EA, as it is a necessary requirement to ensure legislative compliance and Tendele Coal Mining Company (Pty) Ltd failed to comply with the provisions of NEMWA. Tendele also came out with the guns blazing and argued that it does not need an EA as its mining operations are undertaken under the valid EMPr granted before the OES. Tendele further argued that it also does not require a WML as its continuing waste management activities lawfully commenced before commencement of the NEMWA residue stockpiles and residue deposits provisions. The High Court outlined the legislative amendments dealing with environmental authorisations[91] and concluded that the EMPr granted prior to the OES was sufficient to undertake the mining operations as it can be deemed to be an EA under the circumstances[92] and Tendele does not need a WML.[93]

This case clearly highlights that there is still a level of uncertainty on what permits and authorisations are required for the entities which commence before and after the introduction of OES. Such challenges, if not properly understood has the potential to lead to wrongful compliance notices being issued or not issued in circumstances where they are supposed to be issued.

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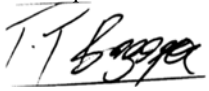
[89] S 24 of Act 107 of 1998.
[90] Ibid at s 43.
[91] Supra note 88 para 48 - 56.
[92] Ibid para 71.1.
[93] Ibid para 101.

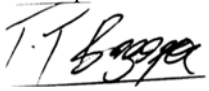


Furthermore, it is also vital to mention that the above Global Environmental Trust's judgement which is appealed to the Constitutional Court was handed down by the Supreme Court of Appeal on 9 February 2021.[94] Of importance and before turning to the 9 February 2021 judgment, one needs to highlight some of the arguments put forward by both the appellant (Global Environmental Trust) and the respondent (Tendele) to the extent that they relate to the challenges brought by the OES. The appellant, in its heads of arguments submitted that the question is whether mining activities could be undertaken without an EA issued in terms of section 24 of NEMA.[95] It is important to note that in asking this question, the appellant did not distinguish between the activities commenced before and after the OES. The appellant further submitted that the respondents argued that MPRDA exclusively governs the EA, and where the EMPr is obtained mining activities can commence.[96] This was done again without interrogating the position before and after the OES.

Furthermore, the appellant dovetailed the applicable NEMA provisions and argued that an EMPr must be understood as the prerequisite before an EA. They further submitted that transitional arrangements relating to the OES do not have the consequence of dispensing with the requirement to obtain an EA under NEMA.[97] It appears that the Supreme Court of Appeal had an opportunity to clarify the murky water as it appears that the legislation has failed to do so but as I will show below, it missed the opportunity which is now before the Constitutional Court. The appellants also argued that the court *a quo* should have pronounced on the necessity to obtain a WML and determined the lawfulness of the respondent's activities. The appellant again didn't necessarily distinguish between the situations which existed before and after the OES.

Before the Supreme Court of Appeal, the respondent argued that the respondent's mining activities commenced before the OES and as such they do not need to be authorised by an EA issued in terms of NEMA, because when they commenced, environmental impacts of mining activities and activities incidental thereto were exclusively regulated under the MPRDA with the requirement to obtain an EMPr.[98] Furthermore, the respondent argued that for the activities which commenced after the OES was introduced, but for which an EMPr and mining right

[94] *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* (2021) 2 All SA 1 (SCA).
[95] Supra note 17 para 5.
[96] Ibid para 6.
[97] Ibid para 16.
[98] Ibid para 4.1.



applications were pending when the OES was introduced, it must be determined in terms of the fragmented regulatory system which was the law applicable before the OES.[99]

By the time of submitting this paper, the Supreme Court of Appeal had dismissed the Global Trust case by finding that the appellants had failed to provide the necessary evidence supporting their allegations that Tendele was conducting NEMA Listed Activities without the requisite EA.[100] One can only infer that the OES continues to offer challenges to the South African environmental system in the mining sector. Although the majority judgment[101] did not decide on the status of the EMPr approved in terms of the MPRDA which seems to be a thorny issue around the OES, for the purposes of this paper I will highlight what Schippers JA held in the minority Judgment. [102]

In the minority judgement, the Supreme Court of Appeal per Schippers JA took the view that a valid EMPr approved in terms of the MPRDA, prior to the coming into effect of the OES, cannot be regarded as an EA issued in terms of the NEMA notwithstanding the transitional provisions I have set out above.[103] The Supreme Court of Appeal found that the transitional provisions which reinforced the implementation of the OES, did not elevate the status of an MPRDA EMPr to that of a NEMA EA but rather that it should be deemed to be an EMPr approved in terms of NEMA.[104] The Supreme Court of Appeal found that an MPRDA EMPr does not authorise NEMA listed activities whose impacts must be assessed prior to the issuance of an EA for mining activities.[105] The implication of this would be that all mining companies which never complied with the NEMA regime (and the Environmental Conservation Act, 1989 (ECA) before that) and which relied on their MPRDA approved EMPrs would urgently need to assess the lawfulness of their operations. From around 1997/98, the ECA and then the NEMA regime, has required records of decision (ECA) and an EA (NEMA) to conduct Listed Activities as *Gazetted* under these Acts.

The Supreme Court of Appeal's minority judgment finding seems to be a departure from the intention of the legislature which is reflected in section 12(4) of the 2008 NEMA Amendment

[99] Ibid para 4.2.
[100] Supra note 94
[101] Ibid para 94 – 127.
[102] Ibid para 1 – 93.
[103] Ibid para 44 – 57.
[104] Ibid.
[105] Ibid.

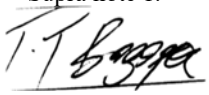
Act which paved the way for the OES. Unfortunately, however, section 12(4) of the 2008 NEMA Amendment Act does say that MPRDA approved EMPrs should be considered to be NEMA EMPrs. This is a conundrum and unfortunately the South African courts are still yet to provide the much-needed clarity, in the interim, one can conclude that the OES did not resolve all the problems it was introduced to try and resolve. Oddly enough, the Supreme Court of Appeal's minority judgment has taken the opposite view with its position that a WML is not required for any mining related waste management activities which were lawfully undertaken (including in terms of an MPRDA EMPr, prior to the commencement of the WML regime).[106]

8. CONCLUSION

We have seen the emergence of the OES system in South Africa. It is clear that before the emergence of the OES, the scope of NEMA did not extend to mining. Mining was not included in the application of the provisions of NEMA, but in a separate legislation, in which MPRDA regulated the mining environmental management. NEMA and MPRDA had their unique processes and information requirements and there was a lack of integration of these processes resulting in an environmental management system that was fragmented. This fragmented environment system in respect of mining required the mining companies to apply for various authorisations from different departments, that of the Mineral Resources and Energy, Environment, Forestry and Fisheries and Human Settlement, Water and Sanitation. This involved duplication of the processes which resulted in high cost implications and significant time delays in the process of acquiring the relevant authorisations according to the book of the law before actual mining activities could begin. It is inevitable that in such an environment, mining companies were discouraged from investing in South Africa as the mining sector was regulated by various statutes.[107] The OES was therefore introduced as a solution to solve this conundrum.

As we have seen above, the South African Courts have also grappled with the interpretation of the OES, what its practical implications are and who has the enforcement powers under the OES. OES was invented in order to resolve a conundrum, however it is not without its own flaws and short-comings. As much as the OES promotes cooperative governance amongst the DEFF, DMRE and Department of Water and Sanitation, the original legislative and executive

[106] Ibid para 68 – 72.
[107] Supra note 1.



powers of the provinces do not seem to have been properly considered, and hence there is still an on-going litigation. This is said because we have seen how the Western Cape provincial authority featured in Maccsand and we have also seen that the Court in Mineral Sands acknowledged the possibility of an overlap between the mandates of provincial and national inspectors. In vesting implementation authority of the OES with the Minister of Minerals Resources and Energy, the provincial sphere of government has lost the power to issue EAs for ancillary activities, a loss that may well impact upon provincial planning and development. The Minister of Mineral Resources and Energy who is mandated with the promotion of the exploitation of mineral resources is most likely to disregard provincial planning, as was done before in Maccsand and this will still create problems similar to those which existed before OES.

We have seen that even after the introduction of OES the problems and challenges facing the mining sector were not resolved. In Mineral Sands, there was still confusion on who the enforcement authority is. Such confusion will cause the same conflict which existed between the relevant departments. Mineral Sands also creates doubt in one's mind as to whether the Department of Mineral Resources and Energy will do well in enforcing environmental laws, taking into account what its primary mandate is. Furthermore, because the OES as understood from the above does not necessarily streamline applications for all NEMA subordinate legislation, mining companies still have to comply with permit requirements under the other applicable NEMA subordinate legislation, and therefore some of the challenges which existed before its introduction might still be faced by the mining sector. Following on from all that has been said, the OES did not resolve all the challenges which existed prior to its introduction and the South African government needs to readdress some of the aspects I have referred to. Judicial court challenges relating to the OES were still heading to the Constitutional Court in the Global Environmental Trust at the time this paper was submitted. OES has some positives but it continues to bring regulatory and enforcement challenges which end up in South African courts and therefore it cannot be said that OES was successful in resolving all the regulatory issues which affected the mining sector prior to its introduction.

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